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The Complete Law and Practice

IN THE

Probate Courts of Ohio

INCLUDING THE

Administration and Settlement of Estates of Deceased Persons—Including the Inheritance Tax and Administration of Estates by Trust Companies—The Guardianship of Infants, Imbeciles and Drunkards—The Assignments for Benefit of Creditors—The Law Relating to the Execution, Construction and Probate of Wills—The Statutes of Descent and Distribution—Dower—Trustees—Appropriation of Property—Adoption of Children—Juvenile Court Proceedings—Mothers' Pensions—Road and Ditch Appeals—Appeals in Condemnation of Road Material—Appeals in Allowance of Sheep Claims—Franchises—Proceedings in Aid of Execution Habeas Corpus—Contempt and other Miscellaneous Matters (other than Criminal) Within the Jurisdiction of the Probate Court.

WITH

COMPLETE AND PRACTICAL FORMS

BY

WILLIAM M. ROCKEL,
(of the Springfield Bar; late Probate Judge of Clark County); former Judge of Circuit Court, Second Judicial District

THIRD EDITION

VOLUME I.

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PREFACE TO THIRD EDITION

The author has gone over the second edition carefully. The errors that appeared were mostly those relating to statutory matter caused by legislative change.

Errors discovered are corrected, new paragraphs added and statutory changes inserted; some of minor character, others of much importance. Equally, and perhaps of greater importance is the large amount of new matter, taken, from recent Ohio decisions, added in the notes.

Some of the chapters in the former edition, principally relating to appellate procedure, having become obsolete by reason of statutory changes, are omitted and new ones added, resulting in eight entirely new chapters, i. e.: Administration of Estates by Trust Companies, Road Appeals, Ditch Appeals, Appeal in Condemnation of Road Material, Appeal in Allowance of Sheep Claims and Orders of Fire Marshal, Inheritance Tax, Juvenile Court and Mother's Pension. The chapters on Inheritanc Tax and Juvenile Court, while limited, contain all of the Ohio law and much that is not readily accessible elsewhere.

The author would be devoid of gratitude did he not feel grateful for the expressions of commendation made by the Bench and Bar in reference to former editions, and he sincerely hopes this will merit the same meed of commendation.

WILLIAM M. ROCKEL.

Springfield, Ohio, January 1, 1922.

PREFACE TO SECOND EDITION

The renumbering of the various sections of the statute law of our state, is, of itself, we deem, a sufficient reason for a new edition of this work. In addition, we have had since the first edition came from the press, a very large number of Ohio decisions upon questions kindred to those therein discussed. These have been carefully scanned and cited in the notes, or woven into the text. Scarcely a page of the first edition has escaped without some change being made.

It is gratifying to know that the views of the author, have in a number of instances, been approved by the courts and that his work has generally been looked upon with favor by the Bar of Ohio, and we trust that it will not only have, but merit, the continued favor of those having occasion to use it.

WILLIAM M. ROCKEL,

Springfield, Ohio, March 1, 1912.

PREFACE

From the fact that causes in the Probate Court are usually submitted to the Judge without the intervention of a Jury, generally in a *pro forma* manner, lawyer and layman alike, ofttimes fail to realize the very many important matters coming before it for decision. Recently, resulting perhaps from the decisions of our Supreme Court, recognizing its capacity and powers conferred, a truer conception of its just position in our judicial system, is being entertained. In youth and old age, protecting our person and preserving our property, after we have departed, guarding our loved ones and enforcing our desires, this Court has charged to its keeping, our dearest and most cherished rights. In addition to its jurisdiction, over matters of a fiduciary character, many others of very great importance have been conferred upon it, all of which, except those of a criminal nature, are discussed in these volumes. The plan adopted, is that which the author's experience suggested as the most convenient and useful, to the active practitioner. Recognizing its many imperfections, but cognizant of an honest effort, he submits the result of his labor, trusting that, in some degree, it may aid in the just and righteous administration of the laws coming within the province of the Probate Court.

WM. M. ROCKEL.

Springfield, Ohio, January 1, 1903.

CONTENTS

CHAPTER 1.

ORGANIZATION OF COURT, JUDGE, ETC.

SECTION.		PAGE.
1.	Introductory	1
2.	Organization, etc	2
2a.	Combined with common pleas	3
2b.	Legislature to create combined court; petition, etc. (§ 1604-1)	3
2c.	How petition shall be signed; verification (§ 1604-2)	3a
2d.	Conduct of election; form of ballot (§ 1604-3)	3a
2e.	Establishment of probate division (§ 1604-4)	3b
2f.	Petition for re-establishment (§ 1604-5)	3b
2g.	Re-establishment on increase of population (§ 1604-6)	3c
3.	Rank of Court	3c
4.	Where Court held	4
5.	Term of Court	5
6.	Who may be judge	6
7.	No Probate Judge or his deputy to practice law, etc	8
7a.	Need not be indicted	8
7b.	Exceptions	8
8.	Can not act when interested	8
9.	Administration, etc., when the Probate Judge is interested	10
9a.	Proceedings in Common Pleas Court	11
10.	Procedure where Judge is interested	11
10a.	When Common Pleas Judge may perform duties of Probate Judge	13
11.	Custody of files, etc	14
12.	Deputy clerks, etc	14
13.	Probate Judges may administer oaths, take acknowledgments and depositions	16
14.	Bond of Probate Judge, etc	16
15.	Judge shall make rules of practice and submit them to the Supreme Court	17
16.	Miscellaneous matters	17
17.	Power to punish contempt	17
17a.	Authentication of records, etc	18

CHAPTER 2.

JURISDICTION.

18.	Constitutional provision	19
19.	Status under the constitution	20
20.	Equity jurisdiction	21
21.	Power to hear common law actions and impanel juries	22
22.	Limited jurisdiction	23
23.	In actions for sale of real estate, can determine title to land	23
24.	Growth of the jurisdiction of the Probate Court	24
25.	Power to grant injunctions	25
26.	Power to appoint receivers	26
27.	Exclusive jurisdiction	27
28.	Concurrent jurisdiction	29
29.	Jurisdiction exclusive of that of any other Probate Court	30

SECTION. PAGE.
30. Appellate jurisdiction 31
31. Jurisdiction to review inferior Courts 31
32. Shall have same powers, and observe rules of Common Pleas so far as applicable 31
33. Action in Common Pleas asking direction of Court respecting estate. Who may bring 32
33a. When suit by creditor 32
34. Comments 33

CHAPTER 3.

GENERAL PROVISIONS OF PRACTICE. APPEAL, ETC.

35. Probate judge to determine all questions, except, etc 35
36. Code of civil procedure governs when 36
37. Notice of proceedings in Probate Court, how given 37
38. Depositions 39
39. When appeals may be taken from Probate Court to Court of Common Pleas 39
40. What may be appealed 40
41. Who may prosecute appeal 41
42. Trial on appeal 42
43. Bond on appeal, when not required 43
43a. Amount of bond 43
43b. Rule as to party appealing in fiduciary capacity in any case 43
44. When bond need not be given 45
45. When must be filed. Written notice of appeal 44
46. To whom bond should be made payable 45
47. Amount of penalty of bond 46
48. Form of appeal bond 47
49. Transcript. When to be filed 48
50. Party interested must file transcript 48
51. Proceedings in Common Pleas. Certifying same back 49
52. Proceedings in error 49
53. Entries, nunc pro tunc, power, etc 51

CHAPTER 4.

ADMINISTRATION, ETC.

54. Administration, devolution of property 53
55. Necessity for 54
56. Where there ought to be no administration 55
57. Where there may be no administration 56
58. Form of bond of residuary legatee 57
59. Liability upon the bond 58
60. Discharge of lien on property 59
61. Officiating without appointment 59
62. Acts done by rightful executor or administrator before qualifying 60

SECTION. PAGE.
63. Letters relate back to time of death 61
64. Time within which letters of administration will be granted. 61
65. Application 62
66. Notice, etc 63
67. Hearing 63

CHAPTER 5.

LETTERS TESTAMENTARY.

68. Definition, etc 65
69. Distinction between administrator and executor 66
70. Power of the executor prior to letters 66
71. When application can be made 67
72. In what court application should be made 68
73. Will must be duly probated 69
74. Inhabitant or resident 69
75. The estate to be administered 71
76. Application for appointment 72
77. Oath to application 73
78. Form of application for letters testamentary 73
79. Who are capable of receiving appointment 74
80. Named in the will 74
81. Legally competent 75
82. Residence of the executor 76
83. Bond of executor and its condition 77
83a. When bond not required 77
84. Form of executor's bond 78
85. When bond need not be given 79
86. Separate bonds 79
87. Form of executor's letters 80
88. The order of appointment 81
89. Form of entry 81
90. Effect of order 82
91. How the order may be attacked 83
92. Renunciation 83
93. Administration during the minority of an executor 83
94. An executor of an executor cannot administer the trust of first testator 84
95. The power of executors and administrators during the contest of a will 85
96. Contest of will. May borrow money, etc 86
97. Application to repair buildings and borrow money 87
98. Form of entry 87

CHAPTER 6.

ADMINISTRATOR WITH THE WILL ANNEXED.

99. Definition 88
100. If executor renounces, etc., administration to be granted 88

SECTION. PAGE.
101. Citation of executor 89
102. Entry ordering issue of citation 89
103. Form of citation to take or renounce administration 90
104. If executor does not qualify. Application, etc 90
105. Bond of administrator with the will annexed 91
106. Powers and duties. Personal trust 91
107. Estate directed or devised to be sold by executor, etc., failure of executors to act, who may sell 92

CHAPTER 7.

LETTERS OF ADMINISTRATION.

108. Definition, etc 94
109. Death of party 95
110. Who is an intestate 96
111. When and where application should be made 97
112. Application, etc 98
113. Form of application for letters of administration 98
114. To whom letters of administration shall be granted 99
115. Who are capable of being appointed 100
116. Residence of administrator 101
117. Order of priority among those entitled 102
118. When entitled in the same degree 102
119. Renunciation, waiver, etc 104
120. Husband and widow 105
121. The next of kin 106
122. The creditor 106
123. To such person as the Court may see fit 107
124. Must give bond, etc 107
125. Form of administrator's bond 108
126. Granting letters 109
127. Form of administrator's letters 110

CHAPTER 8.

SPECIAL ADMINISTRATION.

128. Definition 111
129. When to be appointed 112
130. Delay warranting appointment 112
131. Application, jurisdiction, etc 113
132. Who may be appointed 114
133. Must give bond 115
134. Form of special administrator's bond 115
135. Form of entry appointing special administrator 116
136. Form of special administrator's letters 116
137. Powers, duties and compensation of special administrator 117

SECTION. PAGE.
138. Power to collect, suit, etc. 117
139. Power to sell. 118
140. Power to pay debts, fees, etc. 118
141. When the powers cease. 119
142. How special administrator may be proceeded against by the executor, etc. 119
143. Application for citation, etc. 119
144. Form of application. 120
145. Form of entry ordering citation. 120
146. Form of citation. 120
147. Journal entry ordering writ of attachment. 121
148. Form of writ of attachment. 121
149. Entry committing to jail. 121
150. Special administrator not liable to creditors. Limitation of action against executor, etc. 122

CHAPTER 9.

ADMINISTRATOR DE BONIS NON.

151. Definition, etc. 123
152. When to be granted. 123
153. Must be some estate to administer. 124
154. Time within which appointment must be made. 126
155. To whom granted and where. 127
156. Application, etc. 127
157. Proceedings by administrator or executor against former administrator or executor. 128
158. Recovery of assets, etc. 128
159. Sales, etc., of former executor or administrator valid. 130
160. Notice, bond, inventory. 131

CHAPTER 10.

ADMINISTRATOR DE BONIS NON WITH THE WILL ANNEXED.

161. Definition, etc. 132
162. Appointment, etc. 132
162a. Power to appoint stranger to serve with executor. 133
163. If, after administration granted, as of an intestate, a will be proved, the same shall be revoked, unless, etc. 133
164. Power of executor or administrator in such cases. 134

CHAPTER 11.

ANCILLARY ADMINISTRATION.

165. Definition, etc. 135
166. Not favored and limited to necessity of appointment. 136
167. Difference between ancillary and principal administration. 137

SECTION. PAGE.
168. When appointment may be generally made 138
169. Powers of executor and administrator under will made out of this State 138
170. Administration and proceeding when decedent was not a resident of the State, but engaged in business therein, etc.. 139
171. Where appointment shall be made 139
172. To whom and in what time granted 140
173. Application, etc 141
174. Application for administration 142
175. Form of application for administration under § 10604 142
176. Notice. Proof, etc., required 143
177. Entry, etc 144
178. Form of entry ordering administration 144
179. Form of application for letters of administration 144
180. Form of administrator's bond 145
181. Form of entry 146
182. Form of administrator's letters 146
183. Powers, duties, etc 147
184. Payment of debts and distribution 148
185. Several administrations for one estate, situate in different States 149

CHAPTER 12.

FOREIGN ADMINISTRATION.

186. Definition, etc 151
187. Foreign executors and administrators may be sued here 152
188. Law governing local administrators applies to foreign 154
188a. Jurisdiction of courts 154
189. Same, continued 154
190. Procedure of heir, etc., against foreign administrator 155
191. Suit against foreign administrator by heir or legatee 155
192. Form of refunding bonds 157
193. May be required to secure distributees and indemnify sureties 157
193a. Other remedies 158
194. Form of bond to secure distributee or surety from foreign executor 158
195. May prosecute suits in this State 159
196. Validity of voluntary payment to foreign administrators 159
197. Foreign executor or administrator may be authorized to sell real estate 160
198. Law applicable to such sales 161
199. Foreign executor or administrator to give bond unless already bound 162
200. Foreign executor, etc., to give further bond to account for surplus when he sells more than is necessary to pay debts, etc. 163

CHAPTER 13.

JOINT OR CO-ADMINISTRATION.

SECTION.		PAGE.
201.	Definition, etc.	164
202.	Separate or joint bonds	165
203.	Power of one to bind the other in the co-administration of the estate	166
204.	Liability for act of co-administrator	167
205.	Situs of property. Taxation	170
206.	Remedies against each other	171
207.	Division of commissions	172

CHAPTER 14.

REVOCATION OF LETTERS. RESIGNATION AND REMOVAL.

208.	Power of court. Nature proceedings, etc.	173
209.	Jurisdiction to revoke letters	174
210.	Resignation, etc.	175
211.	Revocation where wrongfully made	176
212.	Form of resignation and entry, etc.	177
213.	Removal of executor for cause, etc.	178
213a.	Proceedings after removal	178
214.	Who must file application, etc.	178
215.	Application	179
216.	Form of application	180
217.	Form of entry for hearing, etc.	181
218.	Notice, etc.	181
219.	Form of notice	182
220.	Causes. Habitual drunkenness	182
221.	Gross neglect of duty	183
222.	Incompetency	184
223.	Fraudulent conduct	185
224.	Removal from the State	186
225.	Unsettled demands	186
226.	Any other causes	187
227.	Other statutory causes	189
228.	Hearing and entry	189
229.	Effect of order of removal	190
230.	Acts after his removal, etc.	191
231.	Termination of authority by completion of trust	192
232.	Appeal and error	193

CHAPTER 15.

BONDS, EXECUTION, FORM, ETC.

233.	Requirement of bond	195
234.	To whom made payable	196

SECTION. PAGE.
235. Good signed in blank 197
236. Sufficient condition 198
237. Execution, form, etc 200
238. Approval and custody 201
239. Liability of judge in accepting bond, etc 202
240. Amount of penalty 203
241. Sureties. Qualification and number 204
242. Examination of sureties 206

CHAPTER 16.

NEW BONDS. SURETIES, ETC.

243. Application for release of surety, etc 207
243-1. Application by executor, etc. (§ 10861-1) 207
243a. Removal on failure to give new bond (§ 10862) 208
243b. Costs 208
244. Application and cause 208
245. Form of application 209
246. Entry ordering notice, etc 209
247. Notice, form of notice, hearing, etc 209
248. When order takes effect 210
249. When new bond may be required by interested party 211
250. Liability of prior sureties 211
251. Liability of sureties on new bonds 212
252. If bond not given, may be removed from trust 213
253. When executor or administrator to give bond of indemnity to surety 213
254. Application, procedure, etc 214
255. Sufficient cause for making order 214
256. Form of indemnity bond 214
257. Construction placed upon such bond 215
258. Additional bonds 215
259. General liabilities of sureties 216
259a. Reduction of bond 218

CHAPTER 17.

SUIT ON BONDS.

260. Procedure. Remedy, etc 219
261. Jurisdiction 221
262. Suit by creditor on liquidated demands 222
263. Kind and nature of creditor's claim 222
264. When suit could be brought by creditors 223
265. Suit by legatee or distributee on liquidated demand 223
266. When right accrues to legatee, etc 223
267. At what time action may be brought 225
268. Suit on unliquidated demand 226
269. When Probate Court may authorize suit to be brought 226
270. Application for leave, etc 227
271. Form of application 228

SECTION. PAGE.
272. Entry ordering hearing and notice, etc. 228
273. Notice, etc. 228
274. Hearing, etc. 229
275. Form of entry granting leave to bring suit. 229
276. Defense in suit on administration bond for not filing account. Costs. 230
277. In suit on bond, claim allowed to be prima facie evidence only of its justice. How such claim contested. 230
278. Suit by succeeding administrator or executor on bond. 230
279. Time within which suit may be brought. 231

CHAPTER 18.

INVENTORY

280. Definition. Importance of. 232
281. Within what time to make inventory. 233
282. When may be omitted. 234
283. Procedure where statement is filed in lieu of the appraisement. Form, etc. 235
284. Appraiser, how appointed. 237
285. If appraisers fail to act justice may appoint. 238
286. Form of appointment of appraisers by justice. 238
287. Inventory to be made and by whom. 238
288. How and when notice to be given. 239
289. Service and form of notice. 239
290. Appraisers' oath; by whom administered. 240
291. Form of oath, etc. 241
292. In whose presence and in what manner the articles shall be appraised. 241
293. Detailed statement required. 241
294. Value to be given articles. 243
295. How bonds and other securities to be inventoried and appraised 244
296. How other debts shall be inventoried and appraised. 244
297. How inventory of money and bank bills to be stated. 244
298. What it shall include. 244
299. When real estate should be included. 246
300. Signing and filing inventory. 247
300a. Monthly statement of Probate Court to county auditor. 247
300b. Taxes and penalty. 247
300c. Beginning of each succeeding tax year. 247
300d. Compensation of Probate Judge. 247
300e. No allowance of tax inquisitors. 248
301. Appraisers' fees. 248
302. Inventory to be sworn to by the executor or administrator. Form of oath, etc. 248
303. Compulsory return of inventory. 249
304. Application for citation, etc. 249
305. Entry and writ of citation. 250

SECTION. PAGE.
306. Removal for failure, etc., and granting of new letters..... 251
307. Excuse for failure to return an inventory..... 251
308. Entry, form, etc..... 252
309. Effect of such revocation..... 252
310. Prosecution of former bond by administrator de bonis non..... 252
311. New assets after return of first inventory..... 253
312. Exceptions to inventory and proceedings thereon. Appeal to Common Pleas..... 253
312a. Appeal on exceptions to inventory..... 254
313. Form of exceptions, etc..... 254
314. Form of entry ordering notice..... 254
315. Notice, etc..... 255
316. Hearing and order..... 255
317. Appeal..... 256
318. Effect of inventory as evidence..... 256

CHAPTER 19.

WIDOW'S AND CHILDREN'S ALLOWANCE.

319. Introductory..... 258
320. What shall not be deemed assets, etc..... 259
320a. Assets not to be administered on in certain cases..... 260
321. Comments. Wearing apparel, etc..... 260
322. Disposition of such property..... 262
323. Right to under § 10654, G. C..... 262
324. Year's allowance..... 263
325. Money to be set off if necessary..... 263
326. Persons entitled to, etc..... 263
327. Right barred by will or contract..... 266
328. Nature of the claim..... 268
329. When appraisers fail to make allowance..... 269
330. Apportionment between widow and children..... 270
331. Amount of, etc..... 270
332. When and to whom payable..... 273
333. Allowance may be increased or diminished by the court..... 275
334. Petition for, etc..... 276
335. Who may file petition..... 277
336. Form of petition to increase or decrease allowance..... 277
337. Form of entry, etc..... 278
338. Notice, etc..... 279
339. Entry on hearing to increase or decrease..... 279
340. Error and appeal, etc..... 280
341. Widow's and widower's quarantine..... 280

CHAPTER 20.

ADMINISTRATION BY TRUST COMPANIES.

342. Trust companies acting as executor, etc..... 282
343. Trust companies may accept business when (§ 710-150)..... 284

SECTION. PAGE.
344. Foreign trust company may do business when (§ 710-151).... 285
345. File certificate of compliance with tax commission (§ 710-152) 286
346. Examination of trust company—Expense (§ 710-153)..... 286
347. Compliance with law before qualifying as executor, etc., (§710-154) 286
348. Retirement from State, must give notice (§ 710-155)..... 287
349. From whom moneys may be received (§ 710-156)..... 288
350. Court may order money deposited with company (§ 710-157).. 288
351. Empowered to act as agent (§ 710-158)..... 288
352. Management of trusts (§ 710-159)..... 289
353. May accept trusts of executorship, etc. (§ 710-160)..... 289
354. Capital and deposits with state treasurer held as security (§ 710-161)..... 290
355. Court may order investigation of company (§ 710-162)..... 290
356. Who may sign papers in court (§ 710-163)..... 291
357. Investment of money, etc., held in trust (§ 710-164)..... 291
358. Mingling of securities prohibited (§ 710-165)..... 292
359. Investment of trust funds (§ 710-166)..... 292
360. Reserve fund required (§ 710-167)..... 292

CHAPTER 21.

ASSETS GENERALLY.

363. Definition 293
364. Personal property, definition..... 294
365. Fixture 295
366. Trees, wood, etc..... 298
367. Manure 300
368. Emblements, definition..... 300
369. When emblements shall be assets..... 302
370. Power to cultivate and gather crops..... 302
371. Rent of farm land..... 302
372. Rents generally 305
373. Leases or chattels real..... 308
374. Annuities. Dividends..... 311
375. Copyrights and patents..... 312
376. Pension money..... 313
377. Trust property..... 314
378. Money on deposit..... 315
379. Fire insurance money..... 316
380. Life insurance money..... 316
381. Mutual benefit insurance..... 318
382. Good-will of business..... 320
383. Property conveyed by decedent to defraud creditors..... 320
384. Proceeds of real estate..... 320
385. Choses in action, etc..... 321
386. Mortgaged premises to be considered personal assets. Executor, etc., may take possession..... 323

SECTION. PAGE.
387. Executor or administrator may discharge mortgage. Possession before redemption 323
388. How executor or administrator to foreclose mortgage..... 323
389. Naming a person as executor not to discharge a debt..... 324
390. Debt of an executor or administrator becomes assets..... 325
391. Discharge of debt in a will against an executor, etc., how construed 327
392. A debt due from an heir or legatee is assets..... 327
393. Assets not possessed by deceased..... 329

CHAPTER 22.

ASSETS CONCEALED OR EMBEZZLED.

394. Nature of proceedings..... 330
395. Proceedings when property of estate concealed or embezzled.. 332
395a. When Probate may reserve case to Common Pleas..... 332
396. Kind and scope of proceeding..... 332
397. Jurisdiction of court, etc..... 333
398. Complaint, etc..... 334
399. Parties 335
400. Form of complaint..... 336
401. Entry ordering citation, etc..... 336
402. Imprisonment for disobeying citation..... 337
403. Party failing to appear or refusing to answer..... 338
404. Form of commitment to jail..... 338
405. Examination to be in writing..... 338
406. Examination of witnesses to be in writing, etc..... 338
407. Comments. Form of examination..... 339
408. Judgment of court thereon. Lien..... 340
409. Trial. Jury..... 341
410. Trial issues..... 343
411. Verdict, etc..... 344
412. Judgment 344
413. Transcript to be filed in Common Pleas and execution issued. 346
414. If judgment in favor of the State, when prosecuting attorney to attend to it..... 346
415. Conveyance to evade these proceedings void..... 346

CHAPTER 23.

PARTNERSHIP ASSETS.

416. Right at common law..... 347
417. Duties of surviving partners..... 348
417a. Foreign executor or administrator..... 349
417b. When surviving partners may make application..... 349
418. Where and by whom application to be made..... 349
419. Application 350
420. Entry ordering notice, etc..... 351

SECTION. PAGE.
421. Form of notice of hearing application for appointment of appraisers 351
422. Form of entry ordering appraisement 352
423. Form of inventory and appraisement 352
424. Entry confirming appraisement, etc 355
425. Oath. Inventory, how made, etc 355
426. When executor to have appraisement made 357
427. When survivor may purchase partnership property 357
427a. Bond of surviving partner 357
427b. When survivor refuses to purchase 358
427c. Will may define manner of settlement 358
428. Application of surviving partner to take at an appraisement 358
429. Form of bond of surviving partner 359
430. Entry of court approving election, etc 359
430a. When bond to be filed 360
430b. Evidence of notice 360
430c. Presentment of claims 360
430d. Account of surviving partner 360
430e. Discharge of surviving partner and sureties 360a
430f. Where surviving partner elects to take after giving bond 360a
431. When partner fails to take 360b
432. When statute does not apply 360b
433. Right of surviving partner 361
434. Where executor is surviving partner 362
435. Executor continuing the business 363
436. Administrator carrying on business 365
437. How partnership real estate to be conveyed 366
438. What constitutes partnership real estate 366
439. Form of executor's deed 369

CHAPTER 24.

COLLECTION OF ASSETS.

440. General duty of administrator or executor to collect 371
441. Duty to bring suits, etc 372
442. Diligence required 373
443. Negligence in collecting 375
444. Statute of Limitations 377
445. When more than twelve months allowed to collect assets 378
446. Affidavit in such case 378
447. When and how application for extension made, etc 378
448. When further time not allowed 379
448a. What further time will be allowed 379
449. Office of executor, etc., not to cease 379

CHAPTER 25.

ASSETS. COMPOUNDING CLAIMS.

450. How executor, etc., may compound with debtor 381
451. Authority to compound 381
452. Application for 383
453. Hearing, etc 384
454. Order of compromise 385
455. Arbitration 385

CHAPTER 26.

ASSETS. SALE OF DESPERATE CLAIMS.

456. Disposition of desperate claims 388
457. Jurisdiction 389

SECTION. PAGE.
458. Application 389
459. When notice of application to Court for their sale necessary. Publication of notice..... 390
460. Entry ordering notice..... 390
461. Form of notice, etc..... 391
462. Required proof..... 391
463. Public or private sales, terms of compounding to be fixed in order 391
464. Entry of public sale..... 392
465. Form of notice and return of sale..... 392
466. Form of private sale, etc..... 393
467. Return of private sale..... 393
468. Effect of order..... 394

CHAPTER 27.

ASSETS. SALE OF PERSONAL PROPERTY.

469. Regulated by statute..... 395
470. What personal property the executor or administrator may sell, and when appraisement, etc., not required..... 396
470a. Household goods..... 397
471. Promissory notes, etc..... 398
472. Property taken by the widow, etc..... 399
473. Property specifically bequeathed..... 399
474. How property may be delivered to legatee 400
475. Form of redelivery bond..... 401
476. Emblements 401
477. Request not to be sold in will..... 402
478. When sale to be made..... 403
479. How to be sold..... 403
480. Notice, etc..... 404
481. Conduct of sale..... 405
482. What credit to be given..... 406
483. Security to be taken..... 406
484. Sufficient surety, etc..... 406
485. When executor or administrator not liable for loss..... 407
486. Payment, etc..... 408
487. Executor or administrator to make out lists of articles liable to sale. Duty of clerk of such sale..... 409
488. Construction of preceding section..... 409
489. Sale bill to be signed by clerk, sworn to by the executor or administrator and filed. Returns of private sale..... 410
490. Form of sale bill, etc..... 410
491. How return of sale bill enforced..... 411
492. Purchase by administrator or executor..... 411
493. Warranty of title..... 412
494. Property unsold 413

CHAPTER 28.

PRIVATE SALE OF PERSONAL PROPERTY.

SECTION.		PAGE.
495.	Statutory provision	415
496.	Application. Essentials	415
497.	Form of application for less than appraised value	416
498.	Entries, etc	417
499.	When property is not sold within six months	417
500.	Return of private sale	418
501.	Confirmation of sale	419
502.	How notes, claims, stocks, etc., may be sold	419
503.	Form of application and entry	419
504.	Sale without order, etc	420
505.	Sale of perishable property	422

CHAPTER 29.

ASSETS. CARE AND MANAGEMENT.

506.	Preservation of property	423
507.	Notes, etc., given by administrator	426
508.	Employment of attorney	427
509.	What counsel allowed	430
510.	Amount of counsel fees allowed	434
511.	Taxation	437
512.	Custody of funds	438
513.	Failure of bank where deposited	439
514.	How executor, etc., guardian and trustee may invest funds	440
515.	When investment to be made	441
516.	Application to invest, etc	443
517.	Insurance	444
518.	Carrying on business of the deceased	444
519.	Carrying out contracts of deceased	448
520.	Contract not binding, etc	450
521.	Duty as to mortgages, etc	452
522.	Stocks	453
523.	Action by executor, etc., to complete contract for sale of land	453
524.	Nature of proceedings	454
525.	Parties	454
526.	Petition	455
527.	Notice, etc	456
528.	When Court may order conveyance. Deed	456
529.	Hearing, etc	457
530.	Entry	457
531.	Form of deed	457
532.	Heirs of deceased purchaser may enforce specific performance	458

CHAPTER 30.

ACTION FOR INJURY BY WRONGFUL DEATH.

SECTION.		PAGE.
533.	Did not exist at common law, etc	459
534.	Right of action for causing death	460
535.	Right by statute of other State, territory or country, enforced	460
536.	Such actions shall benefit whom	461
537.	Settlement, etc	462
538.	Application	463
539.	Entry allowing	463
540.	Report of settlement	463
541.	Apportionment	464
542.	Entry of apportionment	465

CHAPTER 31.

NOTICE OF APPOINTMENT

543.	Object and purpose of notice of appointment	466
544.	When and how given	468
545.	Notice	469
546.	Affidavit as evidence of notice	469
547.	Proof of publication	470
548.	Cases where notice of appointment is not given within the proper time, or evidence not perpetuated	470
549.	Form of petition, etc	470
550.	Entry	471
551.	Liability for omission to give notice	471

CHAPTER 32.

PRESENTATION AND REJECTION OF CLAIMS.

552.	Object and purpose	472
553.	What must be presented	474
554.	What need not be presented	474
555.	Sufficient presentation	476
556.	When waived	478
557.	Authentication of proof	479
557a.	Satisfactory voucher, etc	479a
558.	When not required	480
559.	Allowance of a claim	481
560.	Rejection of a claim	483
561.	When claim shall be rejected at instance of heir or creditor	487
561a.	Action against administrator or executor	487
561b.	Notice	487
562.	Comments	488
563.	Requisition to reject a claim	489
564.	Bond, etc	489
565.	Entry ordering notice	490
566.	Form of notice, etc	490

SECTION. PAGE.
567. Action on real estate stayed 491
568. How action brought 491

CHAPTER 33.

PRESENTATION OF CLAIMS NOT DUE.

569. Contingent claims 493
570. Debts not due paid by administrator, etc 494
571. When claims allowed by Court 494
572. What claims included 495
573. Presentation of claim, etc 496
574. Notice, etc. 497
575. Order of the Court 497
576. Ordering claim paid 498
577. Ordering assets to be retained 498
578. Ordering the giving of bond 499
579. Form of bond 499
580. Allowance of court not conclusive, etc 500
581. Action to be brought against executor or administrator; against heir if he has given bond 500
582. Pleading when action brought on bond 501
583. Appeal and error 501

CHAPTER 34.

CLAIMS UNPAID AT SETTLEMENT.

584. Claim due must be presented, etc 502
585. Estate of deceased in the hands of heir, etc.; liable for certain debts 503
586. Jurisdiction, etc 504
587. Heirs, etc., to contribute to pay claims after settlement of estate and how 504
587a. Limitation 505
588. Comments 505
589. Estate of any heir, etc., liable after his death 506
590. Where two or more liable, creditor may proceed against all in one action 506
591. Insolvency, etc., of heir or devisee not to effect liability of others 506
592. Amendments allowed to bring in other parties 506
593. Heirs, etc., liable to contribution. How recoverable 506

CHAPTER 35.

ARBITRATION OF CLAIMS

594. Doubtful claims against an estate to be referred to arbitration 508
595. Construction of statute 508
596. Agreement to refer 510
597. How proceeded on if claim is less than one hundred dollars .. 511
598. Duties of the justice of the peace 511

SECTION. PAGE.
599. If it exceed one hundred dollars ... 512
600. Duties of probate judge, etc ... 512
601. Notice and oath to referees ... 513
602. Referees to report to court. Proceedings, powers and compensation of referees; costs ... 514
603. Hearing, etc ... 514
604. Witnesses how procured, and, etc ... 515
605. Filing of an award ... 517
606. Form of confirmation of award ... 517

CHAPTER 36.

LIMITATION OF ACTIONS BY CREDITORS AGAINST ADMINISTRATOR.

607. Generally ... 518
608. Claim barred by general statute ... 520
609. When claim barred if not sued within six months after rejection. What deemed a rejection ... 524
609a. Rejection of a claim ... 525
610. Suit on rejected claim ... 525
611. Time within which action can not be brought ... 527
612. Construction of the above section ... 527
613. Limitation of action by creditors ... 529
614. Construction of statute ... 530
615. Assets received after eighteen months ... 532
616. What constitutes new assets ... 533
617. Action of creditors against heirs, etc., not barred ... 533
618. Limitations of actions against administrators de bonis non ... 534
618a. Not required to answer to suit brought after two years ... 534
619. Administrator de bonis non liable for two years after giving bond ... 534
620. When liable for actions for two years ... 534
621. An administrator de bonis non to give notice of his appointment ... 534
622. Barred claims not revived ... 534
623. To be further liable if new assets received ... 535

CHAPTER 37.

EXECUTION. COSTS. JOINT DEBTOR.

624. How estate of deceased joint debtor liable ... 536
625. Preceding section not to affect rights of surety, etc ... 537
626. How and when execution may issue against executor ... 537
627. Revivor of actions and judgments ... 538
628. Executions against executor or administrator ... 540
628a. Action upon suggestion of waste ... 540
629. Costs in actions against an estate, when not recoverable ... 541
630. When costs allowed and by whom ... 541

CHAPTER 38.

CLAIMS OF EXECUTOR OR ADMINISTRATOR

631. Debts due to executor, etc ... 546
632. General law applicable ... 547

SECTION. PAGE.
633. Procedure on presentation of executor's or administrator's claim to Probate Court ... 549
634. Claim under fifty dollars ... 550
635. Where the claim exceeds fifty dollars ... 550
636. Presentation of claims ... 551
637. Entry and notice ... 552
638. Entry and notice for non-residents ... 552
639. Character of proof required ... 553
640. Allowance or disallowance of claim ... 554
641. Hearing. Exceptions. Appeal ... 555
641a. Appeal on claims by executor or administrator for debt ... 555
641b. On appeals from Probate to Common Pleas Court ... 555
641c. Bond ... 555
642. Error, etc ... 555
643. Appeal ... 556
644. Form of appeal bond ... 556
645. Debts due for services rendered to the estate by others ... 557

CHAPTER 39.

ORDER AND TIME OF PAYMENT OF DEBTS AND ADMINISTRATOR'S COMPENSATION.

646. Generally ... 560
647. In what order debts to be paid ... 561
648. Can not be paid in other order ... 562
649. Funeral expenses ... 564
649a. Funeral expenses, etc. Husband and wife ... 568
650. Amount to be allowed as funeral expenses ... 568b
651. Tombstone ... 570
652. Last sickness ... 571
653. Expenses of administration ... 573
654. Compensation allowed executors or administrator. Further allowance. Effect of compensation provided by will ... 573
654a. Further allowance ... 574
655. When entitled to ... 574
656. How calculated ... 577
657. Compensation fixed by will ... 577
658. Compensation of joint administrators ... 579
659. Extra compensation ... 580
660. Employment of agent. Office rent, etc ... 583
661. Allowance made to the widow and children ... 585
662. Debts due the United States ... 585
663. Taxes, etc. ... 586
664. Wages ... 588
665. Debts due general creditors ... 589
666. Previous section (10715) not to affect lien ... 590
667. When executor or administrator may proceed to pay debts without being liable for deficiency of assets ... 591
668. Notice of demands, etc ... 591
669. And if whole estate to be paid and afterwards other claims presented, he shall not be liable therefor ... 592
670. If so paid away as to leave insufficient assets to satisfy subsequent claims. How far liable ... 593
670a. May prove estate insolvent ... 593
671. If assets are exhausted in paying preferred claims. Executor or administrator not liable for payment of subsequent claims. 593

SECTION. PAGE.
672. Interest on claims 594
673. Payment to heirs, etc., before final settlement 595

CHAPTER 40.

PAYMENT OF LEGACIES.

674. Introductory 597
675. Specific legacy 598
676. General legacy 600
677. Demonstrative legacies 601
678. Gift of stock, etc., general or special 602
679. Vested and contingent legacies 604
680. Absolute and conditional legacies 605
681. Cumulative, repeated and substituted legacies 607
682. Stated amount and residuary legacies 608
683. Lapsed legacies 610
684. Void legacies 612
685. Adeemed legacies 614
686. Satisfied legacies 616
687. Legacies, in lieu of dower 617
688. Legacies to creditors 619
689. Legacy to a debtor 620
690. Legacies charged on land 621
691. Legacy for life 622
692. Legacies in the nature of incomes and annuities 624
693. Abatement of legacies 626
694. General rules as to payment 627
695. When legacies should be paid 628
696. If any legatee require legacy to be paid within eighteen months, court may require him to give bond 629
697. Application for order requiring payment 630
698. Form of application 630
699. Hearing, etc 630
700. Form of bond 631
701. Form of entry, approving bond and ordering payment 631

CHAPTER 41.

ADMINISTRATOR'S AND EXECUTOR'S ACCOUNTING.

702. Duty to account 633
703. Executor or administrator to render an account, etc 634
703a. When to make oath as to itemized account 634
704. Where to be filed 635
705. Time extended 636
706. Time allowed to collect assets not to operate as allowance of further time to file account 636
707. Administrator, etc., of deceased or insane administrator, etc., to file account 637
708. Successive administration 637

SECTION. PAGE.
709. Joint executor, etc. 638
710. With what executor or administrator shall be charged. 639
711. Amount of sale bill. 640
712. Goods and chattels not included, etc. 640
713. Rights and credits of the decedent. 641
714. Proceeds of real estate sold. 642
715. Interest, etc. 642
716. Profit and income. Rents, etc. 645
717. How chargeable with property consumed by him. 645
718. Increase or decrease of estate not to affect executor or administrator. 646
719. Executor or administrator not responsible for bad debts. 646
720. Entitled to what credits. 646
721. Vouchers to be produced for all debts paid. 647
722. Voucher, what is proper. 647
723. What items may be allowed without vouchers. 648
724. Comments. Affidavit, etc. 648
725. Preparation of account. 649
726. Oath to account. 651
727. Form of administrator's or executor's account. 652
728. Filing and entry. 653
729. Notice of filing accounts to be published. 654
730. Form of notice, etc. 654
731. Entry and record of publication. 654
732. Importance of notice. 655
733. Examination of accountants under oath. 656
734. Hearing when no exceptions are filed. 656
735. Entry where no exceptions are filed. 657
736. Exceptions. 657
737. Form of exceptions. 659
738. Court may refer account to special commissioner. 660
739. Trial, etc. 660
740. Evidence. 661
741. How compelled to render account. 663
742. Who may compel, etc. 663
743. When and how account may be opened after settlement. 664
743a. Mistakes or errors. 664
743b. Distribution after settlement. 664
744. Absence of party. 664
745. To correct errors and mistakes. 665
746. Opening account after eight months, etc. 667
747. Error and appeal. 670
748. Statement in lieu of account. 671
749. Ancillary account. 671

CHAPTER 42.
DISTRIBUTION IN KIND.

750. Methods of distribution. 673
751. Executor or administrator may distribute certain assets in kind. 674
751a. Partial distribution. 674
751b. Return of assets when necessary. 674

SECTION. PAGE.
752. Application for, etc. 675
753. Hearing and order 675
754. Form of indemnity bond 676
754a. Application to distribute in kind, and order to transfer stock .. 676a

CHAPTER 43.

DISTRIBUTION OF ASSETS CONVERTED INTO MONEY.

755. Definition, etc. 677
756. Kinds and when made 678
757. Real and personal estate 680
758. Law of domicile controls 680
759. Creditors of heir 681
760. Set-off against heirs 682
761. How payment of distribution enforced. Petition therefor ... 683
761a. Citation 684
762. Nature of proceedings, etc 684
763. Parties 686
764. Petition 687
765. Form of petition 688
766. Citation 688
767. Entry ordering citation 689
768. Form of citation 689
769. Service of citation 689
770. Service, when executor or administrator non-resident 690
771. Order for publication 690
772. Form of notice 691
773. Proof of service 691
774. Hearing and judgment. Execution 692
774a. Lien 692
775. Trial, proofs, etc 692
776. Entry, finding. Judgment 694
777. Probate Court may bring in all necessary parties and determine all questions 694
778. Comments 695
779. Probate Court shall on motion of either party send the case to Common Pleas 696
780. Motion, etc. 696
781. Common Pleas to have concurrent jurisdiction to enforce order of distribution 696
782. Comments 697
783. Sureties. Their liability. May be made parties to judgment. Defense 698
784. Comments 698
785. Appeals from Probate Court and from Common Pleas. Bills of exceptions 699
785a. When an appeal may be taken in enforcement of orders of distribution 699

CHAPTER 44.

INVESTMENT OF UNCLAIMED MONEY, AND ACCOUNT OF DISTRIBUTION.

786. How unclaimed money to be invested 701
786a. Disposition of note or bond 701
786b. Limitations 702
787. Application for order to invest 702

SECTION. PAGE.
788. Entry authorizing investment ... 702
789. Return of investment ... 703
790. If fund cannot be invested ... 703
791. When and how such money paid owner ... 704
792. Application, and order to pay money to owner ... 704
793. Entry ordering money turned over to claimant ... 705
794. Judge responsible for safe keeping of certificates, etc ... 705
795. Account of final distribution ... 705
796. Objects of the above provision ... 705
797. Form of account of final distribution ... 706
798. Entry and order of discharge ... 707
798a. Probate Court to order receipt for payment of incumbrances recorded, etc ... 708
798b. Application to have receipt recorded, etc ... 709
798c. Entry. Notice ... 709
798d. Hearing and order ... 710

CHAPTER 45.

REAL ESTATE. SALE WITHOUT ORDER OF COURT.

799. Possession of, etc ... 711
800. Land liable for debts ... 712
801. The right to mortgage and lease, etc ... 714
802. When sale is authorized by will no order of sale is required ... 714
803. Sufficient authority ... 715
804. Title. Devise to sell ... 716
805. Construction of power ... 718
806. Who can execute ... 719
807. Expiration of power ... 720
808. Control of Court over the excution of the power of sale ... 722
809. Form of deed of executor, or administrator with the will annexed ... 723
810. Sale and distribution ... 724

CHAPTER 46.

REAL ESTATE. SALE BY COURT PROCEEDINGS.

811. Direction of will. Or statute must be followed ... 726
812. Nature of the action ... 728
813. In what Court action to be brought ... 729
814. Power of Court ... 730
814a. Release of lien ... 730
815. Nature of power ... 730
816. When action may be brought ... 732
817. Limitations as to the time of bringing ... 732
818. For what the action may be brought ... 734
819. For the payment of legacies ... 735
820. What may be sold ... 736

SECTION. PAGE.
821. When can not be sold 737
822. When real estate fraudulently conveyed liable to sale 738
823. How executor or administrator to get possession of land fraudulently conveyed and avoid such conveyance 738
824. Proceedings where property is fraudulently conveyed 739
825. Petition for sale equitable interest 740
825a. The order and sale 740
826. Persons interested may give bond and prevent sale 741
827. Comments 741
828. Form of bond 742

CHAPTER 47.

REAL ESTATE. PLEADINGS, PROCESS AND TRIAL.

829. Commencement of action, etc 744
830. What petition for sale must contain 746
831. Essentials of petition 746
832. When assets will be marshaled in conformity with the will 748
833. Necessary parties 748
834. Parties defendant 749
835. Administrator *de bonis non* to complete sale made by executor or administrator 750
836. Form of petition for sale of real estate to pay debts 751
837. Filing the petition 752
838. Service. Waiver of. Consent of guardian 753
839. Actual service 754
840. Constructive service 754
841. How publication to be made 756
842. Copy of newspaper to be mailed 757
843. Waiver 758
844. When guardian *ad litem* to be appointed. Such guardian can not waive notice, etc 758
845. How appointed 760
846. Other pleadings 761
846a. Dower and homestead rights 763
847. When court to order real estate to be sold. Term of sale 763b
848. Proof required 763b
849. Trial if contested 765
850. The estate of the heirs in the land set off to the widow may be sold 765
851. The whole to be sold when a partial sale would injure the residue 766
852. Judgment and order of sale 766
852a. Entry of appraisement. Dower. Homestead 767
853. Effect of order 767a
854. Costs when there are objections to granting order for sale 768

CHAPTER 48.

REAL ESTATE. APPRAISEMENT.

855. Object and purpose 770
856. Appraisement when no dower is to be assigned 771
857. Appointment of appraisers. Duty as to dower and homestead. Copy of order to issue 772

SECTION. PAGE.
857a. Dower and homestead ... 772
857b. Lands in two or more counties ... 772
858. Judgment and order to appraise, etc ... 773
859. Copy of order and form of return ... 773
860. Who may be appraisers ... 775
861. Vacancy in office of appraisers; how filled ... 776
862. Valuation ... 776
863. Appraisers may be sworn by whom ... 777
864. Actual view ... 778
865. Employment of surveyor ... 778
866. Subdividing and platting ... 779
867. Assignment of homestead ... 780
867a. Homestead for decedent's family ... 780
867b. Money consideration in lieu of homestead ... 780
868. When entitled to homestead ... 781
869. Assignment of dower ... 783
870. Dower especially assigned to be charge on the land ... 785
871. Report ... 785
872. Compensation of appraisers ... 785
873. Executor or administrator to give bond, etc ... 786
874. Form of bond ... 786
875. And give additional bond to secure further assets if required in what court ... 787
876. Confirmation of appraisement and order of sale ... 787

CHAPTER 49.

REAL ESTATE. ADVERTISEMENT AND SALE.

877. The sale generally ... 789
878. Order of sale. Dower ... 791
879. When sale to be public and when private ... 792
880. Sale of improved land; unimproved ... 792
880a. Readvertisement ... 793
881. Private sale ... 794
882. Affidavit before private sale confirmed ... 795
883. Public sale. Notice of ... 795
884. Notice to contain street number, or name of township, etc ... 795
884a. Name of township in certain cases ... 796
885. Notice of sale in German or Bohemian newspaper ... 796
886. Points to be observed ... 796
887. Form of notice of public sale ... 799
888. Conduct of sale ... 799
889. Who may become purchaser ... 801
890. Return. Confirmation. Order for deed ... 804
890a. Deferred payments ... 804
890b. Sale of notes ... 804
891. Return of sale ... 804
892. Confirmation ... 806
893. Sufficient confirmation ... 808
894. Errors cured by confirmation ... 809
895. Entry confirming sale, and distributing proceeds ... 810
896. Resale ... 812
897. Securing payments ... 813
898. When motion to be set aside to be filed ... 814
899. Deed evidence of validity of sale ... 816
900. Execution and kind of deed ... 816

SECTION. PAGE.
901. Form of administrator's or executor's deed ... 818
902. Purchaser's right and title ... 819
902a. Remedy of purchaser, if sale invalid ... 821
902b. Remedy in other cases of invalid sales ... 822
903. How money arising from sale of land to be applied ... 822
904. Comments ... 822
905. Surplus of proceeds of sale to be considered as real estate ... 823
906. Appeal and error ... 823

CHAPTER 50.

DESCENT AND DISTRIBUTION.

907. Introductory ... 827
908. Ancestor ... 828
909. Descent and devise ... 829
910. Deed of gift ... 830
911. By purchase ... 831
912. Legal representative ... 832
913. Next of kin ... 832
914. Relict of deceased husband or wife ... 834
915. Order of descent of real estate where title came by descent or devise or deed of gift ... 835
916. Comments ... 836
917. Order of descent where estate came by purchase, etc ... 837
918. When real estate to pass to husband or wife; when to next of kin of intestate ... 837
919. When real estate to pass to children of former husband or wife, etc. ... 838
920. Descent of estate which came from former husband or wife ... 838
921. Distribution of personal estate ... 839
921a. When personal property to escheat ... 839
922. Comments ... 840
923. When estate to descend to children of intestate and how ... 840
924. Descent when all descendants of equal degree of consanguinity ... 840
925. When there are living both children and heirs of deceased children of intestate ... 841
926. Extent of application of last section ... 841
927. Previous sections apply to real and personal property ... 841
928. Advancements by intestate to be considered as part of estate ... 842
929. Definition, etc. ... 842
930. What constitutes an advancement ... 843
931. How proven ... 845
932. When advancement is greater or less than heirs' share ... 846
933. When advancement is wholly real or personal estate ... 847
934. When value of advancement expressed in deed, etc ... 847
935. Heirs of aliens may inherit; aliens may hold lands ... 848
936. Capability of bastards as to inheritance ... 848
937. When illegitimate children deemed legitimate, etc ... 848
938. Amount of personal estate to which a widow or widower is entitled upon distribution ... 849
939. Comments ... 849

SECTION. PAGE.
940. Construction of words, "living" and "died"..... 851
941. Posthumous child of intestate to inherit..... 851
942. Permanent leaseholds to descend same as estates in fee..... 851

CHAPTER 51.

DOWER.

943. Nature. Definition, etc. 852
944. Of what estate a widow or widower endowed..... 855
944a. Mansion house, etc. 855
945. Widow or widower..... 855
946. Relinquished 857
947. How barred..... 859
948. Death of a consort..... 861
949. To what property the right attaches..... 861
950. Value and rights when lands are sold..... 863
951. Conveyance in lieu of dower..... 866
952. Effect of defective conveyance in lieu of dower..... 867
953. Effect of eviction from premises conveyed in lieu of dower..... 867
954. When person dwelling in adultery is barred of dower..... 868
955. Where lands are given up by fraud..... 868
956. Dower is forfeited by waste..... 869
957. Assignment of 869
958. Application 870

CHAPTER 52.

INSOLVENT ESTATES WHEN SETTLED BY ADMINISTRATOR, ETC.

959. When estate need not be declared insolvent..... 873
960. When an estate should be declared insolvent..... 874
961. Application for insolvency..... 876
962. Form of application..... 877
963. When commissioners not appointed, executor or administrator to act as such..... 878
964. Entry and order declaring the estate insolvent..... 878
965. Executor or administrator shall give notice of insolvency of estate to creditors..... 878
966. Form of notice 879
967. Time allowed in such case for creditors' to present claims. List of claims to be filed..... 879
968. Comments 879
969. Claim disallowed may be submitted to referees..... 880
970. Presentation and proof of claims..... 880
971. If not referred, creditors to commence suit. Limitation..... 882
972. Court or referee to award costs..... 883
973. How judgment to be rendered on disallowed claims..... 883
974. Preparation of report 883

SECTION. PAGE.
975. Report of claims presented in insolvency 884
976. When court to make order of distribution on return of list of debts 885
977. Hearing and order of distribution 885
978. Report of payment of dividends 887
979. Confirmation of distribution 888
980. When court to make further order of distribution 888
981. Exceptions 888
982. Provisions for contingent debts 889
983. When contingent debt becomes absolute 890
984. Dividends thereon, disposition of residue 890
985. Action against executor or administrator of insolvent estates .. 890
985a. Estate declared insolvent while action against it pending 890
986. Comments 891
987. Claims not presented as required, barred, unless, etc 891
988. If surplus remains after paying debts allowed, other creditors may claim it 892
989. How divided between two or more such creditors 892
990. Executor or administrator liable only for assets in his hands .. 892
991. Creditors may sue after three years in case, etc 892
992. When and how executor or administrator may be compelled to render his account to court 892

CHAPTER 53.

SETTLEMENT OF INSOLVENT ESTATES BY COMMISSIONER, ETC.

993. When estate insolvent, court to appoint commissioners to audit claims 894
994. Comments 895
995. Duties of administrator, etc., when commissioners appointed .. 896
996. Commissioners to give notice of their appointment, etc 896
997. Form of notice, etc 897
998. Time allowed creditors to present and prove claims. Commissioners to report to court 897
999. Presentation of claims 898
1000. Commissioners examine claimants on oath 899
1001. Any one of commissioners to administer oath 899
1002. Hearing and action on claim 899
1003. Report of the commissioners 900
1004. Appeal from decision of commissioners, how perfected. Hearing and costs 900
1005. Procedure and appeal 901
1006. Form of bond, and notice of appeal 901
1007. Duty of commissioners when bond or notice is filed 902
1008. How persons should proceed who have omitted to appeal 903
1009. Comments 903
1010. Allowance of appeal not to disturb distribution previously made 904
1011. Distribution among creditors after commissioner's return 904
1012. Compensation of commissioners 904

CHAPTER 54.

WILLS. GENERALLY.

SECTION.		PAGE.
1013.	Definition, etc.	905
1014.	Distinguishing characteristics	907
1015.	Confusion between wills and other instruments in writing	909
1016.	Law governing will	911
1017.	Right to make	912
1018.	Who may make a will	913
1019.	Any person	913
1020.	Full age	913
1021.	Sound mind and memory	914
1022.	Idiots, imbeciles and lunatics	915
1023.	Blind, deaf and dumb persons	917
1024.	Person under a guardianship	918
1025.	Not under any restraint	919
1026.	Having property	922
1027.	May give any person	923
1028.	Bequest or devise to charitable purpose, when void	924
1029.	Corporation and charitable uses	924
1030.	Entailed estates pass to issue of first donee	929
1031.	Rule against perpetuities	929
1032.	Contract to make a will	931
1033.	Statutory meaning of certain words as applied to wills	932

CHAPTER 55.

WILLS. EXECUTION.

1034.	How will made	933
1035.	In writing	933
1036.	Will being on several pieces of paper	934
1037.	Signed at the end	935
1038.	By party making the same	937
1039.	Signed by other person	938
1040.	Attestation	939
1041.	Subscription	941
1042.	In presence of testator	942
1043.	Two or more competent witnesses	945
1044.	Effect of a person being a devisee or legatee	945
1045.	Who saw testator subscribe or heard him acknowledge	946
1046.	Suggestions for drawing wills	947
1047.	Form of will	949

CHAPTER 56.

REVOCATION OF WILLS.

1048.	General principles	951
1049.	How will expressly revoked or cancelled	953

SECTION. PAGE.
1050 Tearing, etc. ... 953
1051. Interlineation ... 954
1052. By some other will or codicil ... 955
1053. Destruction of second will not to revive first, unless, etc ... 956
1054. Revocation of later will, etc ... 956
1055. By other instrument in writing ... 957
1056. Revocation by sales, or conveyance of property, etc ... 958
1057. Property sold by bond, sale or agreement not a revocation ... 958
1058. Charge or incumbrance not deemed a revocation ... 959
1059. Conveyance, etc., altering but not divesting estate, not a revocation, unless, etc ... 959
1060. When provisions of instrument are inconsistent with terms of will. Effect. ... 959
1061. Marriage will not revoke the will ... 959
1062. Revocation by birth of child ... 960
1063. Having child and making provision, etc ... 960
1064. Child absent, reported dead, or born after will made to have portion of estate. How portion raised ... 962
1064a. How contribution apportioned ... 963
1065. Advancements to be taken into account in such settlement ... 963

CHAPTER 57.

CUSTODY.

1066. Generally ... 964
1067. May be deposited with probate judge. Notice of probate ... 965
1067a. Notice of probate ... 965
1068. How such will enclosed, etc ... 965
1069. To whom it may be delivered ... 966
1070. When to be opened ... 966
1071. Comments ... 967
1072. Who may enforce the production of a will and how ... 967
1073. Application for citation, etc ... 968
1074. Form of entry and order of citation ... 968
1075. Attachment or warrant ... 969
1076. Into what counties such process may issue ... 970
1077. Liability of officer serving same ... 970
1078. Hearing, etc. ... 970
1079. Punishment and liability of person refusing to produce will ... 971
1080. Form of entry and warrant, etc ... 971

CHAPTER 58.

WILLS. PROBATE.

1081. Definition. Nature of proceedings, etc ... 972
1082. What may be admitted to probate ... 974
1083. When should be presented ... 976
1084. Effect of devisee withholding will from probate for three years ... 977

SECTION. PAGE.
1085. Who should present will for probate ... 977
1086. In what court wills should be probated ... 978
1086a. Persons interested in probate of will may contest jurisdiction of court to entertain application; appeal from decision ... 981
1086b. Contest ... 981
1087. Application for probate ... 981
1088. Form of application for probate of will ... 983
1089. Time of hearing ... 983
1090. Entry fixing time, etc ... 984
1091. To whom notice should be given ... 984
1092. Service of notice ... 985
1093. Form of notice ... 986
1094. Essentials to be proven in probate of will ... 986
1095. Examination of witnesses to will ... 987
1096. What witnesses may be heard, etc ... 987
1097. Form of testimony ... 988
1098. How will proved, if witnesses unknown or incompetent, etc ... 989
1099. Sufficient testimony where witness is dead or absent ... 989
1100. Form of testimony of subscribing witnesses ... 991
1101. When court may issue commission to take their testimony ... 991
1102. Order to take testimony of absent witness ... 992
1103. Form of commission ... 992
1104. Return of commissioner ... 993
1105. Admission of will to probate ... 993
1106. Sufficient proof, etc ... 993
1107. Entry ordering probate ... 996
1108. Effect of order ... 997
1109. Record of title by will ... 999
1109a. Certificate of probate judge when will devises real estate ... 999
1109b. By county recorder ... 999
1109c. Fees ... 999
1110. Certified copy of will, etc., evidence ... 999
1111. Recorded in each county where real estate is situate ... 999
1111a. Record of title by descent ... 999c
1112. Uncontested probate after one year binding ... 1000
1112a. Contests, etc ... 1001
1112b. Set aside by agreement ... 1001a
1113. Duty of judge on notice of contest ... 1001b
1114. Error, etc ... 1002
1115. Repropounding a will ... 1003
1115a. Probating second will ... 1003
1116. Appeal from refusal to admit will to probate ... 1004a
1117. How appeal perfected and proceedings in Common Pleas ... 1004a

CHAPTER 59.

FOREIGN WILLS

1118. Introductory, defintition, etc ... 1005
1119. Will executed in other states admitted to record here and its effect. Foreign wills ... 1007
1119a. Record of foreign will ... 1007
1120. Method and effect of such admission ... 1008
1121. Application, etc ... 1009
1122. Form of entry ... 1009
1123. Appeal, error, etc ... 1009
1124. Probate, etc., of will made out of the United States ... 1010
1125. Proceedings to admit a will to record which has been probated without the state ... 1010

SECTION. PAGE.
1126. Application or motion to admit a copy of will, etc....1011
1127. Entry ordering notice, etc....1011
1128. Form of notice....1012
1129. Admission of such will to probate....1012
1130. Admission and effect of admission to record....1013
1131. Entry ordering admission of will made in foreign countries to probate....1013
1131a. Probate of foreign will of later date than one already admitted to probate in this state....1014
1131b. Effect of admitting later will to probate....1014
1131c. Contests....1014
1132. Powers of executor or administrator under the will made out of this state....1014
1133. Rights of purchaser without knowledge of foreign will. No contest of foreign will. Effect, if set aside in foreign state.1015
1133a. Foreign will can not be contested here....1015

CHAPTER 60.

SPOLIATED WILLS.

1134. Definition, etc....1016
1135. Wills when lost or destroyed may be admitted to probate....1017
1136. There must have been a will....1017
1137. Duly executed....1018
1138. Not revoked at death of testator....1019
1139. Lost, spoliated or destroyed....1019
1140. Lost, etc., subsequent to death of testator....1020
1141. After testator is incapable, etc....1021
1142. Application....1021
1143. Form of application....1023
1144. Notice of application....1023
1145. Order of notice, etc....1024
1146. Examination of witnesses....1025
1147. Nature of proceedings....1025
1148. On what proofs will established. How lost or spoliated will may be probated....1026
1148a. Notice....1026
1149. Degree of proof....1027
1150. Proof of contents....1028
1151. Order establishing will....1029
1152. Effect of will so established....1030
1153. Error and appeal, etc....1030
1154. When record of will destroyed, authenticated copy of the will and probate thereof may be admitted to record....1030
1155. An original will may again be admitted to probate....1031
1156. Or an authenticated copy of the will alone may be admitted to record....1031
1156a. Limitation as to contests....1031
1157. Notice that copy has been admitted to record to be published, contest of same, and effect if not set aside....1031
1157a. Appeal from order supplying record of will to the common pleas....1031

CHAPTER 61.

NUNCUPATIVE WILLS.

1158. Definition....1033
1159. Nuncupative will, how made and proved....1034

SECTION. PAGE.
1160. Last sickness....1034
1161. Personal estate....1035
1162. Reduced to writing....1036
1163. Subscribed by competent witnesses....1036
1164. Called upon person present....1037
1165. Testamentary words....1038
1166. Must be admitted to probate within six months....1039
1167. Matter pertaining to probate....1039
1168. Proof required, etc....1039
1169. Form of will....1040

CHAPTER 62.

JOINT AND MUTUAL WILLS.

1170. Definition and classification....1041
1171. Ohio decisions....1042
1172. When admissible to probate....1044
1173. Revocability of joint and mutual wills....1045

CHAPTER 63.

CODICILS.

1174. Definition....1047
1175. Execution. Revocation, etc....1048
1176. Construction of will and codicil....1048
1177. Republication of will by a codicil....1049
1178. Probate of codicil....1049
1179. Form of codicil....1050

CHAPTER 64.

CONSTRUCTION OF WILLS.

1180. Definition, etc....1051
1181. General rules of construction....1053
1182. Rules as to intention....1056
1183. Rules as to repugnancy....1058
1184. Rules for supplying words....1059
1185. When extrinsic evidence admissible....1060
1186. Parol evidence....1062
1187. Declarations of the testator....1064
1188. Devise for life, remainder to heir in fee....1066
1189. Rule in Shelley's case....1066
1190. Vesting of estates....1067
1191. Property acquired subsequent to making of will passes....1069
1192. When whole estate of devisor in land to pass by the devise....1070

SECTION. PAGE.
1193. Life estate with power of disposal....1072
1194. Devise or bequest not to lapse by the death of devisee or legatee.1075
1195. Lapsed bequest....1075
1196. "Heirs," how construed....1077
1197. "Issue" construed....1079
1198. "Children" construed....1080
1199. "Next of kin" construed....1081
1200. "Relation" construed....1082
1201. "Descendants" construed....1082
1202. Disinheriting heirs....1083
1203. Provisions against contesting....1085
1204. Restraints of alienation....1086
1205. Restraint of marriage....1088
1206. When real estate undevised shall be applied to pay debts instead of personalty....1089
1207. Contribution when devised or bequeathed property taken to pay debts....1089
1208. Except when will otherwise provides....1089
1209. But whole estate liable for debts....1090
1210. Portion of child born after execution of will or supposed to be dead, or of witness subject to contribution....1090
1211. If any liable to contribute are insolvent, etc., how others to make up deficiency....1090
1212. How contribution enforced....1091
1213. Order to sell land to pay debts. Not affected, etc....1091

CHAPTER 65.

ELECTION OF WIDOW OR WIDOWER UNDER THE WILL.

1214. Introductoy....1092
1215. Citation to widow or widower to make election....1093
1215a. Construction....1093
1215b. Election time extended....1094
1215c. Dower and gift....1094
1216. When citation should issue....1094
1217. To whom issued....1095
1218. Form of citation and return to widow. To make election....1095
1219. Time within which election may be made....1096
1220. When entitled to both dower and the provisions made in the will....1096
1221. Election or non-election, effect....1097
1221a. Election to be noted....1097
1221b. Election to take under will....1097
1222. Election made in person....1098
1223. Judge to explain wills, etc....1099
1224. Election to be made—Record....1100
1225. Election. Entry, etc....1101
1226. Election made by acts of parties....1102
1227. Effect of election to take....1103
1228. Effect of election not to take....1105
1229. How election set aside....1105
1230. Rights of devisee. How affected....1106

SECTION. PAGE.
1231. If person unable to appear or non-resident of county, how election taken 1108
1232. Application for commission, etc 1108
1233. Commission to take such election 1109
1234. Form of entry, etc 1110
1235. How election made for insane or imbecile widow, etc 1111
1235a. Entry 1111
1236. Application, etc. 1111
1237. Form of commission as to insane or imbecile widow's election 1112
1238. Duty of commissioner 1112
1239. Duty of the Court 1113

CHAPTER 66.

GIFTS CAUSA MORTIS.

1240. Definition, etc. 1114
1241. What kind of property may be given 1115
1242. Requisites of gift 1116
1243. In view of death 1116
1244. Death of donor 1117
1245. Delivery of subject to gift 1117
1246. Gift should be absolute 1119
1247. Revocation of gift 1119
1248. Evidence of gift 1120
1249. Rights of creditors and family 1120

CHAPTER 67.

TESTAMENTARY TRUSTEES.

1250. Definition, etc 1122
1251. Distinction between executor and testamentary trustee 1123
1252. Who may be a trustee 1126
1253. Jurisdiction of Probate Court, etc 1128
1254. Application, etc 1129
1255. Form of application for appointment of trustee 1130
1256. Trustees appointed by will to give bond, unless, etc 1130
1257. Comments 1131
1258. Removed on failure to give bond 1132
1259. Form of trustee's bond 1132
1260. Appointment of trustee 1132
1261. Entry for appointment of trustee 1133
1262. Form of letters of trusteeship 1134
1263. Inventory of estate 1134
1264. Separate bond from each trustee or joint bond 1135
1265. Surviving trustee may execute trust 1135
1266. When Probate Judge may appoint person to execute a trust 1135

SECTION. PAGE.
1267. Trusts created by foreign will....1135
1268. Id. Trustee named in foreign will to give bond....1136
1269. How trustee appointed by foreign Court may execute a trust...1136
1270. Comments....1136
1271. Probate Court may appoint a trustee under a foreign will....1137
1272. Comments....1137

CHAPTER 68.

TRUSTEE FOR NON-RESIDENT.

1273. Introductory....1138
1274. How trustees are appointed for non-residents....1139
1275. When appointment to be made....1139
1276. Jurisdiction....1140
1277. Bond and duties....1140
1278. Trustees may lease or sell real estate as guardian of minor....1140
1279. How long trustee to hold office....1140
1280. When and to whom trustee shall pay over money....1141
1281. Comments....1141
1282. How foreign guardian, etc., may collect money....1142
1283. Petition, etc....1142
1284. Entry and notice....1143
1285. Hearing, etc....1143
1286. Trustee may loan money in certain cases....1144

CHAPTER 69.

TRUSTEE. DUTIES. ACCOUNTING, ETC.

1287. Duties of trustee....1145
1288. Principal and income....1147
1289. Dividends....1149
1290. Gain and loss....1150
1291. Alterations and repairs....1151
1292. Expenses. Taxes. Insurance....1152
1293. Trustees must render biennial account....1153
1294. Citations and notices....1154
1295. Probate Court to determine as to execution of trust....1154
1296. Comments....1154
1297. Appeal from determination of Probate Court....1155
1298. Force and effect of determination....1155
1299. Allowance of compensation....1155
1300. When Court may accept resignation of trustee or remove him...1156
1300a. When trustee under a will may be removed....1156
1300b. Trustee to be removed when guardian appointed....1156
1301. Removal of trustee, etc....1156
1302. Causes for removal....1158
1303. Distribution of fund....1159
1304. Termination of trust....1160

CHAPTER 70.

GUARDIANS. KINDS, ETC.

SECTION.		PAGE.
1305.	Definition	1162
1306.	Natural guardians	1163
1307.	Testamentary guardian	1164
1308.	How testamentary guardian to be designated	1165
1309.	Testamentary guardian to have preference. His duties, powers and liabilities	1166
1310.	When testamentary guardian shall give bond	1167
1311.	Guardian of the person and the estate	1167
1312.	Guardian of the person	1168
1313.	Duties of guardian of the person, etc	1168
1314.	Bond of guardian of person	1163
1315.	Guardian of the estate	1169
1316.	Duties of guardian of estate only	1170
1317.	Other kinds of guardians	1170
1318.	Ancillary guardians	1171

CHAPTER 71.

GUARDIAN. APPOINTMENT AND BOND.

1319.	Court having jurisdiction	1173
1320.	When necessary	1174
1321.	Minors	1175
1322.	Resident of county	1176
1323.	Statement of ward's estate to be filed and bond given. Mortgage in lieu of freehold surety. Oath	1180
1323a.	Surety in lieu of freehold	1180
1323b.	Oath	1180
1324.	Application for appointment	1181
1325.	Form of application for appointment of guardian	1181
1326.	Notice to parties	1182
1327.	When minor may choose guardian; or Court may appoint	1183
1328.	How made, etc	1183
1329.	Parents' choice	1185
1330.	Court's choice	1186
1331.	Who ineligible by law	1187
1332.	Who should not be appointed	1188
1333.	Must give bond	1189
1334.	Form of guardian's bond	1190
1335.	Mortgage in lieu of freehold sureties	1191
1336.	Oath	1192
1337.	Bond not void on account of informality	1193
1338.	One bond for two or more wards, etc., fees	1193
1339.	Order of appointment	1193
1340.	Form of entry	1194
1341.	Letters of guardianship	1194
1342.	Appeal and error	1196

CHAPTER 72.

BOND. NEW. ADDITIONAL. SURETY.

SECTION.		PAGE.
1343.	Additional bonds	1197
1344.	Who may file exceptions, etc.	1198
1345.	Entry ordering notice, etc.	1198
1346.	Notice and form	1199
1347.	Entry ordering additional bond	1199
1348.	New bond. Release of surety	1200
1349.	Application, etc.	1201
1350.	Notice, etc.	1201
1351.	Entry ordering release	1202
1352.	When action may be brought	1202
1353.	Liabilities of sureties, etc	1203

CHAPTER 73.

DURATION OF GUARDIANSHIP. REMOVAL, ETC.

1354.	How long powers of guardian to continue. His settlement	1206
1355.	Termination of trust	1206
1356.	Marriage of ward	1208
1357.	Resignation	1208
1358.	Removal of guardian by the Court	1209
1359.	Jurisdiction and procedure	1209
1360.	Causes, etc	1210
1360a.	Appeal and error	1212

CHAPTER 74.

POWERS AND DUTIES OF GUARDIANS GENERALLY.

1361.	Guardian's relation to his trust	1213
1362.	Guardian's duties enforced	1215
1363.	Power of Court over guardians in the execution of their trust	1216
1364.	Procedure when Court directs the manner of execution of the trust.	1218
1365.	Application of guardian for direction as to the management of his trust	1219
1366.	Powers of guardian of person and estate. Rights of parents	1220
1367.	Duties prescribed by statute	1221
1368.	Inventory.	1223
1369.	Duties as to custody of ward	1224
1370.	Wards may be bound out upon approval of Probate Court	1225
1371.	Form of indenture to bind out a ward	1226
1372.	Rights to services of his ward	1227
1373.	Duties as to maintenance	1228
1374.	When parent may receive compensation for maintenance and education.	1230

SECTION. PAGE.
1375. Duties as to education....1231
1376. Religious instruction....1232
1377. Fixed allowance made by the Court for ward's maintenance, etc. 1233

CHAPTER 75.

POWERS AND DUTIES IN RELATION TO ESTATE.

1378. Management of estate....1234
1379. Carrying on business of the ward....1236
1380. Must pay debts of the ward....1237
1381. Collection of debts, etc....1238
1382. Arbitration and compromise of claims....1239
1383. Actions for the ward....1240
1384. Actions against the ward....1241
1385. Investment of funds....1243
1386. Investment of funds in land....1245
1387. Form of application, entry, etc....1246
1388. Interest on funds....1247
1389. Deposit of funds....1249
1390. Personalty received from administrator, etc., in kind....1249
1391. Sale of personal estate....1250
1392. Management of real estate, etc....1251
1393. Rents....1252
1394. Repairs....1253
1395. Release of ward's tax title by guardian, effect of tender of deed. 1254
1396. Partition and dower....1254
1397. Easement. Appropriation....1255
1398. Completion of real estate contract. Additional bond....1255
1399. Contracts between ward and guardian....1255
1400. Ward's right of action against the guardian....1256
1401. Guardian's right of action against the ward....1256
1402. Employment of attorneys, agents, etc....1257
1403. Guardian cannot purchase property of the ward, etc....1257
1403a. Discovery of assets belonging to estate of ward....1258
1403b. Imprisonment for disobeying citation....1258
1403c. Examination reduced to writing....1258
1403d. Costs, etc....1258

CHAPTER 76.

GUARDIAN'S SALE OF REAL ESTATE.

1404. Nature of action, etc....1259
1405. Sale of personal and real estate of minors. One application for sale of real estate of two or more wards. Two or more guardians may join....1260
1406. In what Court action to be brought....1261
1407. When action may be brought....1262
1408. Parties to action....1263
1409. What may be sold....1264
1410. Petition for sale of real estate....1265
1411. Essentials of petition....1266

SECTION. PAGE.
1412. Form of petition....1267
1413. Notice of filing petition, etc....1268
1414. Ordering notice, etc....1268
1415. Service of notice....1269
1416. Form of notice, publication, etc....1270
1417. Guardian *ad litem*....1270
1418. Hearing of petition. Appraisers. Survey into town lots....1272
1419. When order should be granted....1272
1420. Order to appraise....1273
1421. Oath of appraisers....1273
1422. Guardian to execute additional bond before sale....1274
1423. Form of guardian's bond....1274
1424. Requirements of bond, sureties, etc....1275
1425. Order of sale of real estate, private sale when, laying out in town lots....1275
1426. Entry ordering sale....1276
1427. Public sale....1277
1428. Private sale....1277
1429. Report of sale, confirmation and deed....1278
1430. Form of guardian's deed....1278
1431. Appeal and error....1280

CHAPTER 77.

LEASE OF WARD'S REAL ESTATE.

1432. Power to lease....1281
1433. Power to lease for fifteen years....1282
1434. Petition for lease....1282
1435. Application for lease, etc....1283
1436. Form of petition to lease and improve real estate....1283
1437. Notice. Entry, etc....1284
1438. Who may unite in application and proceedings thereon....1285
1439. Appointment of appraisers. Entry, etc....1285
1440. Order to view, etc....1286
1441. Hearing and orders thereon....1287
1442. Order authorizing lease, etc....1287
1443. How improvements may be made....1287
1444. Report of guardian, etc....1287
1445. When lease extending beyond minority determines....1288
1445a. Lien of tenant for improvements....1288

CHAPTER 78.

POWER TO LEASE REAL ESTATE FOR PETROLEUM, GAS AND MINING PURPOSES.

1446. Lease for petroleum or natural gas purposes....1289
1447. Power to lease real estate for petroleum oil or natural gas purposes....1290

SECTION. PAGE.
1448. Petition therefor 1290
1449. Notice of hearing....1290
1450. Court to prescribe terms, etc....1290
1451. Lease for mining purposes....1291
1452. Power to lease real estate for ten years for mining purposes....1291
1453. Petition; time for hearing....1291
1454. Land to be viewed by disinterested freeholders....1292
1455. Probate Court to order lease....1292
1456. Royalty; report of by guardian; bond to recover....1292
1457. Change in terms of leasing....1292
1458. Lands owned in common by minors....1293

CHAPTER 79.

MORTGAGE OF WARD'S LANDS.

1459. Statute must be followed, etc....1294
1460. Where action to be brought....1295
1461. Guardian may mortgage real estate of ward in certain cases..1295
1462. For whom action may be brought....1296
1463. When application may be filed....1297
1464. Petition therefor; what to contain....1297
1464a. Investigation and report....1298
1465. Essentials of petition....1298
1466. Form of petition....1299
1467. Proceedings upon filing of petition....1299
1468. Viewers, when to be appointed....1300
1469. Amount to be borrowed, etc....1300
1470. Entry ordering guardian to report. What rate loan to be made 1300
1471. Order and report of guardian....1301
1472. Acceptance and confirmation of report and terms....1301
1473. Entry confirming report and making distribution....1302
1474. Report of execution of mortgage, etc....1302
1474a. Form of guardian's mortgage....1302

CHAPTER 80.

FOREIGN GUARDIANS.

1475. Rights, duties, etc....1304
1476. Effect of removal of ward from state, and appointment of foreign guardian 1305
1477. When and under what circumstances the guardian here may be removed 1305
1477a. Foreign state must have similar laws....1305
1478. Comments. 1305
1479. What to be done if guardian here removed....1306
1480. When foreign guardian of foreign ward may demand or receive property of his ward in this State....1306
1481. Foreign guardian of minors may sue and be sued in this State and sell real estate....1306
1481a. Sale of their lands....1307

SECTION. PAGE.
1482. Comments 1307
1483. Foreign guardian of foreign idiot, imbecile or lunatic may dispose of property belonging to his ward 1307

CHAPTER 81.

GUARDIAN'S ACCOUNTING.

1484. Duty to account 1309
1485. When and where to be filed 1310
1486. When barred by lapse of time 1311
1487. What it should contain 1311
1488. With what guardian should be charged 1312
1489. Entitled to what credits 1313
1490. Guardian's compensation 1314
1491. Preparation of the account, etc 1316
1492. Notice, hearing, exception, etc 1310
1493. Effect of his settlement with Court, review of such settlement .. 1317
1494. When account may be opened up 1318
1495. Appeal and error 1319
1496. Settlement with succeeding guardian 1319
1497. Settlement with ward 1321
1498. How finding of Probate Court enforced 1323
1499. Settlement by executors, administrators, etc., of guardians. How enforced 1323
1500. Comments 1324

CHAPTER 82.

GUARDIAN OF LUNATIC, IMBECILE AND IDIOT.

1501. Guardian of idiot, imbecile and lunatic. Who is an imbecile .. 1325
1501a. Guardian for persons confined in state institutions 1326
1502. Court having jurisdiction 1326
1503. For whom appointment made 1328
1503a. Guardians for incompetents and persons confined in state institutions 1329a
1504. Application for appointment 1329b
1505. Form of application 1330
1506. Notice, entry, etc 1330
1507. Form of notice and service 1332
1508. Hearing, etc 1332
1509. When order should be made 1333
1510. Entry, finding person incapacitated 1335
1510a. Costs, etc 1335
1511. Effect of finding of disability 1336
1512. Who may or should be appointed 1336
1513. When guardianship to terminate 1337
1514. Procedure for removal, etc 1337
1515. Appeal and error 1338
1516. Laws applicable to guardians of lunatics, idiots, imbeciles and their children 1338
1516a. Settlement of such guardian 1339
1517. Exception as to voucher and opening account 1339

SECTION. PAGE.
1518. Duties of guardian as to welfare of ward....1340
1519. Duty of guardian as to existing contracts....1341
1520. Insolvency of lunatics....1343
1521. Suit by guardian of idiot, imbecile or lunatic, and revivor of same....1343
1522. Sale of real estate by guardian of idiot, imbecile or lunatic. Petition. Private sale. Parties defendant....1344
1522a. Petition; what to contain....1344
1522b. Husband or wife to be made defendant....1344
1523. Dower of insane, idiotic or imbecile person; how assigned or sold....1345
1524. Procedure in assignment of dower....1345
1524a. Application to sell and release dower right....1346
1524b. Entry authorizing and ordering release of dower right, etc....1346a
1524c. Guardian's deed....1346a
1525. Guardian empowered to lease and improve estate. Termination of lease. Lien of tenant....1346b
1526. Long lease by guardian may be authorized by court. Lease for three years without order of court....1346b
1527. Application for authority to make long lease....1347
1528. Proceeding on such application....1347
1529. Final hearing and orders....1347
1530. Guardian may improve real estate of imbecile, etc....1347
1531. Proceedings....1348
1532. May unite with owners of adjacent property....1348
1533. Guardian's report, etc....1349

CHAPTER 83.

GUARDIANS OF DRUNKARDS, IMPROVIDENTS, ETC.

1534. Laws relating to guardians generally, applicable....1350
1535. When guardian to be appointed for drunkards....1350
1535a. Improvidents; spendthrifts....1351
1536. Procedure to appoint....1351
1537. Notice to be served on party, etc. Sale thereafter invalid....1352
1538. Incapacity to contract....1352
1539. When order of appointment should be made....1352
1540. When guardianship shall terminate....1353
1541. Procedure to terminate....1353

CHAPTER 84.

ASSIGNMENT. JURISDICTION. APPOINTMENT.

1542. Definition, etc....1354
1543. Effect of act of bankruptcy, etc....1355
1544. Jurisdiction of Probate Court....1358
1545. Jurisdiction of Court of Common Pleas....1360
1546. Assignee must give bond in Probate Court....1361
1546a. Assignment; when to take effect....1361
1547. Who may make....1362
1548. Who may be assignee....1363
1549. What property may be assigned....1364
1550. How made....1365
1551. Filing in Probate Court, etc....1366
1552. Filing deed in recorders office....1366
1553. Qualification of assignee....1367
1554. Bond, etc....1368

SECTION. PAGE.
1555. Order of appointment....1369
1556. Effect of order and issue of letters....1369
1557. Notice of appointment....1370

CHAPTER 85.

RESIGNATION. REMOVAL OF ASSIGNEE, ETC.

1558. Introductory....1371
1559. On failure to file assignment or give bond, court to appoint a trustee....1372
1560. Comments. Removal of assignee....1372
1561. Resignation of assignee. Appointment of trustee. Filling vacancy. Additional trustees....1372
1562. Removal of assignee, etc., by the court. Effect of new bond..1373
1562a. Application for release of surety, etc....1373
1562b. Application by trustee for release of surety....1373
1562c. Removal for failure to give new bond....1373
1563. Procedure, etc. 1373
1564. Election of trustee or trustees by creditors....1374
1564a. Proceedings 1374
1565. Application for election of trustee....1375
1566. Form of petition for election of trustee....1375
1567. Entry ordering citation, etc....1376
1568. Form of citation, service, etc....1376
1569. Hearing, etc. 1376
1570. Election by creditors, etc. 1377
1571. Entry. Form, etc. 1378
1572. Trustee appointed, to give bond. His rights on giving bond..1378
1573. Settlement on resignation, removal or death. How enforced..1379
1574. Appointment and qualification of trustee to operate as a conveyance 1380
1575. Appeal and error 1380
1576. Unsettled assignments heretofore made. Citation of assignee to give bail. 1380
1577. Raising an assignment 1381

CHAPTER 86.

DUTY OF ASSIGNEE AS TO CARE AND MANAGEMENT OF PROPERTY.

1578. Introductory 1383
1579. When transfer or assignment void....1384
1579a. To whom act applies....1384
1579aa. When purchaser or assignee becomes trustee....1384
1579b. Receiver; appointment of....1385
1579c. Knowledge of fraudulent intent material; mortgage, provisions as to 1385
1580. How suit brought....1386
1580a. When creditor may bring suit....1386
1581. For what cause action may be brought....1386
1582. When sale conclusively presumed to be fraudulent....1388
1583. Who may bring the action....1389
1584. Jurisdiction 1389
1585. Examination of assignor, etc. Orders to prevent fraudulent transfer. 1389
1585a. Order to prevent fraudulent transfer....1390
1586. Procedure, etc. 1390
1587. Court, on application of three-fourths of creditors, may order business of assignor carried on by assignee....1390

SECTION. PAGE.
1588. Liability of assignee....1391
1589. Application....1391
1590. Form of application, etc....1392
1591. Assignee may complete sales of real estate, etc....1392
1592. Property taken possession of by another under lien or execution....1393

CHAPTER 87.

APPRAISEMENT, EXEMPTION, ETC.

1593. Introductory....1394
1594. Appointment of appraisers....1394
1594a. Real estate without the state....1395
1595. Appraisers, etc....1395
1596. What must be appraised....1396
1597. Return of inventory and schedule....1396
1598. Exempt property excepted unless expressly waived, and wife's property. Homestead to be set off....1396
1598a. Homestead....1398
1599. Who entitled to exemption....1398
1600. Dower....1399
1601. When court may order property sold....1400
1601a. Five hundred dollars in lieu of exemption....1401

CHAPTER 88.

COLLECTION OF ASSETS AND SALE OF PERSONAL PROPERTY.

1602. Shall convert assets into money....1403
1603. Diligence required, etc....1403
1604. When and what to be sold....1404
1605. How to be sold....1405
1606. Terms of sale....1405
1607. Form of application for sale of personal property....1406
1608. Chattel mortgage claim, etc....1407
1609. Public sale of personal property....1408
1610. Court may order property disposed of at private sale....1409
1611. Property to be sold at auction if not disposed of privately....1409
1611a. Compromise or sale of claims....1409
1612. Order, etc., where property not sold....1409
1613. Return and confirmation of sales. Order as to deed, acceptance of cash, sale of notes, etc....1410
1614. Report of sale....1410
1615. Compromise of sale of desperate claims....1411
1616. Title conveyed....1412

CHAPTER 89.

ASSIGNEE'S SALE OF REAL ESTATE.

1617. Introductory....1413
1618. Payment of liens, etc....1413
1618a. Question of title....1414
1618b. Sale of premises....1414
1618c. Disposition of proceeds of sale....1414
1618d. Application of preceding sections....1414
1618e. Homestead exemptions....1414
1618f. Jurisdiction of court in action to foreclose mortgage, quiet title, etc....1414

SECTION. PAGE.
1619. Nature of action....1415
1620. Where action brought....1415
1621. Parties defendant....1416
1622. Form of petition....1416
1623. Procedure, etc....1417
1624. Proceedings to lay out land into town lots....1417
1625. Notice, sale of real estate....1418
1626. Return of sale, confirmation, etc....1419
1627. Form of deed of assignee or trustee. Public or private sale...1419

CHAPTER 90.

PRESENTATION OF CLAIMS.

1628. Presentation of claims, their allowance or rejection....1421
1628a. Report of claims....1421
1629. When to be presented....1422
1630. What to be presented....1422
1631. Claims secured by mortgage....1423
1632. How presented. Affidavit, etc....1425
1633. Form of affidavit, etc....1426
1634. How to be allowed or rejected....1426
1635. When claim shall be disallowed on application of assignor or creditor and proceedings in such case....1426
1636. Procedure under § 11136 General Code....1427
1637. When suit must be entered on rejected claim....1427
1638. In what court action to be brought....1428
1639. Report of claims filed....1429

CHAPTER 91.

PAYMENT OF PREFERRED CLAIMS.

1640. Introductory....1430
1641. Costs of administration....1430
1642. Commission of assignee. Further allowance. Counsel fees, etc.1432
1642a. Further allowance; counsel fees....1432
1643. Ordinary services....1433
1644. Extraordinary services. Attorney fees....1433
1645. Itemized bill. Affidavit, etc....1435
1646. Lien existing at time of assignment....1436
1647. Claims preferred by statute....1437
1647a. Lien and securities....1437
1648. Taxes....1437
1649. Labor claims under § 11138, General Code....1438
1650. Liens under § 8339, General Code....1440
1651. Miscellaneous matters, relating to labor claims....1440

CHAPTER 92.

ASSIGNEE, ACCOUNT AND DISTRIBUTION.

1652. Introductory....1442
1653. Reports and settlements of assignee. The declaring and payment of dividends....1443
1653a. Dividends....1443
1653b. Dividends reserved....1443

SECTION. PAGE.
1654. When it must be filed....1444
1655. What it should contain....1444
1656. Assignee's account....1445
1657. Filing and entry ordering notice....1446
1658. Hearing account....1447
1659. Exceptions....1447
1660. Notice to creditors of dividends....1448
1661. Report of payment....1449

CHAPTER 93.

APPROPRIATION OF PRIVATE PROPERTY.

1662. Introductory....1451
1663. Power of eminent domain....1452
1664. Constitutional provisions....1453
1665. Who may exercise power....1455
1666. How grant to exercise, construed....1455
1667. When may be exercised....1457
1668. What and how much may be taken....1458
1669. Taking property without right....1460a
1670. Additional servitudes....1460b
1671. Compensation....1462
1672. Benefits....1463
1673. Evidence, etc....1465

CHAPTER 94.

CONDEMNATION PROCEEDINGS BY PRIVATE CORPORATIONS.

1674. To what chapter applies....1470
1675. To what does not apply....1471
1676. When appropriations can be made....1471
1677. Appropriation of property of minor, idiot, imbecile, or insane person....1472
1677a. Notice to ward....1472
1678. Proceedings under § 11040, General Code....1472
1679. Petition for appropriation filed in Probate Court....1475
1680. Where to be filed....1475
1681. Petition may include one or more parcels. In what county to be filed....1476
1682. When Probate Judge interested, proceedings to be commenced in Common Pleas. Special term of....1476
1682a. Procedure in Common Pleas Court....1476
1682b. When corporation entitled to possession....1477
1683. Nature of proceedings....1477
1684. Amendments allowed....1477
1685. Time of trials. Adjournments, discharge of juries....1477
1686. Essentials of petition....1478
1687. Parties, etc....1480
1688. Form of petition....1481
1689. Filing the petition, entry, etc....1482
1690. Summons, its command and service thereof. Alias summons....1483

SECTION. PAGE.
1691. Notice. 1483
1692. Service by publication, how proved 1484
1693. Affidavit and form of notice....1845
1694. Court to appoint attorney for party absent or under disability.1485
1695. Jurisdictional questions. When to be heard and determined. Burden of proof....1485
1696. When to be heard....1486
1697. Existence of corporation....1487
1698. Right to make appropriation....1487
1699. Inability to agree 1488
1700. Necessity for appropriation....1488
1701. Jurors to be drawn from box and venire issued....1489
1702. Finding and order to draw jury....1489
1703. How panel to be filled; jurors to be interrogated by court....1490
1704. Challenge to jurors and how vacancies filled....1491
1705. Challenge of jury....1491
1706. Oath to be administered to jury....1492
1707. View of premises....1492
1708. Judge must deliver to sheriff description of property. May appoint persons to be present at view, etc....1493
1709. Entry impaneling a jury....1494
1710. Is the view evidence....1494
1711. Separate owners entitled to separate trial. They hold the affirmative on trial....1497
1712. Motion for separate trial, entry, etc....1498
1713. Witnesses may be examined before jury....1498
1714. Trial, etc. 1498a
1714a. Burden of proof....1498a
1715. When a structure is partly on land sought to be appropriated.1499
1715a. Verdict. Motion for new trial. Confirmation of verdict....1499
1716. Form of entry and verdict, etc....1499
1717. Motion for new trial, etc. 1500
1718. New trial. Proceedings thereon. Costs. 1501
1719. Entry confirming verdict, etc....1501
1720. Petition in error may be filed by either party in Common Pleas, when. Bill of exceptions....1502
1720a. Petition in error....1502
1720b. Corporation may pay judgment and enter on property....1502
1721. When error may be prosecuted....1503
1722. Proceedings in Common Pleas on error. Costs....1503
1723. When corporation may have possession 1504
1724. Entry when deposit made....1506
1725. When and how corporation may abandon proceedings....1506
1726. What is an abandonment....1506a
1726a. When action may be brought for costs and expenses....1506b
1727. Entry of distribution where there are no conflicting claims....1506b
1728. When Probate Court can not order distribution....1507
1729. Conflicting claims adjudicated in Common Pleas. Petition therefor. Disposition of fund....1508
1729a. Custody of the funds....1508
1730. Such proceeding a civil action....1508
1731. When unfinished roadbed of railway company may be condemned 1508
1731a. Construction of terms....1509
1732. Judgment and costs in such case. When jury to determine amount of compensation....1509
1733. In what courts such proceedings may be commenced and how conducted 1509

SECTION. PAGE.
1733a. Error 1510
1733b. Statement of intention 1510
1733c. Failure to occupy roadbed for one year 1510
1733d. Interpretation of word "roadbed" 1510
1734. When land owner may compel appropriation 1510
1735. When land owners or school officers may notify corporation to institute proceedings; petition on failure of corporation to act. 1511
1735a. Demand of written statement describing the land occupied without appropriation 1511
1736. Who may bring action 1512
1737. When and where action brought 1512
1738. Notice to corporation 1513
1739. Demand of description of property 1513
1740. Essentials of petition 1514
1741. Form of petition 1514
1742. Summons in such case 1515
1742a. Summons in such case 1515
1743. Procedure, etc. 1515
1744. When corporation may be enjoined from occupying the land 1516
1745. Motion for injunction, etc 1516
1746. Tender made by corporation 1517
1747. School lands, how appropriated 1518

CHAPTER 95.

CONDEMNATION BY MUNICIPAL CORPORATIONS.

1748. Introductory 1519
1749. When action can be brought 1520
1750. Application to court, etc 1524
1751. Essentials of application 1524
1752. Form of petition or application 1525
1753. Filing of application or petition 1526
1754. Service of notice to owners of property, etc 1526
1755. Notice, etc 1527
1756. When to be heard 1527
1757. Jurisdictional questions, preliminary hearing 1528
1758. Court to fix time for assessment of compensation by jury 1529
1759. Entry finding on preliminary questions and ordering jury 1530
1760. How jurors drawn in Probate Court 1530
1761. Empaneling jury, etc 1531
1762. View of premises may be required 1531
1763. How jury to return assessment. Open and close of case, etc 1531
1763a. Guardian ad litem 1531
1763b. Deposit of money 1532
1763c. How assessment signed 1532
1763d. When appropriation includes part of building 1532
1764. Trial, etc 1532
1765. Verdict in whole or in part 1533
1766. Form and return of verdict 1533
1767. Orders as to payment or deposit of assessment 1534
1767a. Effect of payment or deposit 1534
1767b. Reappropriation to perfect title 1534
1768. Distribution of funds 1534
1770. Costs, how paid 1535
1771. No delay from doubt of ownership 1535
1772. Interested parties may give bond, etc 1535

SECTION. PAGE.
1773. Review of proceedings....1536
1773a. Appeal to Court of Common Pleas....1536
1774. Motion and proceedings on new trial....1536
1775. Entry confirming verdict, etc....1537
1776. Proceedings in error. How execution of order suspended....1538
1777. Appeal to Court of Common Pleas....1538
1778. Notice of intention to appeal....1538
1779. Appeal by guardian, executor, etc., and married woman....1539
1780. Probate Court shall furnish transcript....1540
1781. Original papers may be used....1540
1782. Corporation not to appeal, or prosecute error except on leave..1540
1783. Effect of failure to pay for or take possession of land within six months....1540

CHAPTER 96.

ROAD APPEALS.

1784. Appeals in road matters....1542
1785. When order to open road shall be executed....1544
1786. When may appeal....1544
1787. Matters upon which appeal may be taken....1544
1788. Matters upon which appeals lie....1544
1789. Questions for the jury and the court....1545
1790. Who may appeal....1546
1791. Notice of appeal and specifications shall be in writing....1547
1792. Notice of intention to appeal—When to be given....1547
1793. Form of notice of intention to appeal....1548
1794. Bond....1548
1795. Form of appeal bond....1548
1796. Date when notice of appeal must be given....1549
1797. Appeal by minors....1549
1798. Commissioners shall transmit papers to court....1549
1799. Transcript....1550
1800. Entry in Probate Court....1550
1801. Hearing of preliminary questions and motions....1550
1802. Power of court to dismiss action....1551
1803. Hearing on questions....1553
1804. Granting appeal....1554
1805. Trial by jury—Drawing, etc....1555
1806. Entry—Preliminary hearing, etc....1555
1807. When cases shall be consolidated....1556
1808. Challenge of jurors....1556
1809. Oath of jurors—Form....1557
1810. Right to view premises, etc....1557
1811. View, etc....1558
1812. Trial....1558
1813. Verdict of jury; what it shall contain....1559
1814. Verdict—Form, etc....1559

SECTION. PAGE.
1815. Journal entry confirming verdict, etc....1560
1816. Record of proceedings in Probate Court....1561
1817. Taxing costs....1561
1818. Enforcement of judgment....1562
1819. Transcript and papers certified, etc....1563
1820. When orders for payment of compensation and damages shall be issued....1563
1821. Additional compensation—How....1563
1822. Order as to payment of damages....1563
1823. Entry—Form....1564
1824. Procedure when proceedings for appropriation of land abandoned....1564
1825. Abandonment....1565
1826. Fees and compensation of officers....1565
1827. Procedure after judgment establishing improvement....1565
1828. Reversal of order dismissing proceedings....1566
1829. Appeal—Limitation....1566
1830. Review of judgment of Probate Court....1566
1831. Proceedings after trial....1567
1832. Entry—Form....1567

CHAPTER 97.

CONDEMNATION OF MATERIALS FOR ROAD BUILDING.

1833. Power to purchase materials and appropriate land; application to court (§ 7214)....1568
1834. Condemnation of road material....1568
1835. What may be condemned....1569
1836. Resolution to appropriate....1569
1837. Application to probate judge....1570
1838. Notice to land owner; how served; contents (§ 7215)....1570
1839. Proceedings in probate court....1570
1840. Notice to land owner....1571
1841. Appointment of appraisers; assessment of value and damage (§ 7216)....1571
1842. Entry appointing appraisers....1571
1843. Report of award....1572
1844. Copies of award to commissioners and owners; summoning jury (§ 7217)....1572
1845. Entry of return of award....1573
1846. Form of appeal bond....1573
1847. Costs and expenses....1574
1848. Bond when jury trial requested (§ 7218)....1574
1849. Date and conduct of trial (§ 7219)....1574

CHAPTER 98.

APPEAL IN CONSTRUCTION OF DITCHES, SINKHOLES, LEVIES, ETC.

1850. Ditch construction and appeal....1575
1851. What deemed final order (§ 6473)....1576

SECTION. PAGE.
1852. Final order 1576
1853. Who may appeal (§ 6474)....1577
1854. Persons that may appeal....1578
1855. Notice of appeal 1578
1856. Form of notice of appeal....1579
1857. Perfection of appeal (§ 6475)....1579
1858. Bond 1579
1859. Statement to be filed in court of Common Pleas, etc....1580
1860. Form of statement....1580
1861. Auditor to file transcript (§ 6476)....1580
1862. Filing of transcript....1581
1863. Issue—how determined....1581
1864. Trial governed by rule in civil cases (§ 6477)....1582
1865. Trial by the court....1582
1866. Trial by jury....1582
1867. View of location by jury (§ 6478)....1583
1868. Verdict by jury (§ 6479)....1583
1869. Matters pertaining to verdict....1584
1870. Judgment: motion for new trial (§ 6480)....1585
1871. New trial, etc....1585
1872. Transcript after judgment (§ 6481)....1586
1873. Proceedings in error (§ 6482)....1586
1874. Proceedings shall not suspend construction (§ 6483)....1587
1874a. Stay of proceedings....1587
1874b. When owner may recover tax paid, etc. (§ 6484)....1587
1874c. Claims from owner not having notice....1587
1874d. Evidence in action to recover taxes, etc. (§ 6485)....1588
1874e. Action in proceedings to enjoin....1589
1874f. Not enjoined for error—when (§ 6486)....1590
1874g. When injunction will not lie....1590

CHAPTER 99.

PRESCRIBING MODE OF USE OF STREET BY TELEPHONE AND TELEGRAPH COMPANIES.

1875. Introductory 1591
1876. How right to use public ground acquired....1592
1876a. Compensation only for damages....1592
1877. Petition. Form, etc....1592
1878. Hearing and decree....1593

CHAPTER 100.

PARTITION.

1879. Introductory 1595
1880. Certificate from Probate Court when proceedings for partition commenced and deficiency of assets found....1597
1881. Application. Form 1597
1882. Hearing and order of Court....1598

SECTION. PAGE.
1883. Form of certificate 1599
1884. Court shall order so much proceeds to be paid to him, provided, etc. 1599
1885. Proceedings in Court of Common Pleas....1600
1886. Form of motion and entry ordering money paid....1600

CHAPTER 101.

ADOPTION AND DESIGNATING HEIR. COMMITTING VAGRANT CHILD.

1887. Introductory. Definition, etc. 1601
1888. How a child may be adopted....1603
1889. Who may adopt 1603
1889a. Court shall fix time for hearing....1604
1889b. Duties of next friend, etc....1605
1890. Adoption by stepfather or stepmother....1605
1890a. Consents required 1606
1891. Who may be adopted 1607
1892. Application and form 1607
1893. How consent of wife ascertained....1609
1894. Consents of parents, child or next friend, etc....1609
1895. The order of the court....1610
1896. Hearing 1611
1897. Entry of adoption 1611
1898. Recording and effect of the order....1612
1899. Extra-territorial effect 1612
1900. Rights of inheritance 1613
1901. Power to revoke order of adoption....1614
1901a. Child must have resided with petitioner six months....1615
1901b. When child develops certain conditions—Order may be revoked.1615
1902. Heir-at-law, how designated, etc....1615
1903. Nature of proceedings 1616
1904. Form of designation 1616a
1905. Entry designating person as heir....1616a
1906. Parent of vagrant or incorrigible child may be summoned to appear before Probate Court 1616a
1907. Proceedings under § 8031 G. C....1616b
1908. Entry, on filing of affidavit....1617
1909. Entry ordering child committed 1617

CHAPTER 102.

PROCEEDINGS IN AID OF EXECUTION.

1910. Nature of proceedings 1618
1911. Examination of debtor after return of execution....1620
1912. When and where can be brought....1621
1913. Who can bring 1622
1914. Application 1622
1915. Motion 1622
1916. Hearing for order of examination....1623

SECTION. PAGE.
1917. Order ....
1918. Notice 1624
1919. Examination of party 1625
1920. Examination of debtor before return of execution....1626
1921. Proceedings under § 11769 G. C....1626
1922. When order of arrest may issue, and proceedings thereon....1627
1922a. Examination of debtor and bond 1627
1923. Proceedings under § 11770 G. C....1627
1924. Warrant to arrest 1628
1925. Proceedings for arrest 1629
1926. Examination of debtor of judgment debtor, etc....1629
1926a. When the order may issue, notice....1630
1927. Proceedings under § 11772 G. C....1630
1928. Notice to judgment debtor 1631
1929. Existence of fraud not to excuse examination....1631
1930. Reference by judge 1631
1931. Proceedings may be continued....1632
1932. How attendance of parties and witnesses compelled....1632
1933. Examination before referee to be certified. Oath of witness..1632
1934. How disobedience of order punished....1632
1935. Power to enforce by contempt proceedings....1632
1936. Debtor may pay execution against creditor....1633
1937. Judge may order property to be applied on execution....1633
1938. Order to apply property or money on judgment....1634
1939. Property that may be reached....1634
1940. Property that can not be reached....1635
1941. Order to apply property or money, on judgment....1636
1942. Judge may appoint receiver, and prohibit transfer, etc., of property 1636
1943. Appointment of receiver 1637
1944. Injunction 1637
1945. Liability of sheriff on official bond; undertaking by receiver...1638
1946. Proceedings when indebtedness denied, or another claims the property 1638
1947. Proceedings under § 11784 G. C....1638
1948. Pleadings to be reduced to writing, and filed with clerk....1639
1949. Dismissal and second proceedings 1639
1950. Appeal and review 1640

CHAPTER 103.

HABEAS CORPUS

1951. Definition, etc. 1641
1952. Jurisdiction of Probate Court 1642
1953. Who entitled to writ 1644
1954. Who may make application....1645
1955. Requisites of application therefor 1646
1956. Form of application 1646
1957. When the writ will not be allowed....1647

SECTION. PAGE.
1958. When the writ must be granted....1648
1959. Entry ordering writ....1648
1960. Who to issue the writ, and when....1649
1961. How prisoner may be designated....1649
1962. Requisites of the writ in certain case....1649
1963. Form of writ when prisoner not in custody of an officer....1649
1964. Form of writ when defendant is an officer....1650
1965. How and where writ may be served....1650
1966. How executed and returned....1650
1967. What shall be stated in the return of the writ....1650
1968. Form of return, etc....1651
1969. Adjournment of cause....1652
1970. When prisoner shall be discharged on habeas corpus....1652
1971. Hearing, etc....1653
1972. Form of entry, discharging person....1654
1973. Form of entry, remanding prisoner....1654
1974. Second application....1655
1975. Appeal and error....1655

CHAPTER 104.

CONTEMPT.

1976. Jurisdiction of Probate Court....1657
1977. Kinds of contempt, etc....1658
1978. Proceedings for contempt in presence of judge, etc....1659
1979. Contempts not committed in presence of judge....1660
1980. Contempt....1660
1981. Written charges, etc....1661
1982. Entry appointing attorney to bring action....1662
1983. Form of charge....1662
1984. Entry ordering summons....1663
1985. Form of summons and attachment....1663
1986. Right of accused to bail....1664
1986a. Bail bond to be given to satisfaction of clerk....1664
1987. Trial by the Court....1664
1988. Punishment if found guilty....1665
1989. Imprisonment till order obeyed....1665
1990. Form of commitment for contempt....1665
1991. Proceedings when party released on bail fails to appear....1666
1992. Right of Court who committed prisoner to release him....1666
1993. Judgment final....1667
1994. Appeal and error....1667
1995. When the provisions of this chapter apply....1667

CHAPTER 105.

APPEALS FROM ALLOWANCE ON SHEEP CLAIMS AND ORDERS OF STATE FIRE MARSHAL.

1996. Claims for animals killed by dogs....1669
1997. Owner may appeal to probate court....1669

SECTION. PAGE.
1998. Perfecting appeal 1670
1999. Essentials of petition 1670
2000. Petition—Form 1670
2001. Journal entry 1671
2002. Number of witnesses allowed....1671
2003. Hearing 1671
2004. Entry finding, etc....1672
2005. Limit of amount allowed....1672
2006. Orders of state fire marshal....1672
2007. When and how owner may have hearing....1673
2008. Notice to state fire marshal for hearing....1674
2009. Right of appeal to Probate Court....1674
2010. Perfection of appeal....1675
2011. Journal entry approving bond and fixing time of hearing....1675
2012. Hearing and finding, etc....1675

CHAPTER 106.

INHERITANCE TAX

2013. Origin 1679
2014. Ohio State Historical....1679
2015. Constitutionality 1680
2016. Not a tax on property, but right to receive....1680
2017. Object and purpose....1681
2018. When law takes effect....1681
2019. Subsequent increase 1682
2020. Definition of terms (§ 5331)....1683
2021. Property on which tax levied (§ 5332)....1683
2022. Conditions of transfer which create liability for tax....1685
2023. Resident of state 1685
2024. Non-resident 1686
2025. Widow's years allowance (§ 5332-1)....1686
2026. When subject to tax in another state (§ 5333)....1686
2027. Property in foreign jurisdiction....1687
2028. Deduction for tax paid under U. S. Law....1687
2029. General deductions 1687
2030. Situs of property 1688
2031. Property not subject to tax (§ 5334)....1690
2032. Exemption: public charities, etc....1690
2033. Institutions within the state....1695
2034. Exemptions—Personal 1696
2035. Rates of tax on property (§ 5335)....1697
2036. Schedule of rates and exemptions....1698
2037. Taxes when due and payable (§ 5336)....1699
2038. Time of payment of tax....1700
2039. Personal liability of executor....1700
2040. Personal liability of beneficiaries....1701
2041. Tax on legacy retained (§ 5337)....1701
2042. When property is charged with payment of legacy, etc....1701

SECTION. PAGE.
2043. Tax, to whom paid. Discount, etc. (§ 5338)....1702
2044. Time limit for payment of tax....1702
2045. Petition to remit interest—Form....1703
2046. Notice of motion on application to remit interest—Form....1704
2047. Order remitting interest from 8 to 5 per cent.—Form....1704
2048. When legatee entitled to refunder (§ 5339)....1704
2049. Refunder of tax....1705
2050. Powers and duties of Probate Court (§ 5340)....1705
2051. Jurisdiction of Probate Court....1706
2052. Essentials of application....1707
2053. Filing and notice....1708
2054. Application for determination of tax—Form....1708
2055. Application, etc., where no administration—Form....1712
2056. Application, etc., non-resident—Form....1713
2057. Application, etc., small estate—Form....1714
2058. Appraisement by county auditor (§ 5341)....1715
2059. Appraisal by auditor....1716
2060. Entry—Ordering auditor to appraise—Form....1717
2061. Writ to auditor to appraise—Form....1717
2062. Duties of auditor....1718
2063. Notice of hearing before auditor—Form....1719
2064. Fixing value of real estate....1720
2065. Appraisal of personal property....1720
2066. Value of future or limited estate determined (§ 5342)....1721
2067. Fixing value of future or contingent interest....1722
2068. Application to superintendent of insurance—Form....1722
2069. Inheritance taxation table....1723
2070. Computation, etc....1724
2071. Taxation of estate dependent upon contingencies (§ 5343)....1724
2072. When contingencies exist—Higher rate....1725
2073. Estates held in abeyance or expectancy (§ 5344)....1725
2074. When tax has not been paid, etc....1725
2075. Report of auditor—Form....1726
2076. Findings of Probate Court (§ 5345)....1727
2077. Proceedings of court on report of auditor....1728
2078. Journal entry—Determining tax after auditor's appraisal—Form....1729
2079. Contents of notice and how served....1730
2080. Form of notice fixing tax....1731
2081. Form order exempting from tax....1731
2082. Who may file exceptions (§ 5346)....1731
2083. Filing exceptions....1732
2084. Form of exceptions....1732
2085. Order for hearing exceptions—Form....1733
2086. Notice of hearing exceptions—Form....1733
2087. Entry on hearing—Form....1733
2088. When certified to auditor (§ 5347)....1733
2089. Certifying finding to auditor....1734
2090. Motion to modify findings, etc....1734
2091. Appeal from final order (§ 5348)....1735
2092. Appeal—How perfected....1735

SECTION. PAGE.
2093. Who may prosecute appeal....1736
2094. Tax receipt, etc. (§ 5348-1)....1736
2095. Transfer of securities (§ 5348-2)....1736
2096. Notice of transfer to auditor and tax commission—Form....1737
2097. Transfer without knowledge (§ 5348-2a)....1738
2098. Transfer of stocks of corporation, etc....1738
2099. Application to transfer stock, etc.—Form....1739
2100. Delivery of custody of securities, deposits, etc....1739
2101. Application for consent to transfer—Form....1740
2102. Application for release when no administration—Form....1740
2103. Collection of tax after eighteen months (§ 5348-3)....1741
2104. Prosecuting attorney to represent county (§ 5348-4)....1742
2105. County auditor appoints deputies (§ 5348-5)....1742
2106. Tax commission may designate examiners (§ 5348-6)....1742
2107. Records to be made by Probate Judge (§ 5348-7)....1742
2108. Monthly reports to state auditor (§ 5348-8)....1743
2109. Reports by recorder (§ 5348-8a)....1743
2110. Accounts kept by county treasurer (§ 5348-9)....1744
2111. Fees, etc. (§ 5348-10)....1744
2111a. Probate Judge's fees (§ 5348-10a)....1744
2112. Division of tax (§ 5348-11)....1744
2113. Distribution of tax (§ 5348-12)....1745
2114. Where tax deemed to originate on property in State (§ 5348-13)....1745
2115. Where tax deemed to originate on property not in State (§ 5348-14)....1746

CHAPTER 107.

MISCELLANEOUS.

2116. Introductory....1747
2117. Marriage license....1747
2118. Inquests of lunacy....1750
2119. Removal of drifts....1752
2120. Railroad drains....1753
2121. Proceedings to oust municipal officer....1754
2122. Same proceedings....1755
2123. Same. Trial....1757
2124. Removal of county auditor....1759
2125. Examination of charges; removal; successor....1759
2126. Amercement....1760
2127. Attendance of witness....1761
2128. Justices of the peace....1762
2128a. Miscellaneous....1763
2129. Change of name, definition, etc....1763
2130. Proceeding to change name of person....1765
2131. Re-issuing of certificates of stock lost or destroyed....1768
2132. Parties and notice....1768
2133. Finding and order of court....1771
2134. Rights and liabilities under new certificate....1771
2135. Proceedings may be had by administrators and executors....1771

CHAPTER 108.

DOWER, ANNUITY, AND PRESENT VALUE TABLES.

SECTION. PAGE.

2136. Introductory 1773
2137. Mortality tables 1774
2138. Calculation for consummated dower, and life annuity 1776
2139. Dower and life annuity table based upon the Carlisle table ... 1777
2140. Dower and life annuity table based upon American table 1779
2141. Calculation of contingent dower 1781
2142. Contingent dower table 1783
2143. Expectation of life table 1786
2144. Table for ascertaining present value of certain annuity 1788
2145. Table for ascertaining present value of a sum certain due and payable at end of a stated number of years 1793

CHAPTER 109.

JUVENILE COURT.

2147. Nature of court 1797
2148. Historical 1798
2149. Object and purpose 1799
2150. Judge of court 1800
2151. What courts have jurisdiction (§ 1639) 1801
2152. Designation of judge 1802
2153. Juvenile Court defined (§ 1639-1) 1803
2154. Seal of court—what court (§ 1640) 1803
2155. Appearance docket and journal (§ 1641) 1803
2156. Jurisdiction of subject matter (§ 1642) 1804
2157. Jurisdiction, comments 1804
2158. Continuing jurisdiction 1805
2159. When jurisdiction terminates (§ 1643) 1806
2160. Delinquent child defined (§ 1644) 1806
2161. Who is delinquent child 1807
2162. Dependent child defined (§ 1645) 1808
2163. Who is dependent child 1808
2164. Proper parental care defined (§ 1646) 1808
2165. What is not proper parental care 1809
2166. Who may file complaint (§1647) 1809
2167. Procedure—Filing complaint, etc 1809
2168. Complaint—A delinquent, etc., child. Form complaint for child. 1813
2169. Citation, warrants, etc. (§ 1648) 1814
2170. Citation or warrant 1815
2171. Journal entry, entry for hearing, etc 1815
2172. Citation to child and custodian 1816
2173. Form notice to parents 1816
2174. Service of citation, etc., personally 1816
2175. Service of notice by publication 1817
2176. Form of affidavit for 1818
2177. Journal entry order for publication 1818

SECTION. PAGE.
2178. Notice for publication and sending by mail, when parent, etc., out of state, etc....1818
2179. Form warrant to arrest minors....1819
2180. Form complaint delinquency....1819
2181. Warrants to arrest, etc....1820
2182. Journal entry order for warrant to arrest....1820
2183. Form—Warrant to arrest on complaint....1821
2184. Provisions to avoid incarceration (§ 1648-1)....1821
2185. Special juvenile court room (§ 1649)....1821
2186. Hearing (§ 1650)....1821
2187. Trial of juvenile....1822
2188. Trial of adult....1823
2189. Jury trial; costs (§ 1651)....1823
2190. Right to jury trial....1824
2191. Commitment of child (§ 1652)....1824
2192. Commitment of minors etc....1825
2193. Examination of physicians (§ 1652-1)....1825
2194. Commitment to institution or suitable person (§ 1653)....1825
2195. Commitment of dependent or neglected children....1826
2196. Journal entry—Placing child, etc....1827
2197. Journal entry—Finding, judgment and order of the court....1827
2198. Age limitations (§ 1653-1)....1828
2199. Penalty for abuse or aiding and abetting delinquency (§ 1654).1828
2200. Commitment for causing delinquency....1828
2201. Journal entry—On arraignment, plea of guilty....1829
2202. Journal entry—Judgment....1830
2202a. Entry—Verdict of jury....1830
2202b. Entry—Judgment—Trial by jury....1830
2203. Failure or neglect, etc. (§ 1655)....1831
2204. Form complaint charging abandonment, etc....1831
2205. Commitment for non-support....1832
2206. Journal entry—Non-support, etc....1832
2207. Form—Bond to support....1833
2208. Sentenced to jail or workhouse....1834
2209. Journal entry—Sentence to workhouse....1834
2210. Provisions in case of workhouse sentence (§ 1656)....1835
2211. Commitment on continuance to county jail, etc. (§ 1657)....1835
2212. Citation, etc., on hearing (§ 1658)....1835
2213. Journal entry—Order for arrest—On hearing....1836
2214. Form warrant to arrest....1836
2215. Transfer of case to Juvenile Court (§ 1659)....1836
2216. Child arrested on warrant from Justice of Peace or Police Court, etc. 1836
2217. Writs to whom issued (§ 1660)....1837
2218. Expense—How paid (§ 1661)....1837
2219. Probation officer—Appointment (§ 1662)....1837
2220. Appointment—Probation officer....1838

COMPLETE LAW AND PRACTICE

IN THE

PROBATE COURTS OF OHIO.

CHAPTER I.

ORGANIZATION OF COURT—JUDGE, ETC.

§ 1 Introductory.
§ 2 Organization, etc.
§ 2a Combined with court of common pleas.
§ 2b Legislature to create combined court; petition, etc.
§ 2c How petition signed; verification.
§ 2d Conduct of election. Form of ballot.
§ 2e Establishment of probate division.
§ 2f Petition to re-establish.
§ 2g Re-establishment by increase of population.
§ 3 Rank of court.
§ 4 Where court held.
§ 5 Terms of court.
§ 6 Who may be judge.
§ 7 No probate judge or his deputy to practice law, etc.
§ 7a Need not be indicted.
§ 7b Exceptions.
§ 8 Can not act when interested.
§ 9 Administration, etc., when the probate judge is interested.
§ 9a Proceedings in common pleas court.
§ 10 Procedure where judge is interested.
§ 10a When common pleas judge may perform duties of probate judge.
§ 11 Custody of files, ex officio clerk, etc.
§ 12 Deputy clerk, etc.
§ 13 Probate judges may administer oaths, take acknowledgements and depositions.
§ 14 Bond of probate judge, etc.
§ 15 Judge shall make rules of practice and submit them to the Supreme Court.
§ 16 Miscellaneous matters, etc.
§ 17 Power to punish contempt.
§ 17a Authentication of record.

§ 1. Introductory.

As the laws regulating the devolution of property are as old as jurisprudence itself, they must of necessity at all times have been enforced by some court. In England some part of such jurisdiction was exercised by the ecclesiastical courts. But the powers of ecclesiastical courts prior to the independence of our country were restricted to the judicial cognizance of cases arising out of the probate of wills, the granting of administration, and the payment of legacies.[1]

Other powers now exercised by the Probate Court, were then exercised by the courts of chancery and in some matters the common law courts.[2] Jurisdiction in probate matters was therefore

[1] Woerner on Admin. 317.

[2] Woerner discusses this matter fully, §§ 137–141.

found in various English tribunals until the act of 1854, when the same was placed under the jurisdiction of one court, designated Court of Probate.

Courts by this name, in this country, were first established in 1784 by the act of the Massachusetts General Court, and exist in some form in every State of the Union.[3] These courts entertaining probate jurisdiction are variously designated. Thus in New York they are known as Surrogate Courts, in Pennsylvania as Orphan Courts, in Ohio and a number of other States they are designated Probate Courts. In some of the States probate jurisdiction is entertained by courts of general jurisdiction,[4] and in some other States[5] they have what is called a County Court, which entertains probate jurisdiction with other jurisdiction conferred by statute. But whether probate jurisdiction is exercised alone by a court created for that purpose or by a court exercising general jurisdiction, the law relating thereto is a distinct part of our jurisprudence.[6]

§ 2. Organization, etc.

By the constitution of 1802[7] the Court of Common Pleas in each county had jurisdiction of all probate and testamentary matters, the granting of administration, the appointment of guardians and such other cases as were prescribed by law. Thus until the constitution of 1851, all matters relating to probate law were enforced by our Common Pleas Court. Under that constitution the Common Pleas Court was presided over by one judge and two associate justices. The presiding judge was a member

[3] Wale vs. Willard, 2 Mass. 120.

[4] Ind. and others.

[5] Neb. and others.

[6] Probate Courts are only in a qualified sense the mere creatures of the Statute. They are as truly, as any other judicial tribunals, the offspring of the common law. They existed in substance in England before the usurpation of the ecclesiastics snatched from the crown this rightful portion of its authority, and changed their forms and mode of proceeding. Hubbell, J., in Bronson vs. Burnett, 2 Pinney (Wis.) 189; 1 Chand. 136.

Our probate law relating to wills, appointment of administrators, etc., was taken from the Massachusetts law, while that relating to inventory and presentation of claims was taken from the New York Statute.

[7] § 5.

of the bar, and versed in legal knowledge. The associate members were laymen; matters relating to probate jurisdiction came more directly under the personal supervision of these associate justices, and the clerk of the court by virtue of his office. When our judiciary system was reorganized by the constitution of 1851, matters relating to probate jurisdiction were conferred upon a new court, which was called a Probate Court. The constitutional provision relating to its organization is as follows:

"There shall be established in each county, a Probate Court, which shall be a court of record, open at all times, and holden by one judge, elected by the voters of the county, who shall hold his office for the term of three years, and shall receive such compensation, payable out of the county treasury, or by fees, or both as shall be provided by law." [Const. Art. IV., § 7.]

§ 2a. Combined with common pleas. The constitutional convention of 1912 presented an amendment permitting a combination of the Courts of Common Pleas in all counties of 60,000 population. Under this provision the following counties, Henry, Adams and Wyandotte, the courts have been combined.

The constitutional provision is as follows: There shall be established in each county, a Probate Court, which shall be a court of record, open at all times, and holden by one judge, elected by the electors of the county, who shall hold his office for the term of four years, and shall receive such compensation, payable out of the county treasury, as shall be provided by law. Whenever ten per centum of the number of the electors voting for governor at the next preceding election in any county having less than sixty thousand population as determined by the next preceding federal census, shall petition the judge of the Court of Common Pleas of any such county not less than ninety days before any general election for county officers, the judge of the Court of Common Pleas shall submit to the electors of such county the question of combining the Probate Court with the Court of Common Pleas, and such courts shall be combined and shall be known as the Court of Common Pleas in case a majority of the electors voting upon such question vote in favor of such combination. Notice of such election shall be given in the same manner as for the election of county officers. Elections may be had in the same manner for the separation of such courts, when once combined. [Adopted Sept. 3, 1912, § 7, Art. 4.]

§ 2b. Legislature to create combined court—petition, etc. § 1604-1. Whenever ten per centum of the number of electors voting for governor at the next preceding election in any county

having less than sixty thousand population, as determined by the next preceding federal census, shall petition a judge of the Court of Common Pleas of any such county not less than ninety days before any general election for county officers, for the submission to the electors of such county the question of combining the Probate Court with the Court of Common Pleas of such county, such judge shall place upon the journal of said court an order requiring the sheriff to make proclamation that at the next ensuing general election there shall be submitted to the electors of such county the question of combining the Probate Court with the Court of Common Pleas of such county. The clerk of courts shall, thereupon, make and deliver a certified copy of such order to the sheriff, and the sheriff shall include notice of the submission of such question in his proclamation of election for the next ensuing general election. [103 v. 960.]

§ 2c. How petition shall be signed; verification. § 1604-2. Each elector joining in a petition for the submission of said question shall sign the same in his own handwriting (unless he can not write and his signature is made by mark) and shall add thereto the township, precinct or ward of which he is resident. Such petition need not consist of but one paper, but may consist of as many parts as may be found convenient. One of the signers to each separate paper shall swear before some officer qualified to administer the oath that the petition is bona fide to the best of his knowledge and belief, and such oath shall be a part of or attached to such paper. The judge upon receipt of such petition shall deposit the same with the clerk of courts.

Objections. No signature shall be taken from or added to such petition after the same has been filed with the judge. When so deposited, such petition shall be preserved and be open under proper regulations to public inspection, and if it is in conformity with law, it shall be deemed to be valid, unless objection thereto is duly made in writing by an elector of the county within five days after the filing thereof. Such objections, or any other questions arising in the course of the submission of the question of combining said courts, shall be considered and determined by the judge of the Court of Common Pleas, and his decision shall be final. [103 v. 960.]

§ 2d. Conduct of election; form of ballot. § 1604-3. The election upon the question of combining said courts shall be conducted in all respects as provided by law for the election of county officers, so far as said law may be applicable.

The board of deputy state supervisors of elections shall provide separate ballots, ballot boxes, tally sheets, blanks, stationery, and all such other supplies as may be necessary in the conduct of such election.

Such ballots shall be printed with the affirmative and negative statement thereon, to-wit:

	The Probate Court and the Court of Common Pleas shall be combined.
	The Probate Court and the Court of Common Pleas shall not be combined.

Returns and canvass. Returns of said election shall be made and said returns shall be canvassed at the same time and in the same manner as an election for county officers, and the board of said deputy state supervisors of elections shall certify the result of said election to the secretary of state, to the probate judge of said county and to the judge of the Court of Common Pleas, and the same shall be spread upon the journal of the Probate Court and of the Court of Common Pleas.

If a majority of the votes cast at such election shall be in favor of combining said courts, such courts shall stand combined and consolidated at the expiration of the term for which the probate judge has been elected in the county wherein such election has been held. [103 v. 960.]

§ 2e. Establishment of probate division. § 1604-4. When the Probate Court and the Court of Common Pleas have been combined, there shall be established in the Court of Common Pleas a probate division, and all matters whereof the Probate Court has jurisdiction by law shall be filed in and separately docketed in said probate division, and the resident judge of the Court of Common Pleas, shall appoint the necessary deputies, clerks and assistants to have charge and perform the work incident to the probate division. The salaries of such deputies, clerks and assistants to be regulated by section 2980-1 of the General Code.

Error and appeals. Error may be prosecuted or appeals taken from said probate division to the Court of Appeals in all cases where the same lie to the Court of Common Pleas in counties where such courts have not been combined. [103 v. 960.]

§ 2f. Petition for re-establishment. § 1604-5. At any time after three years from the date of an election held under the provisions of this act, but not before, another election may be petitioned for and shall be ordered by the judge of the Court of Common Pleas as provided for in this act, either to perfect

a combination of said court, or to dissolve said combination and to re-establish the Probate Court. [103 v. 960.]

§ 2g. Re-establishment on increase of population. § 1604-6. Whenever in any county where such courts have been combined a decennial federal census shows that such county has a population of 60,000 or more, and such fact is certified by the secretary of state to said Court of Common Pleas and entered upon its journal, the Probate Court shall be re-established in such county, and a probate judge shall be elected for the regular term at the next ensuing election in an even numbered year, and the records of the probate division of the Court of Common Pleas shall be delivered to such re-established Probate Court upon the entry into office of an elected probate judge. [103 v. 960.]

§ 3. Rank of court.[7a]

From the fact that in many matters within the jurisdiction of the Probate Court proceedings in error or appeal may be prosecuted to the Court of Common Pleas, and also perhaps from the fact that under the former constitution probate matters were largely passed upon by the associate justices of the Court of Common Pleas, arose the idea that the Probate Court was an inferior court, and as such its judgments and decisions might be reviewed or attacked in a collateral proceeding. Soon after the organization of the Probate Court, in speaking of its rank and power, the following language is used: "The tribunal in which these proceedings were had was a court of record, of general common law and chancery jurisdiction; and while it is true that in the exercise of this particular authority it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered that it was the tribunal created by the constitution, with exclusive jurisdiction over probate and testamentary matters, and had no one single characteristic of those inferior courts and commissions, to which the rule insisted upon has been applied by the English and American courts. All its proceedings are recorded and constitute records in the highest sense of the term, importing absolute verity, not

[7a] Cited, Puder vs. Agler, 242 Fed. 95; 62 Bull. 410.

to be impugned by averment or proof to the contrary, and conclusively binding the parties, and all who stand in privity with them. The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. Orphans' Courts and Courts of Probate, when constituted courts of record, have uniformly been held of the former description." [8]

Logically following from the doctrine above was a holding of the court in a future decision, that the Probate Court was a court of record in its fullest sense, and that its records imported absolute verity, and that as such a court it was competent to decide on its own jurisdiction and to exercise it to final judgment without setting forth the facts and evidence upon which it was rendered.[9]

While it may be a court of limited jurisdiction, it is not an inferior court. Within the jurisdiction conferred upon it, it is as much a branch of the judiciary of our State as any court or judicial tribunal,[10] its powers to punish for contempt are the same as the Court of Common Pleas,[11] and it may compel obedience to its orders and decrees. It therefore follows that its judgments and decrees are as conclusive upon the parties to the record until reversed or annulled on appeal, writ of error or direct proceedings in chancery for fraud, as are the decrees of a chancery court or the judgment of a court of common law. Not only in respect to the binding force of its decrees and judgments

[8] Sheldon vs. Newton, 3 O. S. 494.

[9] Schroyer vs. Richmond, 16 O. S. 455; Wheeler vs. State, 34 O. S. 394; Lindemann vs. Ingham, 36 O. S. 1-15; Wehrle vs. Wehrle, 39 O. S. 366; Arrowsmith vs. Harmoning, 42 O. S. 254; Slagle vs. Entrekin, 44 O. S. 637; 10 M. E. Rep. 675; Railroad Co. vs. Village of Belle Center, 48 O. S. 291. See § 90.

[10] City of Toledo vs. Preston, 56 O. S. 361.

[11] § 10500 G. C., § 1916.

Orders made in proceedings to sell real estate can not be attacked in exceptions to the account of the administrator. In re Hess, 33 C. C. 449.

is it equal to the Court of Common Pleas, but from the vast interests which may be affected or controlled by its decisions, it stands equally important in the maintenance of the rights of our people.[12]

§ 4. Where court held.

The place at which the court shall be held is regulated by the following section of the General Code.

"A probate court is established in each county which shall be held at the county seat. Such court shall be held in an office furnished by the county commissioners, in which the books, records and papers pertaining to the court shall be deposited and safely kept by the judge thereof. The commissioners shall provide suitable cases for the safe keeping and preservation of the books and papers of the court, and furnish such blank books, blanks and stationery as the probate judge requires in the discharge of official duties. [R. S. § 523.] [13]

In all matters where the judge acts in his judicial capacity, such action must be done at his office in the county seat as prescribed by law, otherwise they are null and void. But when the proceedings are not what might be termed a judicial proceeding, that is, proceedings where the court renders a judgment which is a final determination of the rights of the parties, the court might perform an act which would be valid, although not done at the place designated by law. Thus it has been held that under our law which provides for the method of designating one person as an heir of another, that the judge might take the declaration of the person designating the heir, although such matter was not held at the office of the probate judge.[14]

In matters which are not strictly judicial in their character the judge may legally act anywhere within the county. Following this decision, the probate judge might take the election of the widow to accept or reject under the will at some other place than at his office.[15]

[12] Woerner on Admin. 326.

[13] 1583 G. C.

[14] Bird vs. Young, 56 O. S. 210.

[15] See § 1551, as to filing deed of assignment etc.

The proceedings can not be questioned in a collateral action. Thus where an administrator filed his petition to sell real estate, his appointment could not be questioned in that action; and that facts not jurisdictional do not need to appear on the record. Ferguson vs. Ferguson, 3 N. P. (N.S.) 549; 16 Dec. 486.

And where a court appointed a trustee who, under the law, had no power to act, this question could not be raised in a collateral action. Union S. B. & T. Co. Exer. vs. Telegraph Co., 79 O. S. 89. Reversing 7 N. P. (N.S.) 609; 30 O. C. C. 380; 19 Dec. 537

He is not obliged to keep a book of daily entries, etc. Commissioners vs. Willard, 4 N. P. 53; 4 Dec. 419.

§ 5. Terms of court.

It will be observed by the section of the constitution, quoted in previous section two, that the Probate Court shall be "open at all times." Considerable difficulty has been encountered upon the question whether the Probate Court has any "terms," and if so, when do they begin and when do they end? This matter only becomes important in proceedings in error or where the Court might wish to correct its own records, etc. Section 11631 of the General Code gives certain reasons which will allow the Court of Common Pleas or the Circuit Court to vacate or modify its own judgment or order after the term at which the same was made; and section 11648 G. C. provides that the provisions of section 11631 shall apply to the Probate Court so far as the same may be applicable to its judgments or final orders; and in estimating time, the Probate Court shall for this purpose hold in each year three "terms" for four months each, the first commencing on the first of January of each year. It has been held that the power to vacate or modify its own judgments did not exist in the Probate Court in reference to proceedings for the settlement of the estate of deceased persons.[16]

Where an adversary proceeding is adjudicated by the court, and the finding and decree is once entered in one of the terms of the court, such decree cannot be set aside and changed at succeeding terms at the mere motion of one of the parties, but only by regular proceedings under section 11578 G. C.[17] This decision applies the section of the General Code [18] fixing the terms of court to other than the proceedings brought under the chapter of which that section is a part; and it may therefore be said that in all matters relating to practice in adversary proceedings in the Probate Court that such court has three terms in each year, and from the fact of the court being in session all the time, the first term begins at the beginning of the first day of January and ends at the ending of the last day in April; and the second

[16] Kinsella vs. DeCamp, 15 C. C. 494; 8 C. D. 352.

[17] Bld. & Loan Co. vs. Speagle, 12 C. C. 761; 1 C. D. 512.

[18] § 11643 G. C.

The Probate court has no terms except for purposes specified in § 11643, G. C., and except where so specified can not on motion vacate or modify its orders. In *habeas corpus* proceedings to take a child from the children's home, it having been regularly committed, a motion was made for a rehearing. On the rehearing, the court vacated its former order; this the Common Pleas Court held was not within the power of the Probate Court. *In re* Jane Blake, 14 Dec. 89.

The only way the court could va-

term begins at the beginning of the first day of May and ends at the ending of the last day of August; and the third term begins at the beginning of the first of September and ends at the ending of the last day of December of each year. This application of the use of "term" of court has been held to apply to an application for setting aside an order of sale made in the Probate Court.[19]

In a case in the Supreme Court it was said "that the provisions of both these subdivisions" to-wit (11631 G. C., etc.) apply only to judgment and orders in adversary actions or proceedings *inter partes* and not the settlement of accounts of an executor in the Probate Court.[20] In a subsequent case in the opinion, it is said, that the reason given for the above conclusion is that said section relates not to *ex parte* proceedings, but to adversary actions and proceedings wherein there is a plaintiff and a defendant.[21] It seems therefore that as that part of the Probate Court's proceedings where the nature of the action is not adversary that the court has no "terms."[22]

§ 6. Who may be judge.

The Probate Court is presided over by one judge, who is elected by the voters of the county, and holds his office for the term of four years. There are no particular qualifications prescribed by statute as to the person who may be elected to this important office. It therefore follows that any person who is eligible to an elective office may become judge of the Probate Court. The question of determining whether or not the person selected is competent or not is left to the decision of the voters of the county. From the fact that many of the duties pertaining to the office of the Probate Judge are largely clerical, and

cate its former order after term, § 5365 R. S. (§ 11643 G. C.).

Sec. 11643 G. C., does not confer upon the Probate Court power to hold three regular terms each in each year for all purposes, but only for purposes mentioned in chapter 6, of title 4, division 4, G. C. Mansfield vs. Cole, 16 N. P. (N.S.) 209; 25 Dec. 231.

[19] Potter vs. Jennman, 4 N. P. 78; 4 Dec. 444.

[20] Johnson vs. Johnson, 26 O. S. 363.

[21] Stayner's Case, 33 O. S. 481.

[22] See § 1901, power to revoke adoption.

For criminal business Probate Courts have monthly terms commencing on first Monday of each month, unless commissioners fix longer terms, § 13457 G. C.

Judge Bigger, of Franklin Common Pleas, in a *habeas corpus* proceeding, where a minor had been committed to a children's home, held that the Probate Court could not modify its judgment, except as pro-

from the further fact that under the organization of the former court having jurisdiction of probate matters, and possibly from the fact that the business of the Probate Court in many counties did not encourage men of legal knowledge to aspire to the position of Probate Judge, this office has been filled in many counties in this State by persons of no legal acquirement whatever. As the jurisdiction of this court has in recent years been greatly enlarged, and the business of the counties increased, thereby increasing emoluments pertaining to the office, men of judicial and legal ability have been elected to fill this position in many of the leading counties. Considering the vast interests to be adjudicated upon by this court, and the very great confidence and trust placed in the person occupying the position of Probate Judge, by persons interested in the administration of estates and like affairs of a trust character, the position ought to be occupied not only by a man of good legal training, but of a very high moral character.[23]

While there are no qualifications prescribed by statute, there are some disqualifications provided, thus:

"No person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace." [R. S. § 18.][24]

vided under §§ 11631-11643, G. C., in such proceedings. 49 Bull. 25.

Since there is no statutory authority for keeping a court calender in the Probate Courts a memorandum on the court calender is not evidence to establish the right to enter a *nunc pro tunc* entry. Stark vs. Stark, 17 C. C. (N.S.) 398; 34 C. C. 135; aff., 88 O. S. 586.

The court having no terms, it is doubtful as to application of the rule as to Common Pleas Courts having control over the docket *during the term* applies. Mansfield vs. Cole, 16 N. P. (N.S.) 209; 25 Dec. 231.

[23] "The office of judge of probate is one of the most important offices in the country, and its duties should be strictly and faithfully performed. Titles must necessarily be dependent in part on proceedings of courts of probate; for which reason it is the duty and business of this court in all cases to require a strict and legal proceeding in that court. We can not overlook errors that affect the rights and property of persons, but must reverse them." Miller, J., in Humes vs. Cox, 1 Pinney (Wis.) 551 (1845). "Judges of probate are selected not only with reference to their legal qualifications, but to their sound discretion also." Rice, J., in Lunt vs. Auburs, 39 Me. 392, 397.

[24] § 11 G. C.

§ 7. **No probate judge or his deputy to practice law, etc.** "Whoever, being the judge of a probate court or his deputy clerk or engaged in the business of such court as clerk thereof, practices law or is associated with another as partner in the practice of law, in a court or tribunal of this state, or prepares a petition or answer or makes out an account required for the settlement of an estate committed to the care or management of an executor, administrator, guardian or other person, or appears as counsel or attorney before a justice of the peace, court or judicial tribunal, shall be fined not more than fifty dollars and removed from office." [R. S. § 534.][25]

§ 7a. **Need not be indicted.** The prosecuting attorney shall file his information against such judge or deputy clerk in the court of common pleas, and proceed as upon indictment. [R. S. § 534.][25*]

§ 7b. **Exceptions.** Section twelve thousand eight hundred and fifty-four shall not prevent a probate judge or deputy clerk from finishing business commenced by him prior to his election or appointment provided it is not connected with his official duty. [R. S. § 534.][25†]

§ 8. Cannot act when interested.

It is an elementary principle as old as the law itself that no man can faithfully serve two masters whose interests are in con-

[25] § 12854 G. C.
See § 1706 G. C.
The Probate Judge may only finish business not connected with his office commenced before his election. Atty. Gen'l. Op. 1913, p. 1142.

[25*] § 12855 G. C.

[25†] § 12856 G. C.
Probate judges have great difficulty in complying with some parts of the above section of the G. C., especially that part which forbids them from making out any account of an executor or guardian especially when the account is small. I am reliably informed that some probate judges not only make out accounts, but prepare other papers in the nature of answers, petitions and cross-petitions for actions in their own court. This certainly is positively forbidden by the Statute, and judges should certainly not violate the law themselves. A judge should hold himself free from suspicion in all of his actions or dealings. The penalty is very severe and was certainly made thus in order to absolutely prevent the judge from acting in any forbidden capacity.

flict,[26] and that no one, taking into consideration the characteristics of human nature, can act justly and impartially where he is an interested party. By a subsequent section of the General Code[27] it is specifically provided that a Probate Judge shall not be granted letters testamentary or guardianship and that he shall not act in any matter in which he is interested as heir, legatee or devisee; and that in all other matters and proceedings pending in the Probate Court which would properly be disposed of or decided therein in which the judge thereof is interested in *any manner whatever*, the judge shall be incompetent to sit in judgment thereon. Just what will constitute such interest in the judge where the same is not specifically declared by the statute must rest very often in the moral sense of the judge himself. No judge ought to let himself open to the aspersion that he is willing to sit in judgment on a case involving his own affairs in any respect whatever; and I am very glad to say that there are very few judges who are willing to decide any case in which they are remotely interested, either financially or otherwise. Generally such interest is either by reason of relationship or finance. The statute directly forbids him accepting the appointment himself, but does not say anything about acting or giving appointments to his relatives. In one case it was held that it was a manifest violation of judicial delicacy and propriety for a judge to appoint his son, but that the action was not void, merely voidable,[28] and in another State it was held that the appointment of a brother of the judge's wife was void.[29] The disqualification of the judge has often been said to be that of a juror; and the latter is incompetent generally within the ninth civil law decree.[30] If he has formerly been counsel in the case he ought not to act. Generally it may be said interest of the judge in the estate will disqualify him so he cannot act. If he have a claim against the estate it would seem that he cannot

[26] Story on Agency, 210.

[27] § 11609 G. C.

[28] Plowman vs. Henderson, 59 Ala. 559; Koger vs. Franklin, 79 Ala. 505. So of a son-in-law; Hine vs. Hussey, 45 Ala. 496; Hayes vs. Collier, 47 Ala. 726.

[29] Hall vs. Thayer, 105 Mass. 219, and cases cited on cognate principles.

[30] 12 A. & E. Ency. of law, 54.

act.[31] He, if he have an interest in the estate, cannot grant letters of administration; and the same would be true of the clerk.[32] But the fact that his aunt by marriage is a legatee under a will does not disqualify him (in Maine).[33] Nor does the fact that one of the creditors of the estate is his father-in-law disqualify him from admitting a will to probate.[34]

In the absence of statute it is said any interest is enough to disqualify.[35] In an appropriation proceeding where the Probate Judge was a treasurer of the company but not interested otherwise, it was stated by the reviewing judge that it was the duty of the Probate Judge to certify the cause to the Court of Common Pleas.[36] In another case, where the Probate Judge was a stockholder in the corporation, it was held that although he did not remember at the time the case was heard that he was a stockholder, yet the judgment ought to be arrested.[37] It was likewise held that the judge of the Court of Common Pleas could not sit in a case where it was sought to recover on a bond given to such court, as no one can be both judge and party.[38] The next section provides for procedure in cases where the judge is interested.

§ 9. Administration, etc., when the probate judge is interested. "Letters, testamentary, of administration, or of guardianship, shall not be issued to a person after his election to the office of probate judge and before the expiration of his term. If a probate judge is interested, as heir, legatee, devisee, or other manner

[31] Thornton vs. Moore, 61 Ala. 347.

[32] Sigourney vs. Sibley, 22 Pick. 507.

[33] Marston's Appeal, 79 Me. 25.

[34] Aldrich's Appeal, 110 Mass. 189; 19 A. & E. Ency. of law. title, Probate and Letters of Administration.

[35] For one, I should be loath to hold that, by force of a legislative act, one could bring an action, in which his interests were involved, in a court of which he was the sole judge, and could sit alone to hear and decide it. Folger, J., in Matter of Ryers, 72 N. Y. 1.

[36] Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 308.

[37] C. W. & Z. R. R. Co. vs. Gill, 10 W. L. J. 213.

[38] Court of Common Pleas vs. Sergeant, Wright 482.

This does not apply to a judge elect who has not begun his term. State v. Hidy, 61 O. S. 549.

in an estate which would otherwise be settled in the probate court of the county where he resides, such estate, and all the accounts of guardians in which the probate judge is interested, shall be settled by the court of common pleas of the county. In such matters and cases in which the probate judge is interested, the original papers shall be by him forthwith certified to the court of common pleas. In other matters and proceedings in a probate court, which would properly be disposed of or decided therein, but in which the judge thereof is interested as attorney or otherwise, or in which he is required to be a witness to a will, such judge shall, upon the motion of a party interested in the proceedings, or upon his own motion, certify the matters and proceedings to the court of common pleas and forthwith file with the clerk thereof all original papers connected therewith." [R. S. § 535.][39]

§ 9a. Proceedings in common pleas court. "When a matter or proceeding is so certified, the court of common pleas, at chambers, by a judge thereof, or in open court, shall hear and determine it as though it had original jurisdiction of the subject matter. Upon final decision of the questions involved in such proceedings, the final settlement of the estate in which the judge is interested as executor, administrator or guardian, or when his interest therein ceases, the clerk shall deliver to the probate court from which they came the original papers and make and file therein an authenticated transcript of the orders, judgments and proceedings of the common pleas court. Thereupon the probate judge shall cause record thereof to be made in the proper records of similar business." [R. S. § 535.][39*]

§ 10. Procedure where judge is interested.

Although a party about to bring a proceeding may be satisfied that the judge is disqualified, yet if the action is one within the jurisdiction of the Probate Court it must be brought in that court; and then a motion should be addressed to the Court, setting out the facts and asking that the action be certified to the Court of Common Pleas. This may be done to any part of the proceedings in the Probate Court. Thus, if an action were

[39] § 1589 G. C.

[39*] § 1590 G. C.

See §§ 11068, 11069, 11070 G. C. in appropriation proceedings.

Duty to certify, when. In re Ullman, 12 C. C. (N.S) 340; 31 O. C. C. 370.

It is not unconstitutional for Common Pleas to act. State vs. Archibald, 52 O. S. 5.

brought in the Probate Court to sell real estate, and the Probate Judge should become a purchaser of the land, the proceeding up to that point might very properly have been passed upon by the Probate Judge; and the only matter that would need to be certified to the Court of Common Pleas would be the report of sale, and confirmation should be made by the Common Pleas Court. So in the probate of a will where the Probate Judge is a witness it should be certified up to the Common Pleas Court to have the testimony of the witnesses taken, and the order admitting to probate made, and then returned to the Probate Court for record and further proceedings. The motion may be in the following form:

(*Title.*)

Now comes A. D., administrator (heir at law, or legatee, etc.,) of C. D., deceased, and moves the court, that a report of sale of said real estate of deceased (or that the probate of the last will and testament of said C. D.) made on the.....day of....., be certified to the Court of Common Pleas of.....County for an examination and confirmation (or in case of probate of will, for admission of said will to probate) for the reason that the Probate Judge of the county in which said action is pending is a purchaser of said premises (or is a witness to said will).

If the Court is satisfied that it is disqualified to act, an entry should be made, which may be in the following form:

(*Title.*) ENTRY.

This day this cause came on to be heard upon the motion of A. D. to certify the report of sale (or probate of will) this day made by said administrator to the Court of Common Pleas of this county. Upon consideration whereof, said motion is found to be well taken, and that the judge of this court is interested therein and should not act and the same is hereby granted.

Wherefore it is ordered that said matter be certified to the Court of Common Pleas of this county, and that all original papers connected with said proceedings be filed with the clerk of this county, as required by law.

After the same is certified to the Court of Common Pleas it is then an action pending in that court, and the judge has power to make all necessary orders and may set aside an order made, just the same as if it was an original action brought in the Court of Common Pleas.[40] After the matter has been passed upon a

[40] Barr vs. Closterman, 7 C. C. 373; 4 C. D. 637; § 1590 G. C.

certified copy of the journal entry of the Court of Common Pleas and the original papers should be returned to the Probate Court, and the matter disposed of and recorded in said court, the same as if the action had not been certified to the Court of Common Pleas.[41]

§ 10a. When common pleas judge may perform duties of probate judge. "When it is made to appear to the satisfaction of a common pleas judge within a county that the probate judge thereof is absent therefrom, he may perform the duties conferred upon him by law for the admission of patients to a hospital for the insane of the state, or when it is made to appear that the probate judge is incapacitated on account of illness, or is absent from his county in obedience to an order issued by the governor of the state directing him to perform military service, he may perform all the duties conferred by law upon such probate judge. The record of such cases shall be made and preserved in the proper records of the probate court by the deputy clerk thereof." [103 v. 257.] [41*]

Prior to the enactment of the above section (1904), there was no other provision whereby the duties of a probate judge, in case of his absence or sickness could be performed by any one. The previous section merely applied to cases in which the probate judge was interested. It was often a matter of very great inconvenience in case of absence or sickness, that matters could not be heard in the probate court. The practice arose in such cases where they could not be delayed until the probate judge was present, for the deputy to act for the judge and permit the entries to remain open until approved or signed by the judge. This was a questionable practice, but perhaps the best that could be done under the circumstances.

It will be observed that the above section of the General Code does not permit the common pleas judge to act in the absence of the probate judge, except in lunacy cases. In case of sickness, it permits the common pleas judge to act for the probate judge in all matters in this court. When the common pleas judge so acts it might be advisable to let the journal entries show the reason why the common pleas judge acts and that the reason be such as is authorized by the statute. In matters that are within the exclusive original jurisdiction of the probate court, as fixed by the constitution (see § 18), the suggestion occurs whether the common pleas judge can con-

[41] See § 1682, when certified, etc. As the Common Pleas Judges are now elected by the county, under State vs. Sheriff, 52 O. S. 5, one objection to its constitutional validity loses much of its force.

[41*] § 1592 G. C.

stitutionally act in and for the judge who has been duly elected for the probate court. The constitution fixes (see § 2) who shall hold or occupy the position of judge of the probate court and stipulates that it shall be a person elected by the voters of the county. The question has not been passed on to our knowledge, by our supreme court and until so declared, it will be considered as constitutional. However, the power conferred by the statute should be strictly construed and only should the common pleas judge act when it is clear that the necessity has arisen for which the statute makes provision.[41a]

§ 11. Custody of files. Judge may act as clerk or appoint a deputy. Oath of deputy. His powers and bond. "Each probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint a deputy clerk or clerks, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each deputy clerk may administer oaths in all cases when necessary, in the discharge of his duties. Each probate judge may take a bond with such surety from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment." [R.S. § 533.] [42]

By virtue of the above section of the General Code the judge, in the exercise of his official duty, occupies the position that is ordinarily filled in a court of justice by two persons. That is, he is judge of the court and he is clerk of the court. As to all matters coming before him, where the act required to be done is one which the statute specifically declares to be personal to the judge, or where it belongs to that class of actions which are known as judicial acts, the judge acts strictly in his capacity as judge of the Probate Court. Where the act to be performed is not personal to the judge and is such an act as is usually performed by a clerk of a court of justice, never being more than a ministerial act, then the judge acts in his capacity of clerk. The powers of his deputy will be considered in the next section.

§ 12. Deputy clerks, etc.

By virtue of the provisions of section 1584, G. C., set forth in the previous section, it will be observed that the Probate Judge may appoint a deputy clerk, etc., and that such deputy clerk shall, before entering upon the duties of his appointment, take

[42] § 1584 G. C.

[41a] See State vs. Archibold, 52 O. S. 5: Knight vs. Johnson, 13 Dec. 715.

an oath of office, and when so qualified, such deputy may perform any or all the duties appertaining to the office of clerk of the court; and such deputy is authorized to administer oaths in all cases in which it is necessary in the discharge of his duties as such deputy clerk. These are all the provisions defining the duties of a deputy clerk. Like the Probate Judge, he is not permitted to practice law, etc.[43] The deputy clerk can perform no act of a judicial character.[43*] The constitution provides there shall be but one judge and all acts of a judicial character can never be performed by a deputy. As a general rule, judicial officers cannot appoint deputies; and the deputy appointed by the Probate Judge is not a deputy to the judge in his judicial capacity, but is a deputy to him in his clerical capacity. Whatever act therefore, by virtue of any statute, the Probate Judge is directed to do, which is to be done in his clerical capacity, can always be performed by his deputy. A deputy is defined as one, who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable.[44] And therefore whatever official act is done by a deputy should be done in the name of his principal, and not in the name of the deputy.[45]

The authority given by law to a ministerial officer is given to the incumbent of the office and not to the deputy. The position of deputy clerk is not an office within the meaning of the constitution, and therefore a female is eligible to that position.[46]

The statute requires that the deputy be sworn, and while he might do some valid act without having the oath administered, yet where a person was acting who had not taken an oath it was held a person could not be convicted of perjury for falsely making an oath before such person.[47] In order that there may be

[43] §§ 12854-5-6 G. C.

[43*] A deputy cannot take the election of a widow to take under the will. Mellinger vs. Mellinger, 5 C. C. (N.S.) 435; 26 C. C. 683. Affirmed, 73 O. S. 221.

[44] 4 A. & E. Ency. of Law, subject, Deputy.

[45] A deputy of an office, hath no interest therein, but doth all things in his master's name. Jacobs, Law Dic., Deputies.

See Gibbens vs. Pickett, 31 Fla. 147; 19 L. R. A. 177, for full and extended note upon this question.

[46] Warwick vs. The State, 25 O. S. 21.

In this case it was said, "The acts of the deputy are in law the acts of the principal, and he is responsible for them. The deputy is appointed by the principal, can be appointed by no one else, and is removable at his pleasure. The appointment of deputy clerk in the Probate Court need not be approved by any other person or court; he is entitled to no salary or compensation, except what may be allowed him by his principal; and he can lawfully do no act against the will of his principal."

[47] Straight vs. The State, 39 O. S. 496.

sufficient proof of this oath being administered, the judge should, when making the appointment, immediately make an entry of such fact on the journal and recite therein that the oath was duly administered. For wrongful acts of this deputy clerk the Probate Judge is responsible, providing such acts are done in the performance of an act pertaining to his office; and in order to protect the judge the statute directs that he may require the deputy to give him bond.

§ 13. Probate judges may administer oaths, take acknowledgments and depositions. "A probate judge may administer oaths authorized by law, take acknowledgment of deeds, mortgages, and other instruments of writing required by law to be acknowledged, and take depositions in a case where authorized by law." [R. S. § 526][48]

Unless the act to be performed is one which is required in some proceeding in the Probate Court, the deputy could not act in any of the cases above authorized by law. Such acts are personal to the judge.

§ 14. Bond of probate judge. Condition. Deposited with county treasurer. "Before entering upon the discharge of his duties, the probate judge shall give a bond to the state in a sum not less than five thousand dollars, with sufficient surety, approved by the board of county commissioners or by the auditor and recorder, in the absence from the county of two of the commissioners, and conditioned that he will faithfully pay over all moneys received by him in his official capacity, enter and record the orders, judgments and proceedings of the court, and faithfully and impartially perform all the duties of his office. Such bond, with the oath of office indorsed thereon, shall be deposited with the county treasurer and kept in his office. From time to time, as the state of business in his office renders necessary, the county commissioners may require the probate judge to give additional bond." [R. S. § 529.][49]

This bond could only be made to cover or hold the judge responsible for a wrongful performance of a ministerial act. For judicial acts he is not liable personally, and therefore would not be liable on his bond.[50]

[48] § 1582 G. C.

[49] § 1581 G. C.

[50] See Ingersoll vs. Smith, 36 Bull. 302, where a judge was held not liable for accepting a forged bond. §§ 238-241, 1560.

The Probate Judge might be liable on his bond if he fails to require an inventory to be filed. In re Pickard's Est., 5 N. P. 493; 7 Dec. 476.

An action against a Probate Judge and his successors in office to recover certain public funds received by him in his official capacity, is subject to the ten-year limitation prescribed by § 11266 G. C., even though his bondsmen are not joined in the action. State vs. Ferris, 23 Dec. 328; 12 N. S. (N.P.) 171. See this case when successor held liable.

§ 15. Judges shall make rules of practicce and submit them to the Supreme Court. "The several judges of the probate court shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of the court, which they shall submit to the supreme court. The supreme court may alter and amend such rules, and make other and further rules, from time to time as they deem necessary for regulating the proceedings in all the probate courts of the state in order to maintain regularity and uniformity in their proceedings." [R. S. § 536.][51]

§ 16. Miscellaneous matters.

The judge is required to perform numerous other duties. He is to be furnished certain books which shall be kept in his office.[52] And where there are destroyed records the statute provides how they may be restored.[53] If his predecessor has failed to properly enter upon the business pertaining to the office it may be done by the judge and proper charges made.[54] He is likewise required to return to the auditor the fees collected in his office on the first day of September in each year.[55]

§ 17. Power to punish contempt. "The probate judge has power to keep order in his court, and punish any contempt of his authority, in like manner as such contempt might be punished in the court of common pleas." [R. S. § 538.][56]

Following the above section of the General Code, provision is made by a subsequent section, § 10501 G. C., that the Probate Judge may issue warrants, attachments and other process, and all notices, commission, rules and orders, not contrary to law, that are necessary and proper to carry into effect the powers granted to him; and the sheriff, deputy sheriff, coroners and constables shall attend his court.[57] And that such officer is liable to fine and amercement as provided in the next section.[58] Another section provides how the person guilty of contempt may be punished.[59] Procedure in contempt cases will be made the subject of a future chapter.[60]

[51] § 1591 G. C. Generally Probate Courts have no fixed rules of practice. I know of none except Hamilton County; these will be found in the first part of Goebel's Probate Reports

[52] §§ 1594 and 1595 G. C.

[53] §§ 12345, 12346, 12347, 12348 G. C.

[54] §§ 1586, 1587, 1583 G. C.

[55] § 1600 G. C.

[56] § 10500 G. C.

[57] § 1596 G. C.

[58] § 1597 G. C.; § 2010.

[59] § 1598 G. C.

[60] Ch. 107, § 1976. Attendance of witnesses, § 2011.

§ 17a. Authentication of records, etc. The Probate Court is frequently called upon for copies of its records or proceedings. If the copy is for use only in the state, a copy certified to by the judge under the seal of his court would be sufficient, and it might be that if done under his name, this act might be performed by a deputy, as such certification is a duty pertaining to the office of clerk, not judicial in its character, and it would be valid if done in the name of the judge by the deputy. It would be the safer plan, however, to have it signed by the judge himself.

However, when the act is to be performed by the judge, the certificate must be signed by him personally. It is a generally recognized rule that a person who is officially in charge of certain documents, may certify that certain papers purporting to be copies, are true and correct copies of the originals in his possession or under his control. If, however, the papers are to be used outside of the state, then, to be competent evidence, they must be authenticated as provided in the following United States statutes:

Records of Judicial Proceedings, etc.:

"The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from which they are taken." [61]

Under the above United States statute it has been held that a certificate of the same person, as judge and ex-officio clerk is a substantial compliance with the act.[62] But it must be signed by the person, once as clerk, and again as judge, etc.,[63] and the attestation must be by the person himself and not by a deputy.[64] The probate judge, being both judge and clerk of the Probate

[61] Compiled U. S. Stat. No. 1519, § 2478, G. C.

[62] Catlin vs. Underhill, Fed. Cas. No. 2523; Keith Bros. vs. Stiles, 92 Wis. 15; Welder vs. McCombz, 10 Tex. Civ. App. 85; State vs. Hinchman, 27 Pa. St. 479; Brown vs. Baxter, 94 Pac. 155, 574; Roop vs. Clark, 4 Greene (Iowa) 294.

[63] Millins vs. Houston, 41 Miss. 59.

[64] See Kansas Pac. Ry. vs. Cutter, 19 Kans. 83; Willock vs. Wilson, 178 Mass. 68; Morris vs. Palthin, 24 N. Y. 394; 82 Am. Dec. 311.

Court in Ohio, he would sign both certificates. The first is attested by him as clerk and the second he certifies that the attestation is in due form, as the presiding judge of the court. The seal must always be attached.

The following may be used as a general form, etc.:

CERTIFICATE TO COPIES.

THE STATE OF OHIO,
..... County, ss.

PROBATE COURT.

I, ..., Judge and ex-officio Clerk of the Probate Court, within and for said County, having the custody of the Files, Journals and Records of said Court, do hereby certify that the foregoing is a true copy of ..... as the same appear.. upon the records of said Court; and I further certify, that I have carefully compared the foregoing copy with the original record, and that the same is a full and correct transcript thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at ....., Ohio, this ..... day of ....., A. D. 19...

.....
Probate Judge and ex-officio Clerk of said Court.

THE STATE OF OHIO, ... COUNTY, SS.

I, ..., sole Judge of the Probate Court, within and for said County and State, the same being a Court of law and of record do hereby certify that ....., whose genuine signature is attached to the foregoing certificate, is, and was at the time of signing the same, ex-officio Clerk of said Probate Court, and as such, full faith and credit are due his acts, and that the above certificate and attestation are in due form of law, and made by the proper officer.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at ....., Ohio, this ..... day of ....., A. D. 19...

.....
Judge as aforesaid

An examination of the United States statute before quoted will disclose that it only applies to the *judicial proceedings;* the next section of the United States statute

applies to "all records and exemplifications of books which may be kept in any public office, etc."

"shall be proved, * * * by the attestation of the keeper of the said records * * * and the seal of his office annexed, * * * together with a certificate of the presiding justice, * * * that the said attestation is in due form, * * * "

This section further provides that

"if the said certificate is given by the presiding justice" then

"it shall further be authenticated by the clerk * * * of said court who shall certify, under his hand * * * that said presiding judge is duly commissioned and qualified."

So if it were held that the judge signs the first certificate as *judge,* the second would have to be signed as *clerk,* and this would require a certificate somewhat different in wording from that given in the previous form. But it seems that where he signs the first as judge and ex-officio clerk, mentioning that he has custody of the records, etc., that then the presumption is that he signs in the capacity of keeper of said records, etc., and the form heretofore given may be used in the authentification of all the records or proceedings in the Probate Court.

Section 1584, G. C., § 11, gives to the judge the care and custody of the records in the probate judge's office, as well as authorizing him to act as clerk.

Another section of the United States statutes provides that when it is desired to have the record of a country outside of the United States certified, so as to entitle it to record, etc., on application to the head of departments, etc., when certified by the American Consul, it may be admitted to record in this country.[65]

[65] See §§ 15330, 15331 and 15332. Page's Revised Edition of General Code.

Sec. 11541 G. C. applies to authentication of depositions, and § 11500 G. C., how records in state offices may be certified, etc.

CHAPTER II.

JURISDICTION.

§ 18 Constitutional provision.
§ 19 Status under the Constitution.
§ 20 Equity jurisdiction.
§ 21 Power to hear common law actions and empanel juries.
§ 22 Limited jurisdiction.
§ 23 In actions for sale of real estate, can determine title to land.
§ 24 Growth of the jurisdiction of the Probate Court.
§ 25 Power to grant injunctions.
§ 26 Power to appoint receivers.
§ 27 Exclusive jurisdiction.
§ 28 Concurrent jurisdiction.
§ 29 Jurisdiction exclusive of that of any other Probate Court.
§ 30 Appellate jurisdiction.
§ 31 Jurisdiction to review inferior courts.
§ 32 Shall have same powers, and observe rules of common pleas so far as applicable.
§ 33 Action in common pleas asking direction of Court respecting estate, who may bring.
§ 33a When suit by creditor.
§ 34 Comments.[1]

§ 18. Constitutional provision. "The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction in *habeas corpus,* the issuing of marriage licenses, and for the sale of land by executors, administrators, and guardians, and such other jurisdiction, in any county or counties, as may be provided by law." [Const. Art. IV., § 8.][2]

Plenary power is conferred by this section as to granting letters, settling accounts, etc. Trumpler vs. Roger, 95 O. S. 194. See State vs. Archibold, 52 O. S. 5; Knight vs. Johnson, 17 Dec. 517.

[1] As to assignments see §§ 1542 to 1552.

[2] The debates of the Constitutional Convention of 1851 show what a narrow escape the Probate Court had of being one of exceedingly limited jurisdiction in Ohio. The last clause of the above section to-wit: "and such other jurisdiction as may be provided by law" was the bone of contention; and certainly without this clause, the greater part of the jurisdiction now exercised by the Probate Court would have been kept from it, and the court would in the truest sense of the term, have been one of special and limited jurisdiction. This last clause has permitted the legislature to confer jurisdiction in matters connected with the jurisdiction specified in the constitution which would not otherwise have been permitted; and the very large jurisdiction of assignments, of appropriation, of road appeals, of ditch appeals, and numerous other matters would never have found their

§ 19. Status under the constitution.[2a]

An idea seems to prevail among a large portion, especially of the older members of the bar of Ohio, which sometimes extends to the judiciary, that by virtue of some principle of organic law the Probate Court is an inferior and limited court. This idea, by virtue of recent decisions of our Supreme Court, I am satisfied, is not as firmly rooted as it formerly was. The reason for its prevalence I am not fully able to understand. Perhaps it resulted from some unfortunate expression of the Supreme Court; and the idea may have been encouraged by the fact that the statutes immediately passed after the adoption of the constitution gave to the Common Pleas Court general powers, while in many instances the powers granted to the Probate Court were specified. But the fact remains that under the constitution the capacity to receive jurisdiction is just as great in the Probate Court as it is in the Court of Common Pleas. If either court is favored by the constitution it is the Probate Court, for the Probate Court has jurisdiction conferred upon it by the constitution in the matters mentioned in the section above quoted, while the Court of Common Pleas has no jurisdiction except such as may be conferred upon it by law.[3]

A careful reading of the decisions of our Supreme Court where jurisdiction of the Probate Court is denied, in a matter because it is one of limited and inferior jurisdiction, will show that it is not because the constitution does not permit such jurisdiction, *but because the statute does not grant such power.* So in determining whether the Probate Court has jurisdiction or not the sole question to be considered is, does the statute anywhere authorize the Probate Court to act in the matter? If it

way into the forum of the Probate Court. Some of the best lawyers of that convention seemed to be of the opinion, that the Probate Court should be confined to such inferior jurisdiction. But finally, the men who seemed to be more prophetic as to the need of the future, led by that very able and distinguished judge, R. P. Ranney, prevailed, and the clause was finally inserted.

See § 1333 in Guardians; § 1544 in Assignment.

2a Cited, Puder vs. Agler, 292 Fed. 95; 62 Bull. 411.

3 Const. 1851, art. 4, § 4; Stephens vs. State, 3 O. S. 543.

The Probate Court in Ohio has common-law jurisdiction. State vs. Metzger, 10 N. P. (N.S.) 97; 21 Dec. 72.

does, and places no limitation on its power, then its jurisdiction in such a matter is as complete as that of the Court of Common Pleas. These matters will be further considered in a subsequent section.

§ 20. Equity jurisdiction.

It has frequently been asserted that the Probate Court has no equity power; and for a long time it was insisted, especially in assignment cases, that the Court could not exercise such power,[4] and likewise was denied in the sale of real estate by executors. But now these matters have been settled in the affirmative by the Supreme Court.[5]

If the Probate Court has no equity jurisdiction it is because the legislature has conferred no such jurisdiction upon it. It does not result from any inherent incapacity in the court itself. In a recent decision of our Supreme Court it is well said: "That if, for the sake of argument, we assume that the language of that section does not in terms expressly confer the jurisdiction, does it follow that such power is wanting? Although the Probate Court is of limited and statutory jurisdiction, it is, we think, a mistake to suppose that it has no equity powers unless the same are expressly conferred. A power given to make a particular order implies authority to hear and dispose of all questions which it is necessary to have settled before the making of such final order, unless the needed authority is distinctly denied." [6]

Upon this matter Woerner says:[7] "Unless a warrant for the exercise of jurisdiction in a particular case can be found in the statute, given either expressly or by implication, the whole proceedings is void; but where jurisdiction is conferred over

[4] Keifer vs. Spence, 5 N. P. 522; 5 Dec. 609; Sayler vs. Simpson, 45 O. S. 141; Dwyer vs. Garlough, 31 O. S. 158.

[5] Doan vs. Bitely, 49 O. S. 588.

[6] Clapp vs. Banking Co., 50 O. S. See Fisher vs. Fisher, where it is held the Probate Court may construe a will so far as necessary for the executor to distribute the estate, 12 O. L. R. 561; 14 C. C. (N.S.) 218; 34 C. C. 201.

[7] Woerner on Admin., § 142, cited in Jones vs. Green, 21 C. C. 98; 11 C. D. 548.

Has chancery power. Spink vs. Spink, 7 C. C. (N.S.) 89; 28 O. C. C. 94. Affirmed, 78 O. S. 390.

any subject matter, and it becomes necessary in the adjudication thereof to decide collateral matters over which no jurisdiction has been conferred the court must of necessity decide such collateral issues."

It may therefore be said that when a power is conferred upon the Probate Court by statute unlimited in its method of execution that the Probate Court has full power to hear and adjudicate all matters relating thereto and pass upon them notwithstanding the fact that in doing so it may exercise the powers of a court of chancery or one of common law or only such power as is strictly confined to probate jurisdiction. By virtue of the general equity power conferred upon the Court of Common Pleas by law, where the remedy afforded by the Probate Court is inadequate, in order that there may not be a failure of justice, the Common Pleas will entertain jurisdiction.[8]

§ 21. Power to hear common law actions and impanel juries.

Following out the principles enunciated in the previous sections, the Probate Court cannot only hear matters coming strictly within its probate jurisdiction, but may also hear and decide matters which require the exercise of the powers of a judge presiding over a court of common law; and therefore where a matter properly comes before the Probate Judge, which is by law triable by jury, he may empanel a jury for that purpose.[9] In this case it is said: "So that under the constitution the Probate Court has capacity for receiving jurisdiction quite as great as that of the Court of Common Pleas. It is not a court of general jurisdiction; but that is because such powers have not been conferred on it by statute as have been conferred on the Common Pleas. So that the question here is, not what capacity has been given the Probate Courts of the State by the

[8] Rote vs. Stratton, 2 N. P. 27; 3 Dec. 156.

See § 267, Surety, Legatee.

In an equity case it was said that the decree of a Probate Court in Ohio, involving the exercise of the general jurisdiction of a court of equity, must be considered as *coram non judice* and void. Gilliland vs. Sellars, 2 O. S. 223.

A court of equity only can enforce a trust. Guion vs. Guion, 4 Rec. 479.

[9] Ry. vs. O'Harra, 48 O. S. 343.

See Wiler vs. Logan Mutual Gas Co., 6 C. C. (N.S.) 206; 27 O. C. C. R. 257. Reversing 1 N. P. (N.S.) 277; 14 Dec. 164. Affirmed, 72 O. S. 628.

constitution, but what jurisdiction has been conferred on them in the several counties of the State by the legislature." [10] And it was further held that the laws relating to struck juries and special juries might be called into exercise by the Court in empanelling a jury.[11]

§ 22. Limited jurisdiction.

The Probate Court is frequently spoken of as a court of limited jurisdiction. This is true simply from the fact that it has conferred upon it by law no general jurisdiction. As was well said by Justice Shauck in a recent opinion,[12] "While the Probate Court is of limited jurisdiction, the limitation chiefly relates to subject matters." Therefore if a subject matter is within its jurisdiction, as to such a subject matter, it is not a court of limited jurisdiction. It is also spoken of sometimes as a court of inferior jurisdiction. But in the recognized use of this word "inferior," as applied to courts of various jurisdictions, this application may be wrongly applied. By courts of inferior jurisdiction is generally meant those courts which are not considered courts of record and whose proceedings do not import absolute verity.[13] The mere fact that a case may be prosecuted in error or appeal from the Probate Court to the Court of Common Pleas no more makes the Probate Court an inferior court than it does the Court of Common Pleas, from which appeals may be taken and error prosecuted to the Circuit Court.

§ 23. In actions for sale of real estate, can determine title to land.

It is now settled beyond question that in an action brought by an administrator, executor or assignee to sell lands or real estate

[10] Id. 354.

[11] Quoted with approval, Doan vs. Bitely, 49 O. S. 597.

[12] Brown vs. Reed, 56 O. S. 264.

[13] The Constitution so states (Const., Art. IV, § 7) and the courts have frequently held that Probate Courts are in the fullest sense courts of record and therefore (Shryer vs. Richmond, 16 O. S. 455) are not "inferior" courts. See § 20. The Probate Court has full jurisdiction to adjudicate all questions arising in proceedings properly before it. Wilberding vs. Miller, 90 O. S. 29.

The jurisdiction of the Probate Court will not be interfered with by a writ of prohibition. State vs. Lueders, 101 O. S. 211; or mandamus, State vs. Lueders, 101 O. S. 211.

that not only may all liens upon or to the land be determined, but that the title to the land itself may be quieted in such an action. This is held to be within the power of the court, although there is no express statutory provisions to that effect. The court holds that it follows from the power given to sell real estate, and that it will be presumed that the legislature intended that the real estate might be placed in that condition in which it would bring the most money; and therefore if a cloud rests upon it that question ought to be settled.[14]

Whether or not the title could be quieted in an action brought by a guardian to sell the real estate of his ward is somewhat of a mooted question. The reasoning used in Doan vs. Bitely, given in a note, would be sufficient for holding that it might be done. But it is questionable whether it fully appears that the act conferring authority on guardians to sell real estate gives the Probate Court power to pass upon such a question. The safer course would be for the guardian in such cases to bring his action in the Court of Common Pleas.

§ 24. Growth of the jurisdiction of the Probate Court.

In almost every matter over which the Probate Court has at any time been given jurisdiction there is a constant tendency to enlarge its power; and in addition the court is constantly receiving new and distinct jurisdiction from both the courts and law-making bodies. The competency of the court to deal with vast and complicated affairs is more and more in evidence from additional legislation and recent decisions of the courts, and it

[14] Doan vs. Bitely, 49 O. S. 588; Sayler vs. Simpson, 45 O. S. 141.

The policy of our legislation has long been opposed to the necessity of a resort to different jurisdictions and multiplicity of actions, in order to obtain the full and final relief to which parties may be entitled, and in favor of clothing tribunals once acquiring control of the subject-matter of a controversy, and of the parties, with jurisdiction, if capable of exercising it, to determine the ultimate rights of the parties, and administer to them their complete remedy. The policy is a commendable one, with which the statute making actions like that under consideration, civil actions, and giving the Probate Court co-ordinate jurisdiction with the Court of Common Pleas, is in harmony. Doan vs. Bitely, 49 O. S. 594.

therefore follows that the earlier decisions of the Supreme Court are not of much value for the purpose of assisting one in arriving at the jurisdiction of the court today. The legislative mind, having become convinced that these courts are able to deal with complicated affairs, it is easy to construe an act of the legislature in accordance with such views, and hold that as to the matter conferred on the Probate Court it has full and complete jurisdiction. It must not be forgotten, however, that the Probate Court is strictly one of statutory power, except as to matters specified in the constitution, and if he statute giving jurisdiction does not contain such power, expressly or impliedly, then it could not be exercised.[15]

§ 25. Power to grant injunctions.

A further evidence of this growth of power in the Probate Court is that relating to injunctions. In the Code of Procedure adopted immediately after the constitution of 1851 by section 239, authority was given to the Probate Court to grant a temporary injunction in an action pending in the Court of Common Pleas when the judges of such courts were absent. But no authority was given to the probate judge to grant an injunction in a cause pending in his own court. The law remained in that condition until 1885, when original section 239 having become sections 11827, 11878, 11879, G. C., was so changed as to allow the Probate Court to grant an injunction at the time of commencing the action or at any time thereafter in causes pending therein just in the same manner as judges of the Common Pleas. So at present, if an action is pending in the Probate Court over which the court has proper jurisdiction and it is proper and necessary that an injunction be granted therein,

[15] As was said by Judge Summers in Jones vs. Green, 21 C. C. 101: The reason is not that Probate Courts have not the power to grant equitable relief, for "while they possess no original chancery powers, yet within the scope of the jurisdiction conferred upon them their powers are not confined to either legal or equitable rules, but are to be measured by the statutory grant alone." (Woerner, § 392, Doan vs. Bitely, 49 O. S. 588; Clapp vs. Banking Co., 50 O. S. 528), but the reason is that jurisdiction of the subject-matter has not been conferred.

See § 209, Revocation of letters.

In re Geo. H. Miller's Est., 12 Dec. 562.

the Probate Court has full and ample power to make such order. The question as to the right to make the order would depend upon the fact whether or not the court had jurisdiction of the action pending therein. Where the Probate Court grants a temporary restraining order in an action pending in another court the Probate Judge for the time being is merely authorized to act for such action as a judge of the other court. It is not an official act in the Probate Court, and therefore no original entry need be made in the Probate Court of such action.[16] The law authorizing the Probate Judge so to act is constitutional.[17]

§ 26. Power to appoint receivers.

In two particular instances is the power to appoint receivers by the Probate Court in matters pending therein specifically provided for by statute, to-wit: Where a partner dies and there is an application made, and the partnership assets are appraised and the surviving partner refuses to take them, the Probate Court is a court of competent jurisdiction for the appointment of a receiver for such partnership to wind up and dispose of the assets in accordance with the law providing for receivership generally.[18] This power was not conferred by law until 1890.[19] The other case in which specific power is granted is under the statute in proceedings in aid of execution.[20]

The general act providing for the appointment of receivers did not confer power on the Probate Judge to appoint receivers for causes pending in its own court prior to the amendment of section 5587 in 1885.[21] The statutes formerly only gave to the

[16] The Probate Court could probably not punish by contempt a refusal to obey an injunction by him granted in an action pending in Common Pleas. Such matter would properly come before a Common Pleas Judge, etc.

[17] Phelon vs. Ry. Co., 5 C. C. 545; 3 C. D. 267.

Some Probate Judges make an entry in their own journal so as to keep a record in their own office of their official acts.

The statute requires that the plaintiff must file an affidavit that the Common Pleas or Circuit Judge is absent.

[18] § 8091, G. C., § 427.

[19] Ohio Laws, vol. 87, p. 98.

[20] § 11782, G. C., § 1942.

[21] Ohio Laws, vol. 82, p. 35. § 11894, G. C.

The General Code grants to Probate Courts the same right to grant injunctions in actions pending before it as is granted to judges of other courts. § 11877, G. C.

Probate Court power to appoint receivers for actions pending in the Court of Common Pleas when the judges of such court were absent.[22]

As the law now stands the Probate Court has the same power to appoint receivers for actions pending in its own court as the Common Pleas has for actions pending in its court. Some difficulty may arise in the application of the law of receivership to many matters coming within the jurisdiction of the Probate Court. But whether or not a receiver can be appointed must rest upon the fact whether the reason of such desired appointment comes within one of the clauses set out in section 11894 G. C. There is a general clause providing that receivers may be appointed in all other cases where they have been heretofore appointed by the usages of equity. It would therefore seem, that without the specific authority of a statutory provision, that the Probate Court could not appoint a receiver in matters which might be strictly termed probate matters, such as might arise *ex parte* in the administration of an estate or the guardianship of a ward, the probating of a will, settling of accounts, etc. The pending of an administration of an estate in a Probate Court is not what might be termed a *pending action* therein.[23]

§ 27. **Exclusive jurisdiction.** "Except as hereinafter provided, the probate court shall have exclusive jurisdiction:

"1. To take the proof of wills, and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country. In case of the sickness or unavoidable absence of the probate judge, any common pleas judge may take proof of wills and approve bonds to be given, but the record of such acts must be preserved in the usual records of the probate court;

"2. To grant and revoke letters testamentary and of administration;

"3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates;

[22] Ohio Laws, vol. 51, p. 97.

[23] The appointment of a receiver is merely a provisional remedy ancillary and auxillary to the main action, and can only be made in an action brought to obtain some other equitable relief where the court has the right to grant, and where it appears to be necessary to make such appointment, in order to preserve the property during the litigation so that the relief awarded by the final judgment, if any, may be effective. Ry. Co. vs. Duckworth, 2 C. C. 518; 1 C. D. 318.

See Special Administration, § 128.

"4. To appoint and remove guardians, direct and control their conduct, and settle their accounts;

"5. To grant marriage licenses, and licenses to ministers of the gospel to solemnize marriages;

"6. To make inquests respecting lunatics, insane persons, idiots, and deaf and dumb persons, subject by law to guardianship;

"7. To make inquests of the amount of compensation to be made to the owners of real estate when appropriated by any corporation legally authorized to make such appropriation;

"8. To try contests of the election of justices of the peace;

"9. To qualify assignees and appoint and qualify trustees and commissioners of insolvent debtors, control their conduct and settle their accounts." [R. S. § 524.][24]

[24] § 10492 G. C.

The Probate Court has full jurisdiction to adjudicate all questions properly before it. Wilberding vs. Miller, 90 O. S. 28.

This section does not confer jurisdiction upon the Probate Court to supervise and control a testamentary trustee in the administration of a trust, when. Pike vs. White, 22 C. C. (N.S.) 61.

The court must appoint a testamentary trustee before it can act. Herrishle vs. Flack, 3 O. App. 444; 23 C. C. (N.S.) 447.

Jurisdiction is the power to hear and determine. Sprankle vs. Sprankle, 22 C. C. (N.S.) 480; aff. 78 O. S. 404.

It is worthy of note that the above section has remained the same since 1854, with the exception that clause nine was added by the codifiers in 1880, thereby giving to the Probate Court, exclusive jurisdiction in assignment matters. It is further to be noted, that the above section is a general provision which applies to the matters relating therein in other provisions of the General Code. Clause one being applicable to §§ 10213 to 10603 G. C.; clause two, §§ 10604 to 10636 G. C.; clause three, §§ 10637 G. C. and following; clause four to §§ 10915 to 11037 G. C.; clause five, §§ 11187 to 11198 G. C.; clause six to §§ 1953 to 1977 G. C.; clause seven, §§ 11038 to 11091 G. C.; clause eight, §§ 5762 to 5768 G. C.; clause nine, §§ 11092 to 11180 G. C.

Under this section it is held that the Probate Court has jurisdiction to order an administrator to receive payment of an unmatured note. Denmead vs. Sharp, 14 Dec. 301.

The Probate Court has no authority to direct an administrator or executor to purchase a monument under this section. In re Ferguson, 6 N. P. (N.S.) 417; 18 Dec. 374. Affirmed by Supreme Court.

In a case reported in 49 Bull. 103. jurisdiction was exercised on application of the administrator to direct him what he should do—to determine whether he should carry out a contract of the deceased or not. The Probate Court has no power to direct an administrator to allow a claim against the estate.

It is well settled that even in matters in which the Probate Court has exclusive jurisdiction, that if for some reason the Probate Court has no power to pass upon a certain question and the jurisdiction in some way is defective, the Common Pleas Court still retains jurisdiction. Thus in a recent case in the Supreme Court, Robinson vs. Williams, 62 O. S. 401, where a man had given a mortgage and then platted the ground upon which the mortgage was given, laid out streets, etc., without any release therefrom of the person holding the mortgage and then the party made an assignment, it was held that a foreclosure of the mortgage might be maintained in the Court of Common Pleas, although the Probate Court had exclusive jurisdiction of assignment matters.

By the constitution it is made a court of record, and it is declared that it shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, and the settlement of accounts of executors, administrators and guardians. Constitu-

§ 28. **Concurrent jurisdiction.** "The probate court shall have concurrent jurisdiction:

"1. In the sale of lands on petition by executors, administrators, and guardians, and the assignment of dower in such cases of sale;

"2. In the completion of real contracts on petition of executors and administrators;

"3. In allowing and issuing writs of habeas corpus, and determining the validity of the caption and detention of the persons brought before it on such writs." [R. S. § 525.][25]

It is a well settled principle of law that where courts have concurrent jurisdiction that that court which first obtains jurisdiction will retain it to the exclusion of every other court.[26] Especially is this true where the remedies afforded by each are equal. If the remedy and powers of the courts were unequal then it might be said that that court would retain jurisdiction which could grant to all parties the most complete remedy.[27]

An action or proceeding is begun in a certain court and the jurisdiction in that court attaches at the time that summons is

tion, Art. 4, §§ 7 and 8. *Prima facie*, then, whatever is done by the Probate Court in these matters is done by the proper authority or tribunal. Following the provisions of the constitution, the general assembly has provided, § 10492, G. C., that the Probate Court shall have exclusive jurisdiction to take the proof of wills, and to admit to record authenticated copies of wills executed, proved and allowed in the courts of any other State, territory or country; to grant and revoke testamentary and of administration; and to direct and control the conduct and to settle the accounts of executors and administrators, and to order the distribution of estates. These statutory provisions do not and cannot limit or enlarge the jurisdiction of the Probate Court in the matters mentioned. Whatever is done, therefore, by the Probate Court in the matters of probate of wills, appointment of executors and administrators and directing and controlling the accounting of such executors and administrators is presumptively within the jurisdiction of the court. Hoffman vs. Fleming, 47 Bull. 430.

[25] § 10493 G. C.

Where courts have concurrent jurisdiction, the one first acquiring jurisdiction will retain the same. If the relief is different each may retain, and the court first determining the question common to both is conclusive on the other. D. U. R. R. vs. D. M. Traction Co., 1 N. P. (N.S.) 296; 14 Dec. 143. Affirmed by Circuit Court, 4 C. C. (N.S.) 329. Affirmed by Supreme Court, 72 O. S. 429, 644, 645.

[25] § 10493, G. C.

[26] Keating vs. Spink, 3 O. S. 105; State vs. Railroad, 35 O. S. 154.

[27] In a case in the Probate Court of Clark county (Bateman vs. Morris, 4 N. P. 397; 7 Dec. 287) in which the administrator brought a suit to sell the lands of a deceased person after a suit had been brought in the Court of Common Pleas to foreclose a mortgage on the land,

issued, or as has been said, at the time the right to begin the inquiry commences.[28]

§ 29. Jurisdiction exclusive of that of any other probate court. "The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law." [R. S. § 527.][29]

The above section merely puts into statute form the rule that applies to courts of concurrent jurisdiction. There is but one case in Ohio in which this section has been the subject of a reported decision.[30] In this case there was an application for letters of administration made upon the estate of a deceased in Hamilton County, and the matter was submitted to the Court, but the Court refused to appoint the applicant administrator. The matter then went over until some eligible person should

in which common pleas action, the administrator had not been made a party. It was held that the Probate Court would retain jurisdiction. The reason of this being, that the administrator had not been made a party and that as it was his duty to pay all demands existing against the estate as well as the right of the heirs to insist that the personal property should first be applied to the payment of debts; and therefore the administrator was a necessary party in order to be precluded from bringing an action himself as the statute directs.

It seems that from the fact that the mortgage is merely regarded as security for the debt, that before suit could be brought to foreclose a mortgage the debt ought to be presented to the administrator just the same as any other debt against the estate. Some have gone even so far as to insist that the Probate Court has exclusive jurisdiction in the administration of estates, the same as in assignment cases, but in a recent case in the Circuit Court (Citizens Sav. Bank vs. Ide, 20 C. C. 665; 10 C. D. 800), this was expressly denied and a foreclosure in the Court of Common Pleas was upheld where the same made the heirs, administrator and all other lien holders parties. Public policy, if no other consideration, requires that a construction so long accepted and acquiesced in should not be disturbed.

[28] Spinning vs. Life Ins. Co., 2 Dis. 336; In re Worthington, 4 Dec. 381; Bateman vs. Morris, 4 N. P. 397; 7 Dec. 287.

The power to hear and determine a cause is jurisdiction. Sheldon vs. Oren, 3 O. S. 494.

Some of the Probate Courts have concurrent jurisdiction in divorce and partition proceedings, and certain criminal actions.

In the counties of Pickaway, Licking, Richland, Perry, Defiance, Henry, Fayette and Coshocton Probate Courts have concurrent jurisdiction in divorce, alimony, partition and foreclosing mortgages. § 10494 G. C.

[29] § 10498 G. C.

[30] In re Worthington, 4 Dec. 381.

It is not special legislation to give the Probate Court jurisdiction in cases involving the question of keeping saloons open on Sunday. Oberer vs. State, 28 O. S. 620.

Jurisdiction not lost by removal of guardian from state. Netting vs. Strickland, 9 C. D. —; 18 O. C. C. R. 136.

be presented to whom the court might grant letters. In the meantime application was made by another party to the Probate Judge of Lucas County, and letters of administration were granted in that court. In a very thoroughly considered case Judge Ferris held that the appointment made by the Lucas County Court was void, that the matter was exclusively within the jurisdiction of the court of Hamilton County, and that the jurisdiction attached at the time the application was made.

§ 30. Appellate jurisdiction.

The Probate Court has jurisdiction by way of appeal in a number of matters coming from inferior boards, etc. Thus there is a right of appeal in county ditches,[31] township ditches,[32] drifts,[33] certain pikes,[35] establishing county roads,[36] and for material for improving roads,[37] township roads,[38] and insolvent decedents' estates.[39]

These matters are all regulated by statute and where not fully considered in this work reference must be had to the General Code.

§ 31. Jurisdiction to review inferior courts.

The Probate Court has no right to entertain proceedings in review of inferior tribunals by way of a bill of exceptions, etc., but under and by way of appeal in various matters mentioned in the preceding section the court has power to review the action of various boards and inferior tribunals, and if erroneous set aside the proceeding, and in some instances when the proceedings of the inferior tribunals have been found to be faulty they are set aside and the court hears the matter *de novo*.

§ 32. Shall have same powers, and observe rules of common pleas so far as applicable. "In the exercise of jurisdiction the probate judge shall have the powers, perform the duties, and be governed by the rules and regulations provided by law for the courts of common pleas and the judges thereof in vacation, so far as they are consistent with laws in force." [R. S. § 537.] [40]

31 § 6469 G. C., § 1833.
32 § 6625 G. C., § 1857.
33 § 6746 G. C., § 2000.
35 §§ 654-5 G. C., § 2004.
36 § 7062 G. C., § 1785.
37 § 7373 G. C.
38 §§ 7075-6 G. C., § 1805.
39 § 10890 G. C.
40 § 10499 G. C.

The matter of jurisdiction as applicable to individual branches of the jurisdiction of the Probate Court will be considered when treating of such branches in future chapters in this work and reference must be had to such places for further discussion of the jurisdiction of the Probate Court.[41]

§ 33. Action in common pleas asking direction of court respecting estate, who may bring. "An executor, administrator, guardian, or other trustee, may maintain an action in the court of common pleas against the creditors, legatees, distributees, or other parties, asking the direction or judgment of the court in any matter respecting the trust, estate or property to be administered, and the rights of the parties in interest, in the manner, and as fully, as formerly was entertained in courts of equity." [R. S. § 6202.][42]

§ 33a. When suit by creditor. "After being requested in writing by a creditor, legatee, distributee, or other party in interest, to bring such action, if an executor, administrator, guardian, or other trustee fails for thirty days so to do, the creditor, legatee, distributee, or other party making such request, may institute the suit." [R. S. § 6202.][42*]

41 As to granting letters testamentary, see Chapt. 5, § 72; Ancillary letters, Chapt. 11, § 172; Revocation of letters, Chapt. 14, § 209; New bond, Chapt. 16, § 243; Suit on bonds, Chapt. 17, § 261; Sale of desperate claims, Chapt. 26, § 457; Claims unpaid at settlement, Chapt. 34, § 586; Arbitration of claims, Chapt. 35, § 595; Payment of legacies, Chapt. 40, § 605; Accounting, Chapt. 41, § 704; Distribution of assets, Chapt. 43, § 762; Proceedings to sell real estate, Chapt. 46, § 813; Assignment of dower, Chapt. 51, § 957; Custody of wills, Chapt. 57, § 1067; Probate of wills, Chapt. 58, § 1086; Testamentary trustees, Chapt. 67, § 1253; Trustees for non-residents, Chapt. 68, § 1276; Appointment of guardians of minors, Chapt. 71, § 1319; Guardians duties enforced, Chapt. 74, § 1363, *et seq.*; Sale of guardians real estate, Chapt. 76, § 1406; Mortgage of wards' lands, Chapt. 79, § 1460; Guardian's account, Chapt. 81, § 1485, and Guardians of lunatics, etc., Chapt. 82, § 1502; Concealed assets, Chapt. 22, § 397; Assignments, §§ 1542 and 1552.

42 § 10857 G. C.

A court of equity only can enforce a trust. Guion vs. Guion, 4 Rec. 476.

A will may be construed in a suit in partition and accounting. Bantz vs. Rover, 14 C. C. (N.S.) 218; 24 C. C. 201.

One who has no trust to administer can not maintain action. *Id.*

Under this provision an executor may ask the court to determine whether a certain sum of money paid was a gift or advancement Ferris vs. Goodin, 19 C. C. (N.S.) 477; 36 C. C. 110.

The Probate Court has no jurisdiction to control a testamentary trust, etc. Pike vs. White, 22 C. C. (N.S.) 61.

See other recent cases. McKelvy vs. McKelvy, 14 C. C. (N.S.) 331, 33 C. C. 117; Moores vs. Guinn, 15 C. C. (N.S.) 31; 33 C. C. 406.

Incompetent as witnesses. Miller vs. Miller, 15 C. C. (N.S.) 481; 34 C. C. 43.

Where can not be brought. ——— 16 C. C. (N.S.) 544.

42* § 10858 G. C.

§ 34. Comments.

It was a common practice of Chancery Courts for trustees to come into that court and receive instruction upon their rights in the management of a trust. The above statute is a recognition of this rule. Before the Court will give relief, however, it must be shown that there is a trust involved.[43]

The Court would not construe a will under the above section for the mere fact of giving an opinion of the Court as to its effect upon certain after-acquired property.[44]

The person invoking the jurisdiction of the Court must show that he is an interested party and that he invokes the Court for his own safety and that there is some need for action of the Court. Thus where an executor filed a petition asking whether or not he should erect a monument and did not state that there would be any money in his hands or coming to his hands which could be appropriated for that purpose, the Court refused to entertain jurisdiction.[45]

Where a trust is created for the benefit of one body or society and there are two bodies claiming it, the executor may compel the parties claiming the fund to interplead and have the Court make a decision thereof.[46]

Generally it may be said that authority is granted to an executor to maintain a civil action in the Court of Common Pleas asking the direction of the Court in any matter affecting the trust estate or property to be administered and the right of the parties in interest.[47]

An executor may bring an action securing direction of the Court as to whether a legacy is payable immediately or at some future time.[48]

An administrator petitioning for the sale of land to pay debts

[43] Collins vs. Collins, 19 O. S. 468.

[44] Corry vs. Flemming, 29 O. S. 147; Bowen vs. Bowen, 38 O. S. 426.

[45] Rothgeb vs. Mauck, 35 O. S. 503. See Chase vs. Isherwood, 1 N. P. 31; 5 Dec. 1.

[46] First Presb. Soc. vs. First Presb. Soc., 25 O. S. 128.

[47] Merrick vs. Merrick, 37 O. S. 126.

[48] Gordon vs. Groesbeck, 1 C. C. 320; 1 C. D. 176.

may have a construction of the will to ascertain to whom it has given the title.[49]

A guardian may bring an action and have the court determine whether a certain claim shall be paid or not.[50]

It has recently been held that an executor or administrator may bring an action under the above section to have the Court pass upon the question whether or not a widow of a deceased is entitled to a year's allowance.[51]

An action under the above section has been held to be appealable.[52]

[49] Farrar vs. Fallestine, 4 C. C. 235; 2 C. D. 519.

See Hollister vs. Howe, 4 N. P. 168; 6 Dec. 157, where it is said an administrator or trustee under the will can maintain a suit to construe the will if there is anything to construe.

[50] Wing vs. Hibbert, 7 N. P. 124; 8 Dec. 65.

This might also be done in Probate Court, § 1362, § 1360, § 1364.

[51] McCalla vs. McCalla, 46 Bull. 280.

See § 329, when appraisers fail to make allowance.

[52] Swing vs. Townsend, 24 O. S. 1.

See Whittakers Forms 719, for petition to construe will.

The superior excellence of a court of general jurisdiction like our Common Pleas, resides in the fact that whatever the case may be, there will not in general be a failure of justice from the want of power in the Court to hear and determine. Its jurisdiction is in all cases easily determined. It possesses all the powers of a court of justice that are not expressly denied to it, or exclusively given to some other tribunal, and in all questions of doubt, jurisdiction is resolved in its favor. Judgment in both cases. Robinson vs. Williams, 62 O. S. 410.

CHAPTER III.

GENERAL PROVISIONS OF PRACTICE, APPEAL, ETC.

§ 35 Probate judge to determine all questions, except, etc.
§ 36 Code of civil procedure governs, when.
§ 37 Notice of proceedings in Probate Court, how given.
§ 38 Depositions and evidence.
§ 39 When appeals may be taken from Probate Court to Court of Common Pleas.
§ 40 What may be appealed.
§ 41 Who may prosecute appeal.
§ 42 Trial on appeal.
§ 43 Bond on appeal, when not required.
§ 43a Amount of bond.
§ 43b Rule as to party appealing in fiduciary capacity in any case.
§ 44 When bond need not be given.
§ 45 When must be filed. Written notice of appeal.
§ 46 To whom bond should be made payable.
§ 47 Amount of penalty of bond.
§ 48 Form of appeal bond.
§ 49 Transcript—when to be filed.
§ 50 Party interested must file transcript.
§ 51 Proceedings in Common Pleas—certifying same back.
§ 52 Proceedings in error.
§ 53 Entries, *nunc pro tunc*, etc., power.

§ 35. Probate judge to determine all questions, except, etc. "All questions, except those arising in criminal actions and proceedings, unless otherwise provided by law, shall be determined by the probate judge, unless, in his discretion, he orders them to be tried by a jury, or referred, as provided for references in the court of common pleas." [R. S. § 6400.] [1]

This section has been quoted [2] as showing the intention of the legislature to confer upon the judge of the Probate Court all power that is necessary to be exercised in the proper trial of a subject matter over which his court has jurisdiction. It recognizes the fact that in a proper case he may call a jury or may refer the matter to a master in the same manner as a judge of the Court of Common Pleas. It should be read in conjunction with section 10499,[3] which likewise confers upon the Probate Judge the same powers and the same duties as judges of the

[1] § 11199 G. C.
See summoning jury, § 11419 G. C.
Trial by jury, §§ 11447, 11465 G. C.
Trial by court, §§ 11469, 11474 G. C.
Trial by referee, §§ 11475, 11486.

[2] Doan vs. Bitely, 49 O. S. 596.

[3] § 32.
Consent is necessary to refer a case. In re Gorman, 2 N. P. (N.S.) 667; 15 Dec. 204.

Court of Common Pleas exercise in vacation so far as the same are consistent.[4]

§ 36. Code of civil procedure governs when. "The provisions of law governing civil proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court, when there is no provision on the subject in this title." [R. S. § 6411.][5]

In reference to procedure in the Probate Court, Woerner says,[6] " Although Probate Courts are mostly, if not universally, courts of record, having a seal, a clerk or authority to act as their own clerk, and executive officers, yet their procedure is generally summary, requiring no pleading in the technical sense, nor adherence to artificial rules in the statement of the cause of action or defense. An intelligible statement of an existing substantial right, which the Court has jurisdiction to enforce, is a sufficient allegation of all matters necessary to sustain a judgment; and the simple appearance of the defendant usually entitles him to rebut the proof offered by the other side, or prove any matter in defense; save, perhaps, a cause of action constituting a set-off or counterclaim, of which the other side must have sufficient notice to enable it to prepare any defense it may have to the same. The practice in county courts is purposely so framed that parties can attend to their own business in ordinary matters, and the decision should be so rendered as to subserve the ends of justice according to the evidence, without regard to technical precision in pleading."

In a great many of proceedings in the Probate Court a method of procedure is outlined, but where an action in the Probate Court is of a like character of one for which the Civil Code provides, then the provisions of the Civil Code are to be applied

[4] See § 11419, as to summoning jury. Kinkead's Pract. 251.

See §§ 11447 to 11465 as to trial by jury. Kinkead's Pract. 178, 338, 246.

See §§ 11469 to 11474 as to trial by court. Kinkead's Pract. 206.

See §§ 11475 to 11486 G. C. as to trial by referee. Kinkead's Pract. 217.

[5] § 11212 G. C.

This means in like proceedings. Mansfield vs. Cole, 16 N. P. 209; 25 Dec. 231.

The court may grant a new trial, etc. Doan vs. Bitely, 49 O. S. 588.

[6] Woerner on Admin. 339.

so far as practicable; and thus where an action is such that a jury is required to determine the issues between the parties, the code in reference to the calling of a jury and the submission of the case applies.[7]

And it has been held in actions triable by jury where the same is waived by the parties the Court may be required to state its findings as provided by section 11470 of the General Code.[8]

§ 37. Notice of proceedings in Probate Court, how given. "When notice of any proceedings in a probate court is required by law, or deemed necessary by the judge, and the manner of giving it is not directed by statute, he shall order notice to be given to all persons interested therein, in such manner and for such length of time as he deems reasonable." [R. S. § 6406.][9]

The above general provision is to supply a method and manner of giving notice in proceedings in the Probate Court where the statute does not specifically provide the kind of notice that should be given; and, where the statute does not provide the kind of notice that should be given, by virtue of the above statutory provision, the same is left in the absolute discretion of the Probate Judge. Where the statute provides how the notice shall be given, then it becomes a jurisdictional fact that such notice be given in the manner the statute directs, and where a proceeding is brought in the Probate Court to which the Code of Civil Procedure applies, then the notice should be given in the manner the code provides. The proceedings in the Probate Court are generally *ex parte* and *in rem*, but even before the Court can receive jurisdiction of a proceeding *in rem* it is neces-

[7] See Ry. Co. vs. O'Harra, 48 O. S. 343; Doan vs. Bitely, 49 O. S. 588.

[8] Kittredge vs. Miller, 12 C. C. 128; 5 C. D. 391.

[9] § 11205 G. C.

It is a fundamental principle of justice that no valid proceedings can be had against any person until he should have been notified of such proceedings by proper service of process upon him either actually or constructively, and this right, recognized at common law is secured by constitutions and judicial decisions. 22 A. & E. Ency. of Law, title, Service of Process.

When a guardian removes from the State, notice can be served by publication. Netting vs. Strickland, 9 C. D. 844; 18 O. C. C. 136.

There is no provision of law giving notice to a guardian in another State. Gilbert vs. Gilbert, 13 C. C. 29; 7 C. D. 60.

sary that notice in some manner be given. Thus in the administration of estates a notice is given by proclamation in a newspaper,[10] and therefore many proceedings may afterwards be had in the management of an estate which would be legal without any particular notice. So it has been held that in reference to guardianships that after the appointment has been made the court has jurisdiction of the subject matter and may proceed without further notice. But the Court should err, if err at all, upon the fundamental principle that the rights of no one in any respect whatever should be adjudicated upon without the party having had his day in court and the opportunity to defend if he chooses. In all matters where notice is required the safer plan of procedure is for the Court to make a finding that a notice has been given as required by law or the former order of the Court; this will prevent the question whether or not a notice was given, from being raised collaterally. The mere fact that the statute requires notice to be given will not of itself make the proceedings an adversary one.[11] And where the proceeding is *in rem* and the statute requires a notice to be given, it has been held that the proceeding is not void, although such notice is not given.[12]

[10] Chapt. 31, § 543.

[11] Barr vs. Closterman, 3 C. C. 445; 2 C. D. 251.

[12] Denson vs. Cilley, 8 O. S. 604. The remedy by due course of law guaranteed by section 16 of the Bill of Rights, extends to all the adversary rights of persons in property, and requires that before there is a judicial determination affecting such right process to obtain jurisdiction of the person claiming it shall be issued and served, except that the legislature may provide for a substituted or constructive service to be made when actual service is impracticable. State vs. Guilbert, 56 O. S. 575.

"A grant of probate or of administration is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares belongs to him." (2 Smith's Lead Cas., 7th Am. ed., § 593). Subsequent acts in the administration of the estate, done by or under direction of the court, are steps in the same proceedings. With respect to some of these acts, provision is made that notice shall be given.

While obviously many acts may be performed in the administration of the estate without notice (as in Treasurer of Franklin Co. vs. McElvain, 5 Ohio, 200), others can not be properly performed in the absence of it, though the statute be silent. Of the latter class are proceedings to appoint new ap-

§ 38. Depositions. "Depositions taken according to the provisions of law to be used on the trial of civil cases, may be taken and used on the trial of any question before the probate court, where such testimony is proper." [R. S. § 6404.] [13]

The same rules of evidence are applied in actions tried in the Probate Court as are applicable to causes which are tried in the Court of Common Pleas. The presumptions of law and the proof necessary to establish a cause of action are alike in all courts.

§ 39. When appeals may be taken from Probate Court to Court of Common Pleas. "Appeal may be taken to the common pleas court, by a person against whom it is made, or whom it affects, from any order, decision, or judgment of the probate court in settling the accounts of an executor, administrator, guardian, and trustee, or of assignees, trustees or commissioners of insolvents; from an order removing or refusing to remove an executor, administrator, guardian, assignee, trustee or other officer appointed by the probate court; or in proceedings for the sale of real estate to pay debts; or to change the allowance made by appraisers of an estate to a widow, minor child or children, for a year's support; or against one suspected of having concealed, embezzled or conveyed away the property of dead persons; or in cases for the completion of real contracts, or in the administration by assignees, trustees, or commissioners, of insolvent estates; or in proceedings to appoint guardians or trustees for idiots, lunatics, imbeciles, or drunkards. The cause so appealed shall be tried, heard, and decided in the court of common pleas in the same manner as though the court of common pleas had original jurisdiction thereof." [R. S. § 6407.] [14]

praisers, and the act of such appraisers in making allowance to a widow for a year's support. Heck vs. Heck, 34 O. S. 369.

[13] § 11206, G. C.

An appeal from the Probate Court refusing to appoint a guardian of a lunatic, takes up the whole case, and if the Common Pleas Court decides there is need for a guardian, it may appoint one. Guardianship of Oliver, 77 O. S. 475.

[14] § 11206 G. C.

See Mansfield vs. Cole, 14 N. P. 209 as to power of court to vacate its former orders and what constitutes a final order appealed from.

An appeal lies from on order of the Probate Court determining the validity of an account rendered by an attorney employed by administrator. Roger vs. Trumpler, 38 C. C. 187.

Also from an order appointing a guardian for a drunkard, Clark Common Pleas. But not from the appointment of an administrator. Luburg vs. Luburg, 13 O. App. (1920).

Other statutes providing for appeal are as follows: Appropriation by municipal corporation. §§ 3695-3696; Proceedings to enforce distribution, § 10859 G. C., § 785; Insolvent estates, § 10890 G. C., § 1004; Inventories, § 10640 G. C., § 993; Claim of executor, etc., §§ 10729-32 G. C., § 641; From refusal to probate will, § 10532 G. C., § 1116; From order settling account of guardian, § 10954 G. C., § 1493; In contest of election of probate judge, § 7252 G. C.

§ 40. What may be appealed.

As a general rule it may be said that actions pending in the Court of Common Pleas which are triable by jury are not appealable, and all actions which are not triable by jury are appealable. If an ordinary issue were tried in the Probate Court which by the rules of law was triable by jury, such a question could not be tried on appeal. But the rule applicable to issues pending in the Probate Court *rests upon the fact whether or not the statute gives a right of appeal. For without a statute giving such right there is no appeal from any action in the Probate Court;* and as a general rule no appeal can be taken from an interlocutory order; it must be an appeal from what is known as a final judgment or decree, that is, one which disposes of the whole merits of the case and leaves nothing further for the consideration of the court.[15]

It is further held that the appeal must not be from such order as merely affects the administration of the trust and therefore the approval by the Probate Court of the election of an assignee for creditors is not appealable.[16]

It has likewise been held that a refusal to confirm a sale was not appealable.[17] But it has been held that a confirmation of private sale by an assignee of certain stocks is appealable,[18] and that confirmation of private sale of real estate is also appealable.[19] In another case, however, it was held that a mere confirmation of sale which does not define and determine rights of parties, but merely confirms acts in obedience to a former order is not appealable.[20] If a confirmation also contains a

[15] Kelley vs. Stanberry, 13 Ohio 408; Teaff vs. Hewitt, 1 O. S. 511; Evans vs. Dunn, 26 O. S. 439.

An appeal from the judgment of a Probate Court to the Court of Common Pleas, does not vacate or annul the judgment appealed from, it merely suspends its execution during the pendency of such appeal, and error may be prosecuted at the same time. Jennings vs. Walker, 10 C. C. (N.S.) 586; 86 O. S. 100.

[16] Brigel vs. Starbuck, 34 O. S. 280.

[17] Aultman vs. Seiberling, 31 O. S. 201.

[18] Schumacher Assignment, 5 N. P. 145; 5 Dec. 386.

[19] Browne vs. Wallace, 60 O. S. 177.

[20] Norwood Park Co. Assignment, 4 N. P. 240; 6 Dec. 341.

The court in Browne vs. Wallace, 60 O. S. 177, seems to make a dis-

distribution, then it is certainly appealable.[21] It is generally held that the decree in foreclosure finding the amount and ordering the sale is a final and appealable order.[22] It has been held that an appeal lies from a refusal by the court of insolvency to administer upon property declared to have been conveyed in fraud of creditors,[23] and also that an appeal lies from a final order in a proceeding to recover concealed assets.[24]

§ 41. Who may prosecute appeal.

The statute relating to appeals in the Court of Common Pleas provides that "a party or other party directly affected by a judgment may appeal therefrom." [25] The question, therefore, whether or not a party has a right to appeal will depend upon a number of circumstances. If he has any substantial right which will be in any manner affected by the judgment then he has a right to appeal. Thus it has been held that a judgment ordering the cancellation of the lease of a railroad, executed by its owner to another company, is a judgment direct-

tinction between a private sale and a public sale.

[21] Center Bld. Assoc. vs. O'Connor, 8 Rec. 99; Kelley vs. Stanberry, 13 Ohio 408; Spence vs. Basey, 34 O. S. 42.

[22] Baker vs. Lehman, Wright 522.

[23] In re Schumacher, 5 N. P. 387; 6 Dec. 125.

[24] Harris vs. Westervelt, 15 C. C. 534; 8 C. D. 367. The matter as to appeal will be discussed in various future sections. As to revocation of letters, chapt. 14, § 232; As to exceptions to inventories, chapt. 18, § 317; As to widow and children's allowance, chapt. 19, 340; As to assets concealed or embezzled, chapt. 22, § 413; As to presentation of claims not due, chapt. 33, § 583; As to claims of executor or administrator, chapt. 38, § 643; As to accounting, chapt. 41, § 747; As to distribution of assets, chapt. 43, § 785; As to sale of real estate, chapt. 49, § 906; As to settlement of insolvent estates, chapt. 53, § 1005; As to probate of wills, chapt. 58, § 1116; As to spoliated wills, chapt. 60, § 1153; As to election of widow, chapt. 65, § 1229; As to appointment of guardians, chapt. 71, § 1342; As to removal of guardians, chapt. 73, § 1359; As to guardian's sale of real estate, chapt. 76, § 1431; As to guardian's accounting, chapt. 81, § 1495; and As to guardians of lunatics, etc., chapt. 82, § 1515.

See § 1659.

A proceeding brought to vacate a judgment under § 11631 G. C., rendered in a proceeding to sell real estate is not appealable, as to course to pursue in such cases, see Fox vs. Bank, 25 Bull. 28; Bank vs. Mullen, 18 Dec. 637.

[25] §§ 12224-5 G. C.

The section relating to the Probate Court provides an appeal may be taken "by any person against whom such order, decision, or decree shall be made, or who may be interested thereby."

§ 11206 G. C., § 39, see § 1514.

ly affecting the stockholder and that such stockholder has a right to appeal.[26]

The securities on a guardian's bond may except to the finding of the Probate Court and appeal the same.[27] The guardian of drunkard has no right to appeal from a decision of the Probate Court, terminating the guardianship,[29] nor an administrator.[30]

§ 42. Trial on appeal.

The cause so appealed shall be tried, heard and decided in the Court of Common Pleas in the same manner as though the said Court of Common Pleas had original jurisdiction.[31] From the liberal policy of allowing amendments it is generally held that the Court on appeal may allow such amendments as justice may require and new parties may be brought in and their rights effectually adjudicated upon.[32] The application for amendment is addressed to the sound discretion of the Court,[33] but amendments cannot be permitted which will have the effect of changing the cause of action, that is, an action at law could not be changed into a suit in equity.[34] In such trial the Court acts *de novo* and is not concerned with the decision of the Court below as to whether it was right or wrong.[36]

The Court may go into the question whether the appellant has such an interest as will entitle him to appeal,[37] and gener-

[26] Henry vs. Jeanes, 47 O. S. 116; see 48 O. S. 443.

[27] Netting vs. Strickland, 18 C. C. 144; 9 C. D. 841. A party may appeal a case, even though it is not necessary that he be made a party (Bowlus vs. Shanabarger, 19 C. C. 137; 10 C. D. 167), provided such party has some interest in the matter.

See Comb vs. Jefferson, 3 Metc. 72; Studebaker vs. Markley, 7 Ind. App. 368.

[29] Unreported case, Clark County, C. C.

[30] See Martin vs. Dershiem, 46 Bull. 172. See § 1778.

[31] § 11206 G. C.

But the parties do not have a right to a jury trial. Shroyer vs. Richmond, 16 O. S. 467.

[32] Grant vs. Ludlow, 8 O. S. 1; Potter vs. Norwood, 21 C. C. 461; Bausch vs. McConnell, 13 C. C. 640; 7 C. D. 547.

[33] Brock vs. Bateman, 25 O. S. 609.

[34] Nelson vs. Kennedy, 2 C. D. 671; 4 C. C. 498.

[36] Bruster vs. Anderson, 1 C. D. 268; 1 C. C. 479.

[37] In re Dunham, 8 C. C. 160; 4 C. D. 329.

ally all questions as to whether or not the appeal has been perfected according to law. It is a general rule that but one appeal may be allowed, that is, if a case is appealed to the Common Pleas Court, it cannot be further appealed to the Circuit Court.[38]

§ 43. Bond on appeal—when not required. "A person desiring to so appeal from an order, decision, or decree of a probate court, within twenty days after it is made, must give a bond, executed to the adverse party, with one or more sufficient sureties to be approved by such court, and conditioned that the party appealing will abide and perform the order, judgment, or decree in the case, of the appellate court, and pay all moneys, costs, and damages required of, or awarded against him." [R. S. § 6408.][39]

§ 43a. Amount of bond. "When the order, decision, or decree, from which an appeal is taken, directs the payment of money, the bond must be for double the amount, and in other cases, for such sum as the probate court prescribes." [R. S. § 6408.][39*]

§ 43b. Rule as to party appealing in fiduciary capacity in any case. "When an appellant from an order, judgment, or decree, in or by any state court or tribunal is a party in a fiduciary capacity in which he has given bond in Ohio for the faithful discharge of his duties, appeals in the interest of his trust, upon written notice to the court, within the time limited for giving bond, of intention to appeal, it shall be allowed without bond." [R. S. § 6408.][39†]

§ 44. When bond need not be given.

When the person appealing from a judgment or order, etc., is a party in a fiduciary capacity in which he has given bond within the State and appeals in interest of the trust, he need not give the bond. It will be observed that there are three conditions necessary in order that an appeal may be taken from

[38] Bauer vs. Lohr, 6 Bull. 754; *In re* Correy, 4 C. C. 220; 2 C. D. 510; Moore vs. Moore, 46 O. S. 89.

[39] § 11207 G. C.

[39*] § 11208 G. C.

[39†] § 11209 G. C.

When one of two executors, who is also a devisee under the will, appeals from a decision of the Probate Court upon the allowance of the claim of his coexecutor, he must give bond. Downing vs. Downing, 3 C. C. (N.S.) 623; 23 O. C. C. 384.

Written notice does not take the place of an appeal bond unless it appears that its appeal is taken by a party in a fiduciary capacity, and in the interest of the trust. Est. of Arkenberg, 1 N. P. (N.S.) 9; 13 Dec. 656.

Where a guardian is removed, and he appeals, he must give bond. *In re* Wallace, 4 N. P. (N.S.) 449; 17 Dec. 136; 78 O. S. 417. Affirmed.

The statutory right of appeal under § 6417 R. S., removing an ex-

the judgment of the Probate Court without a bond being given. *First,* the person appealing must be a party in a fiduciary capacity. What is meant by that is, that he must be acting as executor, guardian, administrator, trustee, assignee, etc. *Second,* the appeal must be in the interest of the trust. This has been held to mean by the Supreme Court, that if the party appeals from a judgment affecting adversely his own pecuniary interest he is required to give bond.[40]

Thus an assignee of an insolvent estate who has a personal claim against the estate cannot appeal without giving bond from a judgment against him,[41] because it is not in the interest of the trust.[42]

The words "in the interest of the trust" mean for the benefit of the trust. It must appear in the plaintiff's bill of particulars, that he acted in a fiduciary capacity.[43]

The *third* condition is, that the person appealing must have given bond within the State, therefore an executor residing out of the State and never having given bond here is not entitled to appeal without bond.[44]

§ 45. When must be filed. Written notice of appeal.

The bond must be given within twenty days after the order is made. This time is computed by excluding the first day and including the last.[45]

ecutor, does not conflict with § 524, giving the Probate Court exclusive jurisdiction to grant and revoke letters testamentary. *In re* Sells Est., 5 N. P. (N.S.) 629; 19 Dec. 567.

[40] Collins vs. Millen, 57 O. S. 289.

An executor in a joint suit can appeal the cause as well for himself as to his codefendants without giving security. Emerick vs. Armstrong, 1 O. 513; Hance vs. Chappell, 20 C. C. 214; 11 C. D. 130; Thomas vs. Moore, 52 O. S. 200.

It does not include public officials —State vs. Smiley, 14 C. C. 660; 8 C. D. 117; 14 C. C. 669; 8 C. D. 117.

[41] Biddle vs. Phippes, 2 C. C. 61; 1 C. D. 363.

[42] The court can not relieve a party from giving bond, etc. Thomas vs. Moore, 52 O. S. 200. Where one of two executors, who is also a legatee under the will, is dissatisfied with the finding of the Probate Court upon the allowance of a personal claim of a coexecutor, he must give bond. Downing vs. Downing, 23 C. C. 389.

This clause "in the interest of the trust," seems not to have been in the former statutes. Collins vs. Millen, 57 O. S. 294.

Where the court terminates the guardianship of a drunkard, and the guardian appeals from such order, such appeal is not in the interest of the trust, and he must give bond. Unreported case, C. C. Clark Co.

[43] Brown vs. Larkin, 10 C. D. 829.

It applies to appeals from justices of the peace. Thomas vs. Moore, 52 O. S. 200.

Whether an appeal is prosecuted in the interest of the trust must be determined from the record and the original papers in the case, authorized to be used by § 6409 R. S.; if any presumption of fact arises it is that the administrator is beneficially interested. In re Est. Arkenberg, 1 N. P. (N.S.) 9; 13 Dec. 656.

The presumption is that when an administrator appeals, if there is any, is that he is beneficially interested, and written notice must be filed within thirty-one days after judgment is returned. Fergus vs. McClure, 12 C. C. (N.S.) 87; 31 O. C. C. 207.

[44] Work vs. Massie, 6 Ohio 503; Denison vs. Talmage, 29 O. S. 433.

An appeal by a guardian from judgment terminating the trust is not in interest of the trust and a bond must be filed within twenty days. In re Robinson, 18 N. P. 286.

[45] Bushong vs. Graham, 4 C. C. 138; 2 C. D. 464. In an appeal

If the party appealing is not required to give a bond, then he must give a written notice to the Court of his intention to appeal, within the time limited for giving a bond, that is twenty days from the time the order was made. If bond is given this notice of intention to appeal is not required.[46] But otherwise the statute must be strictly complied with, and therefore although there has been some holding to the contrary,[47] it is now settled beyond question that the mere fact of a notice given in the journal entry will not be sufficient.[48] The notice must be separately given in writing to the Court.[49]

This is a matter of importance and attorneys have been misled by the fact that notice of appeal taken from the Court of Common Pleas was formerly sufficient if incorporated in the journal entry.

§ 46. To Whom bond should be made payable.

The bond must be executed on the part of the person appealing to the adverse party.[50]

While this is the language of the statute, yet if a mistake is made it may be corrected. Thus where, by a mistake, an appeal bond, attempted to be given in a case, is defective in not naming the obligees, and is therefore invalid, this would not entitle the appellee to a dismissal of the appeal as against a motion by the appellant for leave, to file an amended appeal bond.[51]

In another case it was said that the provisions of the statute

from a final judgment of a justice of the peace where the tenth day occurred on Sunday, it was held that it would be in time if filed on Monday, the eleventh day.

Meyer vs. Seinsheimer, 5 N. P. 281; 7 Dec. 409.

It dates from the time entry is filed, not from the time the oral opinion is made. State v. Seward, 16 C. C. 443; 9 C. D. 168.

[46] Keck vs. Douglass, 6 C. C. 649; 3 C. D. 629.

[47] Hirsh vs. Kilsheimer, 12 C. C. 291; 5 C. D. 514.

[48] Browne vs. Wallace, 16 C. C. 124; 8 C. D. 764.

[49] Willis vs. Willis, 20 C. C. 664; 10 C. D. 798. Aff. 57 O. S. 668; Brown vs. Wallace, 21 C. C. 417; Affirmed Sup. Ct., 47 Bull. 163.

The two methods for perfecting an appeal, which are provided by § 6408 R. S., for one acting in a fiduciary capacity, are not cumulative, but mutually exclusive, and relate to separate and distinct characters of appeal.

Where an administrator has an individual interest in the appeal, written notice of his intention to appeal is not required by § 6408 R. S.

Written notice of an intention to appeal does not take the place of an appeal bond, unless it appears that the appeal is taken by a party in a fiduciary capacity, in the interest and for the benefit of the trust alone. *In re* Est. Arkenberg (1903), 1 N. P. (N.S.) 9; 13 Dec. 650.

As to appeal bonds in condemnation, see 48 Bull. 942.

[50] § 11207-9 G. C., § 43.

[51] Ireland vs. Ireland, 11 C. C. 565; 5 C. D. 277.

relating to appeals, appeal bonds, and proceedings thereunder to perfect an appeal, are remedial in their character, and must be liberally construed so as not to defeat the remedy on unsubstantial grounds. In furtherance of this beneficial purpose, by provision of statute, a bond that is insufficient in form or amount may be amended or an additional or new bond given, etc.[52]

§ 47. Amount of penalty of bond.

The statute says that when the order, decision or decree from which the appeal is taken directs the payment of money, then the penalty shall be in double the amount thereof and in other cases in such amount as shall be prescribed by the Probate Court. The words "if the order, judgment, or decree direct the payment of money," can and should be restricted to orders against a party to the case as an individual, as distinguished from an order as to the division of an existing fund controlled by the court or in the hands of an official depositary. Such an order is not one for the payment of money, because not directed to the personal resources nor in legal contemplation affecting the finances of an individual, but is as it purports to be, the allotment of a fund held only for purpose of partition; and therefore where the Probate Court made an order of distribution, among other things, awarded to one A. W. $1,600. Another claimant, not paid in full by reason of the allowance of this claim appealed from this item and the Probate Court fixed his appeal bond at $250, it was held sufficient.[53]

This question is very fully gone into in another case, and it is there held that in order to avoid a hardship, which might occur where the party appeals who has an interest in but a small part of the fund, the Court would be inclined to follow the last

[52] Smith vs. Frenzer, 12 C. C. 250; 5 C. D. 658; Aff. 40 Bull. 303.

A bond given to the State of Ohio does not comply with the statute and on motion such an appeal ma properly be dismissed by the court, unless corrected by giving a new or independent bond. White vs. Morelidge 7 C. C. 348; 4 C. D. 629.

[53] Winzerfeldt's Appeal. 2 Dec. 473; 29 Bull. 226.

part of the section, and the bond would be fixed in such a sum as the Court might think proper.[54]

Where the Court found that an administrator *de bonis non* was indebted to the estate in a large sum of money, which it ordered him to pay to his successor, and the administrator appealed, it was held that the bond in such a case must be double the sum of the judgment.[55]

In an assignment case where there were various controversies between the secured and unsecured creditors, the Court held that the bond did not need to be double the amount of the matter passed upon by the Court, but in such a sum as the Court might fix, which was $250.[56]

It seems therefore that the Court will not, unless strictly coming within the law, require the bond to be in double the amount.

§ 48. Form of appeal bond.

Know all Men by these Presents:

That we .....are held and firmly bound unto .....in the penal sum of.....Dollars, to the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators. Signed by us, and dated this.....day of.....A. D. 190...

The condition of the above obligation is such, that whereas, the said .....taken an appeal from a certain.....rendered against..... in favor of the said.....in the Probate Court, within and for the County of..... in the State of Ohio, on the.....day of.....A. D. 190..., for the sum of.....Dollars, to the Court of Common Pleas, within and for the County aforesaid.

Now, if the said..... shall abide and perform the order and judgment of said Court of Common Pleas, and shall pay all moneys, costs and damages, which may be required

[54] Mannix vs. Goebel, 1 C. C. 550; 1 C. D. 307. In this case, the court made a finding that the assignee of an estate was indebted to the estate in the sum of $55.000 and fix the bond at $111,000, double the amount. The assignee desiring to appeal, an application for writ of mandamus to compel the court to fix a lower bond was allowed.

[55] *In re* Estate of Ziegler, 3 N. P. 307; 6 Dec. 54.

[56] White vs. Morelidge, 7 C. C. 348; 4 C. D. 629; 28 Bull. 286.

or awarded against.....by said Court, then this obligation to be void, otherwise to remain in full force and virtue in law.

(*Signed*).....

I approve the above Bond with the sureties thereto, this.....day of.....A. D. 190....

.....

Probate Judge.[57]

§ 49. Transcript—when to be filed. "Upon the giving of such bond, or notice, when that only is required, the probate judge shall make an authenticated transcript of the docket or journal entries in the cause, and the order, decision, or decree, appealed from; by the appellant's filing of which, with the clerk of the common pleas court on or before the second day of its next term after such bond or notice was given, the appeal shall be perfected. The original papers pertaining to the cause may be used upon the trial, or hearing in the court of common pleas." [R. S. § 6409.][58]

If the transcript be filed in time it may be amended under § 11363 G. C. Omitted entries may be supplied at any time before final judgment.[59]

§ 50. Party interested must file transcript.

In a case reviewing the authorities of the State pretty thoroughly [60] it is held that when a person appeals from the decision of the Probate Court to the Common Pleas Court, under § 11201 of the General Code, to perfect his appeal, he must file a transcript of the proceedings in the former court with the clerk of the latter court within the time therein prescribed, and it is not the duty of the Probate Judge to file it. That the filing of the transcript within the time fixed is a jurisdictional fact, and unless it was done within the required time the Pro-

[57] See § 1778.

[58] § 11210 G. C.

It must be filed within the time provided by statute, to-wit, or or before the second day of the term after the undertaking, or notice is given—not the second day, etc., after the expiration of the time in which an undertaking or notice can be given. Downing vs. Downing, 23 C. C. 389.

[59] Falconer vs. Martin (Sup. Ct.), 47 Bull. 551.

[60] In matter of assignment of Sears, 5 N. P. 116; 7 Dec. 253.

bate Court has no jurisdiction.[60*] That the statutory requirement that the transcript shall be filed within the time fixed is mandatory and not directory.[61]

§ 51. Proceedings in Common Pleas—certifying same back. "Upon the decision of a cause, appealed to the court of common pleas, the clerk shall make out an authenticated transcript of the order, judgment and proceedings of such court therein, and file it with the probate judge, who shall record it, and the proceedings thereafter be the same as if such order, judgment, and proceedings had been had in the probate court." [R. S. § 6410.][62]

§ 52. Proceedings in error.

The statute provides that a judgment rendered or final order made by a Probate Judge, etc., exercising judicial function inferior to the Court of Common Pleas may be reviewed, vacated or modified by the Court of Common Pleas.[63] This provision of our statute is in the general chapter providing jurisdiction in error, and there are no other provisions relating to the Probate Court except that which relates to the terms of such court.[64]

It therefore follows that as to all matters of practice the same rules and laws apply to proceeding in error from the Probate Court as apply in proceeding in error from the Court of Com-

60* Downing vs. Downing, 23 C. C. 389.

61 By General Code, § 11210, it is made the duty of the person appealing to file the appeal in the Court of Common Pleas. Biddle vs. Phipps, 2 C. C. 62; 1 C. D. 363.

See § 1780, Municipal corp.

See § 1858, Ditch appeal.

62 § 11211 G. C.

63 § 12241, as amended (1902), 95 vs. 392, reads as follows: "An order made by a Probate Court removing or refusing to remove an executor, administrator, guardian, assignee, trustee or other officer appointed by a Probate Court, and a judgment rendered or final order made by a Probate Court, justice of the peace, or any other tribunal, board, or officer, exercising judicial functions, and inferior to the Court of Common Pleas, may be reversed, vacated, or modified by the Court of Common Pleas."

Under this act it is held error cannot be prosecuted from the Common Pleas Court to the Circuit Court. North vs. Smith, 27 C. C. 367; 5 C. C. (N.S.) 495. Reversed, 73 O. S. 247.

While error and appeal may be concurrently prosecuted, and if the appeal be dismissed the case may be heard on error. Hull vs. Bell, 54 O. S. 241.

Yet if it is heard on appeal, that necessarily dismisses the error proceedings, as the appeal takes the whole case to be reviewed. Ginn vs. Co. Com., 11 C. C. 396; 58 O. S. 693.

See Jenney vs. Walker, 10 C. C. (N.S.) 586; 80 O. S. 100.

§ 12241 G. C.

A judgment will not be reversed on error for the action of the court below, in regard to a matter of discretion. Legg vs. Drake, 1 O. S. 286.

64 § 11643 G. C.

§ 39 *infra*.

mon Pleas. The provisions of the General Code therefore relating to exceptions,[65] and the chapter relating to new trials,[66] and the chapter relating to new trial and other relief after judgment[67] apply to proceedings in the Probate Court. Error can only be prosecuted from a final order or judgment affecting a substantial right.[68]

It has been held that the order must not only affect a substantial right, but it must be prejudicial.[69] The substantial right must also be a legal right.[70]

It may further be said that where the statute leaves a matter in the absolute discretion of a judge, as for instance under the former statute the removal of an administrator from his trust, that an order of that kind will not be reviewed by a higher court in proceeding in error. Likewise the order appealed from must be one by the judge in his judicial capacity; if it is a ministerial act as *contra* distinguished from a judicial act, then the same will not be reviewed in proceeding in error. Proceeding in error must be commenced within seventy days from the rendition of the judgment or making the final order complained of.[71] This date would be determined from the date of the journal entry rendering the judgment or making the order. And this is so notwithstanding the fact that a motion for a new trial may have been filed. A proceeding in error is commenced by the filing of a petition and issue of summons.[72]

[65] §§ 11559 to 11574 G. C. Kinkead's Pract. 508.

[66] §§ 11575 to 11581 G. C. Kinkead's Pract. 498.

[67] §§ 11631 to 11643 G. C. Kinkead's Pract. 550.

[68] § 12258 G. C.

Kinsley vs. The State, 3 O. S. 508; Holbrook vs. Connelly, 6 O. S. 199; Hobbs vs. Beckwith, 6 O. S. 252.

It has been held that the jurisdiction of the Probate Court to appoint an administrator *de bonis non* is exclusive and error will not lie to reverse the Probate Court where the record does not show that the court, without right, appointed one who was entitled to the appointment. Gardner vs. Meyer, 27 Dec. 198.

[69] Noble vs. Martin, 4 C. C. 365; 2 C. D. 598.

[70] Armstrong vs. Herancourt Brewing Co., 53 O. S. 467.

[71] § 12270 G. C.

[72] Kink. Pract. 617.

Sunday is not excluded in computing the three days allowed for filing a motion for new trial. Chicago Box Co. vs. Washburn, 15 C. C. 510; 8 C. D. 113.

See § 1717, Municipal corp.

The order made upon the hearing of the preliminary question in condemnation proceedings, is a final order. Dayton El. U. Ry. Co. vs. Traction Co., 48 Bull. 957.

See recent decision of Supreme Court under appropriations.

§ 53. Entries, nunc pro tunc, power, etc.

It is said to be an inherent power in all courts of record to correct or change their records so as to conform to the truth; and if for any reason the entries placed upon the record do not conform to the truth and give the decision of the Court as it was intended to be, then it is the duty of the Court either on its own motion or on motion of an interested party to have the records made correct. The question is, within what limits must this power be exercised? It is a settled principle of law that the Court may, without any evidence other than that which it possesses correct its own records during the term; even after the term if there are no interfering rights or equities, and may make it as of the term it should have been made,[73] and the statute makes provision in what manner judgments may be vacated or modified at a subsequent term.[74]

It is clearly therefore the law that as to all adversary matters in the Probate Court the same rule applies as to the Court of Common Pleas, for as to such matters the Probate Court has terms. But the difficulty experienced is as to that large class of business within the Probate Court for which it has no terms, being a court that is open at all times. It has sometimes been claimed that in administration of estates the Court has control over its docket and journal, and may make such orders from time to time as are proper, during the continuance of settlement of the estate.[75] As to such matters the Probate Court has no terms, and it may be doubtful if the Court at any time may put on a *nunc pro tunc* entry. If a decision is properly entered upon the journal or record of the Probate Court it is final unless reviewed or changed in some method provided by law for such particular case.[76]

Our Supreme Court has expressly held that the Probate Court has no power under the general provisions of law relating to a vacation of former orders of the Court to vacate or modify

[73] Elliott vs. Platter, 43 O. S. 198. See § 5.

[74] § 5354 R. S.

[75] Bld. & Loan Co. vs. Spiegel, 12 C. C. 761; 4 C. D. 474.

[76] Kinsella vs. DeCamp, 15 C. C. 494; 8 C. D

an order made in the settlement of an account of an administrator.[77]

[77] Johnson vs. Johnson, 26 O. S. 363.

See Woerner on Admin. 333.

Kink. Pract. 558. Of course in no instance can a journal entry be changed so as to constitute a different decision from that which was actually in the then intention of the judge, rendered. But where a journal entry does not state the actual decision either by reason of mistake or fraud, or inadvertence, then the judge ought at any time, correct such entry to conform to the truth upon due notice to all concerned, even though it be in *ex parte* matters. Ludlow vs. Johnson, 3 Ohio 553.

Every court of record has a supervising charge over its own records and papers belonging to its files, and may at any time direct the correction of clerical errors or substitution of papers lost, etc. Hollister vs. Judges, 8 O. S. 201.

The power conferred upon courts by § 534 of the Code, to vacate or modify their own judgments or orders does not abridge the right to maintain an original action impeaching the judgment, etc. Coates vs. Chillicothe, etc., 23 O. S. 415; Darst vs. Phillips, 41 O. S. 514.

A court has no power to correct its journal after term, if the judgment reads as intended at the time made notwithstanding a mistake of law or fact or both was made in rendering the judgment.

A judgment as shown by the record, can not be shown to be false, except the evidence is such as to show no other conclusion. *In re* Farkash, 54 Bull. 207.

Cited with approval. *In re* Farkash, 54 Bull. 207.

Memorandum by the Probate Judge in court calender, inadmissible to establish decree of divorce *nunc pro tunc*. Stark vs. Stark, 34 C. C. 135; affirmed no opinion, 88 O. S. 586.

CHAPTER IV.

ADMINISTRATION.

§ 54 Administration; devolution of property.
§ 55 Necessity for.
§ 56 Where there ought to be no administration.
§ 57 Where there may be no administration.
§ 58 Form of bond of residuary legatee.
§ 59 Liability upon the bond.
§ 60 Discharge of lien on property.
§ 61 Officiating without appointment.
§ 62 Acts done by rightful executor or administrator before qualifying.
§ 63 Letters relate back to time of death.
§ 64 Time within which letters of administration will be granted.
§ 65 Application.
§ 66 Notice, etc.
§ 67 Hearing.

§ 54. Administration. Devolution of property.

At common law the real estate of a deceased person descends to his heir, and his personal property goes to his legal representative. The reasons for an arbitrary distinction between the devolution of real estate and personalty never existed in this country. But with other features attaching to the common law it has engrafted itself into our jurisprudence; and with some few minor statutory regulations is followed in almost all of the States of our Union. So that now the real estate descends to the heirs and devisees subject to the power of the executor or administrator to convert the same into personalty for the payment of the decedent's debts. The real or personal property set apart for the widow and minor children goes to them absolutely, and the personal property goes to the executor or the administrator to be distributed, after payment of debts, to legatees or next of kin.[1]

[1] Woerner on Admin. 381.

See act for administration of charitable trusts, §§ 10085-10092 G. C.

As a general rule administration is a prerequisite to the distribution of the personal estate of a decedent. An heir cannot maintain an action on a note belonging to his ancestor. McBride vs. Vance, 73 O. S. 258.

See § 1111a as to mode of transfer of real estate.

§ 55. Necessity for.

From this rule of the common law that the title to all personal property of the decedent vests in the executor or administrator of his estate, follows the rule that where there is any personal property to distribute or where there are any debts owing by the decedent, there must be an administration of the estate.[2]

No one can sue for a debt due the decedent except an administrator or executor; and this rule applies even to heirs after an administrator has settled the estate and all debts are paid.[3]

It has even been held that a division of all the assets among the heirs without an administration, they paying the debts, vests no title in them, nor binds a subsequent administrator, and that a note allotted to one heir cannot be collected by him.[4] Likewise the creditors of the estate are entitled to have the same settled in due course of administration, and, if it be necessary to use real estate to pay debts, that it be done by an order of a competent court, and hence it has been held that it is no bar to an action by an administrator to sell land to pay debts, that the heir has, without an order of court, sold the same at private sale and applied the proceeds in satisfaction of preferred claims.[5]

This liability of real estate for the payment of debts makes it very desirable that where a person dies owning real estate there be an administration of his estate. For if there be no such administration there is no evidence upon any of our public

[2] The term Administration, in its primary signification and general sense, equivalent to conduct, distribution, etc., is also applicable to the management of the estate of minor persons of unsound minds, drunkards and spendthrifts. The settlement, management and distribution of the decedent's estate to the parties entitled thereto and his administration of the estate.

Woerner on Admin. 9.

[3] Davis vs. Corwine, 25th O. S. 668.

Even where under the law the husband is entitled to all the personal property of his deceased wife, it is held that he can not recover the same, but an administrator must bring the action. Reed vs. Jordon, 12 C. C. 161; 5 C. D. 527.

Contra—Vanskoyck vs. Selvy, Dayton 413 (Ohio).

The Federal Court can not take away the jurisdiction of the Probate Court. Puder vs. Agler, 242 Fed. 95; 62 Bull. 410.

[4] Rousch vs. Hundley, 3 W. L. M. 126.

[5] Sidener vs. Hawes, 37 O. S. 532.

See Duly vs. Duly, 3 W. L. M. 42; Taylor vs. Thorn, 29 O. S. 569; *In re* Sattler, 21 Bull. 161; Goebel 183; Taylor vs. Huber, 13 O. S. 288.

records showing that the real estate may not be liable for some unsatisfied debt of the deceased. Another reason: Under our law when real estate descends to the heirs there is no evidence without an administration who are such heirs. This may not always be disclosed, but will usually be found in the application made for administration. However, it has recently been held that where it appears that substantially all outstanding debts of the deceased testator have been paid by the parties entitled to the fund under the terms of the will of deceased, there is no necessity for an administrator or executor to close up the estate, and courts will not tolerate or encourage proceedings under the direction of the Probate Court for the administration of an estate nor the expenditure of money left by deceased parties for the *mere forms* of *administering upon an estate.*[6]

If there are no claims due the estate to collect, or if there are such claims and the creditors are willing to pay them to the heirs, and the heirs pay all the debts of the decedent and there are no minor heirs, an administration may be dispensed with, especially if the decedent owned no real estate. But if he owned real estate or there exist minor heirs, it is highly desirable, necessary, I may say, that there be an administration of the estate.[6] *

§ 56. When there ought to be no administration.

A good many States have provided that when the property left by a decedent is not more than sufficient to pay the widow's allowance, etc., that upon a showing made to that effect in the Probate Court, that no administration be required. There is no statute to that effect in Ohio. But it has often occurred to the author that such a law would be a very salutary one. For, in the language of a distinguished author, "The soundness of the principle upon which such provisions rest, or rather ab-

[6] Catlin vs. Huestis, 11 C. C. 120; 5 C. D. 23.

[6*] See § 800.

A lawyer of 35 years' practice gives his experience that in nine cases out of ten an attempt to settle an estate without going through the formalities prescribed by law, results disastrously to those interested. The law now requires that before property inherited can be transferred there must be an affidavit filed showing the heirs, etc. § 1111a.

surdity of a contrary view is self-evident, why should the law compel an administration where there is nothing to be administered? The appointment of an administrator in such case could have no possible effect except to diminish or to eat up what the law intends for the support of widows or orphans." [7]

§ 57. When there may be no administration.

It seems that the only instance in which there may be no administration of an estate is where the testator devises his property to a person or persons and also makes them executors to settle his estate, which is found in the following:

Different bond may be given when executor is residuary legatee. "If the executor is residuary legatee, instead of the bond prescribed in the two next preceding sections, he may give a bond in a sum and with two or more sureties to the satisfaction of the court with condition to pay all the debts and legacies of the testator and to pay over such estate to the persons entitled thereto in case the will at any time be set aside. In such case he shall not be required to return an inventory, unless it be made to appear to the satisfaction of the probate court that one should be made and returned, if the probable value of the estate is less than five hundred dollars." [R. S. § 5997.][8]

"The executor shall not be liable for legacies paid to legatees other than himself, after eighteen months from the probating of the will, and before an action to set aside has been commenced. The legatee, however, shall be liable to repay the legacy and interest thereon if the will be set aside." [R. S. § 5997; vol. 102 v. 200.][8*]

Under this section the executor and legatee must give bond to the satisfaction of the Court with a condition to pay all the debts and legacies of the decedent, and the executor giving such bond at once becomes liable for all debts of the testator. But, as will be seen in the following section, the real estate is not

[7] Woerner on Admin. 436.
See Carr vs. Hull, 63 O. S. 394.
[8] § 10608 G. C.
[8*] § 10609 G. C.
See Shields vs. Matthew, as to discussion as to nature of bond, 22 C. C. (N.S.) 398; McBride vs. Vance, 73 O. S. 258.

discharged from any liability for the debts of the decedent. Such bond dispenses with the necessity of returning an inventory, unless ordered by the court, where the estate does not exceed $500 in value; and also dispenses with the further accounting to the Probate Court and operates as an admission of sufficient assets and a guarantee to pay all debts, since as there is no inventory of the assets required to be filed, there is no means of knowing whether the assets equal the debts and liabilities.[9]

The bond cannot be surrendered or cancelled, at least not after the expiration of the time within which the law requires an inventory to be filed. The filing of such bond confers upon the residuary legatee and executor the right to collect all assets of the decedent and appropriate the same to his own use, and use and convey the real estate without any further control or accounting to the court.[10]

In order to take advantage of the provisions of § 10608 G. C., a mere designation in the will of the person as executor and residuary legatee is not sufficient to authorize a person to collect demands due the testator. Such persons must first be appointed by the court as executor.[11]

This section is in derogation of the common law, and therefore must be strictly construed. Its language would indicate that it would not apply unless the residuary legatee was also named in the will as executor; and that if the will named no one or a different person the residuary legatee could not take advantage of its provision.

§ 58. Form of bond of residuary legatee.

Know all Men by these Presents:

That we.....

and.....are held and firmly bound

[9] It may be that under the law which now seems to require inventories in every case to be filed and report made to the auditor, the object and purpose of which is to prevent the estates from escaping taxation, that a statement should be presented to the Probate Court showing the assets of the estate. Or the Court will require the inventory to be made.

[10] Woerner on Admin. 434, 435.

[11] Tappan vs. Tappan, 30 N. H. 50; Lafferty vs. People's Bank, 76 Mich. 35; S. C. 43 N. W. Rep. 34.

unto the State of Ohio, in the sum of.....Dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors and administrators, if default be made in the condition following:

Whereas, by the last will and testament of.....
....., deceased, duly admitted to probate by the Probate Court, within and for the County of....., and State of Ohio, the said.....
made executor and residuary legatee of all the estate, both real and personal.....of said....., deceased.
Now if the said.....
shall pay all the debts and legacies of the said decedent, and pay over said estate to the persons entitled thereto, in case the will be at any time set aside,—together with the charges of administration, and all other legal claims against said estate, then this obligation to be void, otherwise to be and remain in full force and effect.

Signed by us at.....
Ohio, this.....day of....
A. D. 190....

EXECUTED IN PRESENCE OF

.....[12]

§ 59. Liability upon the bond.

The residuary legatee is not required to give such bond — he may do it and it must be supposed would not do so unless satisfied that the amount of assets would exceed the amount of debts and liabilities. The residuary legatee who gives bond is also the executor, and the bond is in the place of the bond ordinarily required of an executor. It creates no liability nor affords a remedy which the latter does not, but is only intended to provide for the payment of the debts of the testator and not against any unjust claims. The residuary legatee has only to pay *just claims* against the estate. And a person suing need not show the presentment or rejection of the claim as is ordinarily required in a suit on a claim against an executor or administrator.[13] In such an action, the claim not having been previously established in an action against the executor in his representative capacity, the plaintiff is not a competent witness to testify as to transactions between him and the testator.

[12] See § 475.

[13] Stephens vs. Hartley, 13 O. S. 525.

[13] Surety on the bond has lien on residuary share. Tidd vs. Black, 4 C. C. (N.S.) 216; 26 O. C. C. 118.

§ 60. Discharge of lien on property.

Whether the giving of the bond releases the personal property from a creditor's right to have the same applied to his claim or not is a mooted question. The weight of authority, however, is that the remedy is cumulative, and the personal property is liable unless conveyed to a *bonafide* purchaser.[14]

The right as to real estate is expressly reserved in Ohio by the following statute:

"The giving of the bond prescribed in the second preceding section shall not discharge the lien on the testator's real estate for the payment of his debts, except such part as has been lawfully sold by the executor to one who purchased in good faith, and for a valuable consideration." [R. S. § 5998.][14*]

§ 61. Officiating without appointment.

While the laws of Ohio do not recognize an administrator or executor *de son tort,* yet the liabilities of an intermeddler with the effects of a deceased person are discussed in the books under that head. If an injury is done to the personal property, or real estate which is disposed of by will, of a deceased person, the action to recover for such injuries must be brought by the rightful executor or administrator and not by creditor.[15] Every person, other than the legally appointed administrator or executor, dealing with the effects of the deceased person unless his acts are beneficial, may be held liable for his acts in reference thereto. If the creditor pays a claim to any person other than the executor or administrator he is still liable to the

[14] Thompson vs. Brown, 16 Mass. 172; Lafferty vs. Bank, 76 Mich. 35; 43 N. W. Rep. 34; Kreamer vs. Kreamer, 52 Kans. 597.

[14*] § 10610 G. C.

[15] Dixson vs. Cassel, 5 O. 533; Benjamin Le Baron, 15 O. 517; Van Ausdal vs. Potterf., 41 O. S. 677.

In the latter case there was no administration, but the widow took possession of all the personal estate. She proceeded to collect some of the notes that drew a usurious rate of interest. It was held that the maker could set up the same as he could have if he would have given it to an administrator.

rightful administrator for a payment of the claim. The general rule as to the liability of an intermeddler might be stated that if his acts are beneficial to the estate no liability would be incurred, but if they were injurious he would be responsible. Among those things which it is stated a person may do without being liable are notably all acts or offices of kindness and charity and the looking to the preservation of the property. Mr. Williams mentions such as locking up the goods for preservation, directing the funeral and paying expenses thereof out of his own means or out of the effects of the deceased, making an inventory of his property, feeding his cattle, repairing his houses or providing necessaries for his children.[16]

Also where the property is not a greater amount than is allowed by law for the immediate support of the family, the widow is not liable for so using the assets. Or where the widow supports the family of one absent from home before certain news of his death, or being compelled to vacate the premises, moves the furniture, partly to an auction room to be sold and partly to another house to be used by her, or where she appropriates the wearing apparel of less value than debts which she pays, or where the assets appropriated will not pay the expense of taking out administration.[17]

§ 62. Acts done by rightful executor or administrator before qualifying.

An administrator or executor may, by relation, ratify and make valid all acts which come within the scope of a rightful administrator's or executor's authority; and whatever dealings, justifiable on this principle and in the interest of the estate, he may have had with it before his appointment are cured in modern practice by the grant of subsequent letters.[18] Where an act is done in good faith by such an executor or administrator before his appointment he cannot afterwards avoid it, but will be an estoppel in the absence of fraud.[19]

[16] Williams on Executors 261.
[17] Woerner on Admin. 418.
[18] Sch. on Extrs., § 195.
[19] Bennett vs. Lyndon, 8 App.

Indeed it may be said that where an executor knows of his being named in the will as such, it is his duty before appointment to look after the estate and preserve it with reasonable diligence; and it would not be inappropriate for him to contract and make arrangements for all funeral expenses and matter attached thereto. Whether or not his right in this respect is superior to that of the family of the deceased may be doubtful; generally in reference to such matters courts are inclined to leave that to the family of the decedent and that their wishes and inclinations about such matters should prevail.[20]

§ 63. Letters relate back to time of death.[20a]

For general purposes it may be said the letters of administration relate back to the time of the death of the intestate and vest the property in the administrator from that time. On this principle an administrator may maintain trespass for injuries to the goods of the intestate committed after his death and before the appointment; or maintain an action on a contract made with the defendant before appointment; or for money belonging to the estate collected by defendant before grant of letters; and on the same principle the heirs have no power before the appointment of an administrator to bind the personal estate by agreement.[21]

This doctrine of relation is a fiction of law to prevent injustice and the occurrence of injuries where otherwise there would be no remedy; and would not be applied in case where the rights of innocent parties intervened.[22]

A conveyance under a power of sale in a will, before probate of such will, by one nominated as executor will be validated by a subsequent probate of the will.[23]

§ 64. Time within which letters of administration will be granted.

There is no provision in the laws of our State requiring application for letters of administration within any specified time

[20] See §§ 61, 70.

[20a] Cited and approved, *In re Pollock*, 60 Bull. 274; 17 N. P. 492.

[21] Woerner on Admin. 386.

[22] Per Napton, J., in Wilson vs. Wilson, 54 Mo. 213, 216.

[23] Brooks vs. McComb, 38 Fed. R. 317; Babcock vs. Collins, 60 Minn. 73.

from the death of the testator. Provision is made for the citation of the person holding a will to produce it before the court for probate. Likewise there are provisions authorizing the citation against an executor to appear and take or decline administration. There is also provision for citation against other persons who are by right entitled to administration to appear before the Court and either decline or take. But there is no limitation as to when such proceedings must or may be had. Generally it may be said that so long as there are assets to be administered upon or any other reason for administration of the estate letters will be granted. It is, however, provided that there is a limitation to an absolute right to have administration upon an estate; the statute relating to which is as follows:

"Administration shall not be originally granted as of right after the expiration of twenty years from the death of the testator or intestate. But, within his county, each probate judge may grant letters of original administration upon the estate of a person deceased, after the expiration of twenty years, upon petition of the next of kin or other person or persons interested, or their agent, and on good cause shown therefor. Before allowing the prayer of such petition, such judge may direct notice thereof to be given, by publication, for a period not exceeding thirty days, in one or more of the newspapers printed in the county where it is filed." [R. S. § 6014.][24]

The object of this provision seems to be that after such a great lapse of time an administration ought not to be granted without notice to all that might be interested or affected by such administration and the public generally.[25]

§ 65. Application.

The application for an appointment after the expiration of twenty years, as provided in the above section of the Revised Statute, should set forth, in addition to the statements re-

[24] § 10626 G. C.

[25] § 10626 G. C.
Statute does not begin to run until notice of appointment. Hoiles vs. Biddle, 74 O. S. 182; reversing 4 C. C. (N.S.) 449.
See McBride vs. Vance, 73 O. S. 258.

quired in an ordinary application, the reasons that now exist for such an application; that is, it ought to state why an administration has not been had at an earlier date. And if the decedent died owning real estate which has since been sold the names of the holders of such real estate should also be given. Likewise the names of all other persons who are in any way interested in such an estate should be given.[26]

§ 66. Notice, etc.

In all such cases the Court should require that notice be given either directly to all interested parties or by publication. If the notice is given by publication it should be for a period not exceeding thirty days. It is not very specific how often a publication should be made, but should think it would be wise to make five insertions in a weekly newspaper.

FORM OF ENTRY.

(*Title.*)

A. B., having filed his petition herein, asking for letters of administration on the estate of E. F., represented in said petition to have died on or about the.....day of.....and then being a resident of this county, it is ordered said petition be for hearing on.....day of..... and notice thereof be given by publication as required by law.

FORM OF NOTICE.

Notice is hereby given on.....day of....., the undersigned filed his petition in Probate Court, ...county, Ohio. Asking that there be an administrator appointed for the estate of the late E. F., who died on or about the.....day of....., residing at....., in said county, and said petition will be for hearing on the.....day of.....at.....o'clock.

§ 67. Hearing.

Upon the day of hearing a copy of such notice, with proof of service if advertised, as the case may be, should be filed in court, and if the Court is satisfied that there is good reason for such appointment, that all persons interested therein within the

[26] The forms used under appointment of executors and administrators may readily be adopted.

county have had due notice, such administration should be granted and the following would be an entry showing such a fact:

GRANT OF LETTERS.

This day this cause coming on to be heard and it being shown that notice thereof has been given as required by law and the former order of this Court and it appearing from the testimony of parties that good cause is shown, it is hereby ordered and the Court does hereby grant to C. D. letters of administration on the estate of E. F., deceased, late of said county; and thereupon said C. D. appeared in open court, presenting his bond as such administrator in the sum of.....dollars, which is approved by the Court.

CHAPTER V.

LETTERS TESTAMENTARY.

§ 68 Definition, etc.
§ 69 Distinction between administrator and executor.
§ 70 Power of the executor prior to letters.
§ 71 When application can be made.
§ 72 In what court application should be made.
§ 73 Will must be duly probated.
§ 74 Inhabitant or resident.
§ 75 The estate to be administered.
§ 76 Application for appointment
§ 77 Oath to application.
§ 78 Form of application for letters testamentary.
§ 79 Who are capable of receiving appointment.
§ 80 Named in the will.
§ 81 Legally competent.
§ 82 Residence of the executor.
§ 83 Bond of executor and its condition.
§ 83a When bond not required.
§ 84 Form of executor's bond.
§ 85 When bond need not be given.
§ 86 Separate bonds.
§ 87 Form of executor's letters.
§ 88 The order of appointment.
§ 89 Form of entry.
§ 90 Effect of order.
§ 91 How the order may be attacked.
§ 92 Renunciation.
§ 93 Administration during the minority of an executor.
§ 94 An executor of an executor can not administer the trust of first testator.
§ 95 The power of executors and administrators during the contest of a will.
§ 96 Contest of will. May borrow money, etc.
§ 97 Application to repair buildings and borrow money.
§ 98 Form of entry.[1]

§ 68. Definition, etc.

An executor is a person appointed by a testator to carry out the direction and request of his will and dispose of his property according to his testamentary provision after his decease.[2]

Usually every will designates some one or more persons to whom the testator intrusts the carrying into effect of his testamentary desire; and papers have been upheld and deemed and

1 See § 1013, Wills, etc.
See § 1081, Probate of Wills.
See § 1250, Testamentary Trustees.

2 Whart. law lex. title Executor.
2 Bl. Com. 494.
See chapter 13a, Trust companies as executor.

entitled to probate which have named no disposition of property whatever.[3]

The mere failure to mention some one as executor does not effect the validity of the will, for the Court will never allow a trust to fail for want of a trustee.

§ 69. Distinction between administrator and executor.

The functions, powers, duties, rights and liabilities of executors are in most respects identical with those of administrators. An executor being named in the will as the person whom the testator desires to administer his estate, and from that fact he is entitled to receive the appointment from the Court of Probate.[4] While an administrator receives his right to administer from some provision of law, and the Court acting upon such provision, grants to him letters of administration; an executor, so far as no other provision is made in the will for the settlement of an estate, acts under the same law and is under the same responsibility as an administrator. But in all matters in the administration of the estate, where not contrary to law, he must follow the provisions of the will. The mere fact of being named as executor in the will does not give him power to act — it merely confers upon him the right to be appointed as such executor by the Probate Court.[5]

§ 70. Power of the executor prior to letters.

Our statute provides as follows:

"No executor named in a will, before letters testamentary are granted, shall have any power to dispose of any part of the estate of the testator except to pay funeral charges, nor to interfere with such estate further than is necessary for its preservation." [R. S. § 6004.][6]

This section does not prohibit such possession of the property under the will as may be necessary for its safety until the pro-

[3] 19 Am. & Eng. Ency. of Law 178.
See § 1026, Having property.
[4] §§ 79, 81 and 108.
[5] § 1251. Distinction between executor and testamentary trustee.
[6] § 10616 G. C.

bate of the will, but merely inhibits the exercise of any power of deposition over the estate or any interference with it. But if it were necessary, for example, to take possession of the personal estate for its protection, in any respect, the executor would be justified in so doing.[7]

This section deprives a person named as executor in the will from so acting as to become a representative of the decedent person.[8]

§ 71. **When application can be made.** "When a will is duly proved and allowed, the probate court shall issue letters testamentary thereon to the executor, if any be named therein, if he is legally competent, and accepts the trust and gives bond, if that be required. Provided, however, if the executor named in a will be a non-resident of this state, the court may refuse to issue letters testamentary to such person named therein. Otherwise, the court shall grant letters of administration on the estate as hereinafter provided." [R. S. § 5995; 108 v. 275.] [9]

It will be noticed from the above statute that there is no time limited within which executors must qualify. It is, however, generally speaking, highly important that they should qualify as promptly as possible. They should have a reasonable time after the will is probated to consider whether they will accept the appointment. In the next chapter it will be seen that if

[7] § 62.

People vs. Commissioners, 31 Hun 235; Van Schaack vs. Saunders, 32 Hun 520.

[8] Matter of Flandrow, 28 Hun 279.

The executor derives his appointment and title to the estate from the will, though he is not called in substantial power of deposition or administration until the Probate Court grants him authenticated evidence of his right in the form of letters testamentary upon proof of the will. The will is the source of executor's title and general powers. The letters testamentary founded on probate of the will do not create the executor nor confer title upon him, but are the authentic evidence of the power conferred by the will and which existed before he was appointed. The property of the testator is in the hands of the executor appointed by the will, before the probate, and he may exercise many of the powers of an owner over it. He cannot dispose of it, but he may take it into his possession for safe keeping.

People vs. Barker, 150 N. Y. 52; Hartnett V. Wandell, 60 N. Y. 346; Morris, Admin., vs. Bills, Wright 343.

See § 61; Woerner on Admin. 384

[9] § 10605 G. C.

they do not qualify they may be cited to appear before Court, and if they decline to take, some one else may be appointed.[10]

§ 72. **In what court application should be made.** "Upon the death of an inhabitant of this state, letters testamentary, or letters of administration on his estate, shall be granted by the probate court of the county in which he was an inhabitant or resident at the time he died. When a person dies intestate in any other state or country, leaving an estate to be administered within this state, administration thereof shall be granted by the probate court of a county in which there is any estate to be administered. The administration first lawfully granted, in the last mentioned case, shall extend to all the estate of the deceased, within the state; and exclude the jurisdiction of any other court." [R. S. § 5994.][11]

Under this section it is held that although the will of a testator, wherever domiciled at the time of his death, may be admitted to probate in any county of the State in which he may have left real or personal estate; yet, if the testator be a resident of this State at the time of his death, letters testamenary on such probated will can issue only from the Probate Court of the county in which the testator resided.[12]

When any person shall die in any other State or country, leaving an estate in this State, then there may be an administration in any county in which there is an estate; and in such cases the Probate Court first assuming jurisdiction shall have exclusive jurisdiction, and no appointment can be made in any other county.[13] Likewise the court first acquiring jurisdiction over the estate of a deceased resident of this State acquires exclusive jurisdiction.

If the appointment be made in a county where there are no assets and where the deceased was not an inhabitant, although there be assets in another county of the State, such appointment is not void — it is merely voidable and cannot be attacked in a collateral proceeding.[14]

10 § 101. Citation of executor.

11 § 10604 G. C.

See § 11028 G. C., for Trustees of persons unheard of.

The court has no jurisdiction to appoint an administrator for the estate of a person who was a non-resident at the time of his decease. Steel Castings Co. vs. Farkas, 15 N. P. (N.S.) 609.

12 Limes vs. Irwin, 16 O. S. 488.

13 § 29. Excl. Juris.

§ 111, Appt. Adm'r.

A person sentenced to the penitentiary for life is not dead so that letter on his estate can issue. Frazier vs. Fulcher, 17 O. 260.

14 Robinson vs. Epping, 24 Fla. 237; S. C., 4 So. Rep. 812; Arnold vs. Arnold, 62 Ga. 627; Murphy vs. Creighton, 45 Ia. 179; Gilchrist vs.

§ 73. Will must be duly probated.

Several facts must exist to give the court jurisdiction in the appointment of an executor. Among which may first be mentioned the fact that the will must have been somewhere duly probated. Good practice demands that the will be originally probated in the county in which the Probate Court has jurisdiction to appoint an executor. However, if the will has been probated in any other place than that in which application is made for letters testamentary, the Probate Court should first require that the will be admitted to record in the county of its own jurisdiction. In no instance ought letters testamentary be issued until this has been attended to, although it may not be absolutely essential to give the court jurisdiction.[16]

§ 74. Inhabitant or resident.

The next jurisdictional fact is that the decedent was an inhabitant or resident of the county in which the application is made. If the application does not state, it will be presumed the deceased was an inhabitant or resident of the county.[16a] It has been said that it was not always easy to determine the place of residence of a person at the time of his death so as to fix jurisdiction over his estate in the proper forum. It has been defined as being, in the common law sense, the place where one has his true, fixed and permanent home and principal establishment, to which whenever he is absent he has the intention of returning.[17]

Williams, 1 B. Mon. 133; O'Connor vs. Huggins, 113 N. Y. 511; S. C., 21 N. E. Rep. 184; 1 N. Y. Supp. 377; Sullivan vs. Fosdick, 10 Hun. 173. Contra, People's Savings Bank vs. Wilcox, 15 R. I. 258; S. C., 3 Atl. Rep. 211.

See § 1086, In what court will probated.

16 See § 1081, *et seq.* Probate of wills.

16a Miller vs. Miller, 13 N. P. (N.S.) 1.

17 Woerner on Admin. 442.

A habitation is a place of abode, a place to dwell in; and an inhabitant is one who has an actual residence there. But a person's domicile is a place where he may reside in fact, or for many purposes may be deemed to reside. A man's domicile, as the word implies, is his house, his home; and it may continue such for many years, without being actualy inhabited by him. But an inhabitant of a place is one who ordinarily is personally present there, not merely *in itinere*, but as a resident and dweller therein. A person who, in contemplation of law, has a domicile, may, nevertheless as a matter of fact, be a mere wan-

Where a person of unsound mind or a minor not of age has acquired a residence he cannot of his own accord change the same.[18] Absence for reason of comfort, business, temporary convenience and the like do not intend an abandonment of the residence. But a mere temporary residence in a county does not give the court of that county jurisdiction to grant letters; it must be a fixed domicile or residence.[19]

If a person has left one domicile to acquire another in a different county, but die on the way, it has been held that letters should be granted in the place of destination;[20] while others favor the old domicile;[21] and still others the place of his death.[22]

If a foreigner traveling in this State die here our courts have no jurisdiction to grant letters of administration unless he left assets here.[23]

If an inhabitant of a county die an administrator for him must be appointed in such county, although he have no assets there, and has assets in another county of the State.[24]

To work a change of domicile there must be a concurrence of the *intention* to acquire the new domicile with *the fact* of having acquired one and abandoned the former one without the intention of returning thereto.[25]

derer, and not an inhabitant of any place. Holmes vs. Oregon & Cal. Ry. Co., 5 Fed. 523; 10 Am. & Eng. Ency. of Law. 774.

Residence means the act or the state of being seated or settled in a place. It embraces not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between the person and the place, as by usually sitting or lying there. In re Collins, 64 How. Pr. 63.

Residence does not mean precisely the same thing as domicile when applied to succession of personal estate, but rather a fixed and permanent abode, a dwelling place for the time being as contradistinguished from a mere temporary locality of existence. 21 Am. & Eng. Ency. of Law 123.

[18] See § 1322.

[19] George vs. Watson, 19 Tex. 354; Harvard College vs. Gore, 5 Pick. 370.

[20] Burnett vs. Meadows, 7 B. Mon. 277; S. C., 46 Am. Dec. 517; Olson's Will, 63 Ia. 145.

[21] Cummings vs. Hodgdon, 147 Mass. 21; Embry vs. Miller, 1 A. K. Marsh, 300; S. C., 10 Am. Dec. 732; State vs. Hallett, 8 Ala. 159.

[22] Leak vs. Gilchrist, 2 Dev. 73; Alford vs. Holbert, 74 Tex. 346.

[23] Aspinwall vs. Queen's, 2 Curt. (U. S.) 241. Cited in T. & B. Indiana Probate Practice 41.

[24] R. R. Co. vs. Reeves, 8 Ind. App. 667; S. C., 35 N. E. Rep. 199.

[25] Woerner on Admin. 443.

To create legal domicile there must be actual residence combined with intent to remain.[26]

§ 75. The estate to be administered.

There must be some estate to be administered or some office for the executor to perform before there can be an appointment. It will be sufficient to authorize an appointment if there is property in some other county in the State; even if there be none in the county in which application is made. Property brought into the State after the deceased's death for the mere purpose of giving jurisdiction confers none.[27] If, however, the property is brought within the State with good faith and not for the purpose of giving jurisdiction, the courts thereby acquire jurisdiction and may appoint an administrator.[29]

A judgment held by the deceased in this State is such an asset as justifies the appointment of an administrator here.[30] So if an action lies to set aside a conveyance in fraud of creditors.[31] So if a debt is due from an inhabitant of this State to the deceased.[32]

If a policy of insurance on property in this State be issued here, and there is an agent of the insurer upon whom process can be served residing in this State, letters may be granted here.[33] If the claim prove invalid, yet the grant of letters because of such claim will be valid.[34]

Evidence of debt payable to bearer, or which transfer title to

[26] Greene vs. Burkhard, 8 N. P. 237; State vs. Kuhn, 8 N. P. 197. See §§ 758, 1094, 1086.

On application to probate a will the Probate Court has jurisdiction to fully and finally determine the domicile of the testator. The declaration of the testator in his will as to his place of residence is of high character in determining this question. Wilbering vs. Miller, 90 O. S. 28.

[27] Christy vs. Vest, 36 Ia. 285; Varner vs. Pevil, 17 Ala. 286.

[29] Pinney vs. McGregory, 102 Mass. 186; Borer vs. Chapman, 119 U. S. 587; Carroll vs. Hughes, 5 Redf. 337; *In re* Hooper, 5 Dem. 242; Fox vs. Carr, 16 Hun 434; Smith vs. N. Y. Ins. Co., 57 Fed. Rep. 133.

[30] Thomas vs. Tanner, 6 T. B. Mon. 52.

[31] Bowdoin vs. Holland, 10 Cush. 17.

[32] Stearns vs. Wright, 51 N. H. 600; Murphy vs. Creighton, 45 Ia. 179; Wyman vs. Halstead, 109 U. S. 654.

[33] New England Ins. Co. vs. Woodworth, 11 U. S. 138; Smith vs. N. Y. Life Ins. Co., 57 Fed. Rep. 133. See Sulz vs. Mutual, etc., Ass'n, 28 N. Y. Supp. 263; S. C., 7 Misc. Rep. 593; *In re* Miller, 5 Dem. 381.

[34] Sullivan vs. Fosdick, 10 Hun. 173; Holyoke vs. Mutual Life Ins. Co., 22 Hun. 75.

person by mere delivery, in the hands of an applicant in this State for letters will confer jurisdiction to grant letters here.[35] Such are shares of stock in the county where the stock books are kept, transfers made and dividends paid.[36]

A note secured by a mortgage on property situated in this State is sufficient to authorize the granting of letters here.[37] So real estate situated in this State authorizes the granting of letters.[38] A folding chair is sufficient to confer jurisdiction.[39] So a suit on a unliquidated claim.[40] So a claim against an administrator who has distributed the assets contrary to the provisions of a will he knows is in existence when he made the distribution.[41]

§ 76. Application for appointment.

Before an appointment is made an application must be filed which must state the name of the husband or widow and all of the next of kin of the deceased known, the postoffice address, if known, and also in general terms as to what the estate consists of and the probable value.[42]

In addition it must state that the will has been proved and that the testator died an inhabitant or resident of the county. It must also be under oath. It is exceedingly important that all the jurisdictional facts be set forth in the application; while it may not be absolutely necessary to support the jurisdictional power of the Court to have a recital of all the facts, yet it is of the highest importance that a record should be made of all facts and circumstances which call for the judicial power of the Court. The application affords the most convenient means for

[35] Goodlet vs. Anderson, 7 Lea. 286; Shakespeare vs. Fidelity Co., 97 Pa. St. 173; Beers vs. Shannon, 73 N. Y. 292; Moore vs. Jordan, 36 Kan. 271.

[36] Arnold vs. Arnold. 62 Ga. 627.

[37] Clark vs. Blackington, 110 Mass. 369.

[38] Apperson vs. Bolton, 29 Ark. 418; Rosenthal vs. Renick. 44 Ill. 202; Sheldon vs. Rice, 39 Mich, 296; Nicrosi vs. Guily, 85 Ala. 365; S. C., 5 So. Rep. 156; Bishop vs. Lalouette, 67 Ala. 197; Lees vs. Wetmore, 58 Ia. 170; Hart vs. Coltrain, 19 Wend. 378.

[39] White vs. Nelson, 2 Dem. 265.

[40] Robinson vs. Epping, 24 Fla. 237; 4 So. Rep. 812.

[41] In re Nesmith, 1 N. Y. Supp. 243.

Where the estate exceeds $100 there must be an administration. Barrielle vs. Bettman, 199 Fed. 838.

[42] § 10617 G. C.; § 114.

the proper allegation, so the finding may constitute an adjudication of all the necessary facts.[43]

It would likewise be proper for an applicant to state his own place of residence; if the will was probated in any other place than the county in which the application is made that fact should be stated and the name of such place given. If there are any minor heirs or legatees their names, ages and guardians, if known, might also well be included. As to the averments showing the county in which the deceased died it has been held sufficient to aver that he was "late of" a particular county.[44] Also the statement that *unadministered assets remain* is sufficient.[45] An appointment, however, without a written petition has been held not void, merely voidable.[46] Also an application for an administration on two estates in one petition will not render the appointment void.[47] The application should also show any indebtedness the deceased had against the applicant.[47a]

§ 77. Oath to application.

The statute says that it must be under oath; by this is meant not that it should be verified as pleadings generally are, but that it should be sworn to as a fact and not as a matter of belief. However, it has been held that the averment "to the best of affiant's knowledge and belief" is sufficient.[48]

Likewise a failure to verify the application will not subject the appointment to collateral attack.[49]

The oath may be taken before a notary or any person empowered to administer oaths.[50]

§ 78. Form of application for letters testamentary.

THE STATE OF OHIO,
.....County, ss.

PROBATE COURT.

The last will and Testament of.....who died

[43] Woerner on Admin. 561.

[44] *In re* Crawford, 21 C. C. 554; Abel vs. Love, 17 Cal. 233.

[45] Pumpelly vs. Tinkham, 23 Barb. 321.

[46] Robinson vs. Epping, 24 Fla. 237; 4 So. Rep. 812.

[47] Saul vs. Frame, 3 Tex. Civ. App. 596.

[47a] § 10617 G. C.; § 114.

[48] Sheldon vs. Wright, 7 Barb. 39; Roderigas vs. East River Inst., 76 N. Y. 316.

[49] Appeal of Miller, 49 N. W. Rep. 427.

[50] Pickens vs. Hill, 30 Ind. 269.

on the.....day of....., an inhabitant and resident of said County, having been heretofore admitted to Probate in said Court, and the undersigned, whose Post Office address is.....County, Ohio, having been named therein as execut....., hereby makes application for letters Testamentary thereon.

That the applicant was.....indebted to deceased in the sum of - - - - - - - - - $.....

Said decedent left Personal Estate composed of moneys, goods, chattels, rights and credits, estimated of the value of about - - - - - - - - - - $.....

And Real Estate being.....

Of estimated value of about $.....,—so much thereof as is directed by said Will to be sold, being of about the value of - - - - - - - - - - $.....

Said applicant offers bond in the sum of - - - $.....

with .....and .....

.....all freeholders, as sureties, and suggest .....

and .....as appraisers.

Said decedent died leaving.....h.....husband widow—and the following persons all the next of kin of the deceased, to this affiant know.

That said applicant was indebted to deceased at the time of his death as follows:

NAME.	DEGREE OF KINSHIP.	P. O. ADDRESS.
.....		

The foregoing application was signed in my presence and sworn to before me this.....day of.....190...

.....Probate Judge.

.....Deputy Clerk.

§ 79. Who are capable of receiving appointment.

All persons, generally speaking, are capable of becoming executors who are capable of making wills.[51] This is the common-law rule which is in force in our State. The only limitation which the statute designates is that the person must be legally competent. Recently it has been enacted by statute that corporations upon complying with certain provisions incorporated in the law may become executors.[52] As to who are legally competent will be treated of in a subsequent section.

§ 80. Named in the will.

The person asking the appointment must be named in the will. This does not necessarily mean that he should be desig-

51 Sch. Ex. 32.

52 § 3821c R. S. This law was declared unconstitutional, and it was held in another case that the order of the Probate Court could be collaterally attacked. Telegraph vs. Savings Co., 30 O. C. C. 380; 78 O. S. 398; affirming, without report, 20 Cir. D. 380. This latter case, however, was overruled, and it was finally held that even if the law was unconstitutional the appointment could not be attacked collaterally. See 53 Bull. 83-445; 79 O. S. 89. Later act of 1919, 108 vs. 120, § 207a; 710-160 G. C. Chapter 13a. No bond is required except on application.

See § 1252. Who may be trustee. Marriage of a female is no disqualification. § 10636 G. C.

nated by his name in the will; it will be sufficient if the language used by the testator be such that it shows an intention that a certain person be invested with the character of executor.[53] The testator may even delegate the appointment to a third person.[54]

So the testator may empower the survivor of two executors named, or a single executor, to appoint a co-executor on one hand or appoint his successors on the other hand until the will shall have been executed, and such appointees will be charged with the trust estate in place of their predecessors.[55]

If the testator used the word trustee and yet imposed upon him duties involving the functions of an executor, this is a good appointment.[56]

Where the testator in his will did not specifically appoint any executor, but nominated four persons to act as his trustees, and bequeathed to them his residuary estate, with power to receive any sums due to the residue, and to give and discharge for the same; and the will contained directions "to my executors," as to the payments of his debts, and as to the manner in which they were to deal with the residue and other portions of the estate, and generally it appears that the testator had used the word trustees and executors indefinitely as referring to the same person, it was held that the trustees were executors.[57]

§ 81. Legally competent.

Statute provides that the person named in the will shall be appointed if legally competent, but it fails to provide as do the statutes of many of the other States, what is considered to be legal incompetence. It has been thought by some[58] that where such objections exist against the appointment of the person as

[53] Carpenter vs. Cameron, 7 Watts. 51; Matter of Blancan, 4 Redf. 151.

[54] Hartnett vs. Wandell, 60 N. Y. 346.

[55] Mulford vs. Mulford, 42 N. J. Eq. 68.

[56] Richards vs. Moore, 5 Redf. 278.

[57] *In re* Melville, 15 Prob. Div. 22. See § 1308. Testamentary guardian.

[58] Giauque Settlements, 203.

would justify his removal by the court after his appointment there would be sufficient to refuse him in the first instance. It has, however, been held by several Probate Courts in Ohio to the contrary; and that, under the common law rule, which prevails in Ohio, none are legally incompetent except minors, idiots and insane persons.[59] And that where the person was not thus legally incompetent he was entitled to receive the appointment.[60] To this might be added that the Probate Judge could not receive the appointment himself.[61]

And likewise the guardian of a deceased person could not be appointed. Courts sometimes permit guardians to resign and file their account, and then appoint them administrators. The difficulty in the way of this practice is that the administrator in settling with the guardian is one person acting in two capacities. It may perhaps be legally done, but is not commended. There is no special provision on this subject, but it is not within the duties of the guardian to settle up the estate and make distribution to the persons entitled. Formerly it was held that a married woman could not act as executor, but this is now abolished by statute.[62] An infant improperly appointed is an administrator de facto and her acts are valid and can not be collaterally attacked.[62a]

§ 82. Residence of the executor.

At common law non-residence of the executor did not disqualify him to act. There being no statutory provision on the subject, it is safe to assume that the common-law rule prevails in Ohio. Yet the law certainly does not encourage such appointments, for it is provided that a resident executor may be removed if he moves from the State. And if removal from the State is good cause to terminate the trust, non-residence ought to be a good reason for refusing it.

And it may be said that it is not advisable where the same can be avoided to appoint a non-resident as executor. In fact no one ought to be appointed, ordinarily, to either the position

[59] *In re* Sultzbach, 5 N. P. 218; S. C., 5 Dec. 516.

[60] *In re* Oscamp, 5 Dec. 584; 7 N. P. 665.

[61] §§ 1589, 1590 G. C., § 9.

[62] § 10636 G. C. See chapter on Letters of Administration, § 115. See § 222, Incompetency, 1308, and 1309, Guardians.

If the person named is capable he must be appointed, and the question of his unsuitability would need to be raised upon an application to remove. *In re* Sell's Est., 5 N. P. (N.S.) 629; 52 Bull. 610.

If the person named in the will has since the death of the testator been convicted of a crime the court might refuse to appoint him. *In re* Marsh, 60 Bull. —.

[62a] Towlin vs. Pesh (W. Va. 1914), 80 S. E. 450.

of executor or administrator who is not a resident of the county in which the application is made; and therefore within the jurisdiction of the court to control and govern his actions concerning the trust. There may, however, be stronger reasons for the appointment of a non-resident as executor, by reason of his being named in the will. He may have particular knowledge of the affairs to be administered and besides he was selected for that purpose by the decedent who is presumed to have known his qualification. In a recent case it was held that a non-resident person named as executor must be appointed.[62b] The statute has now been amended to make it optional with the court.[62c]

§ 83. Bond of executor, and its condition. "Every executor before entering upon the execution of his trust, must give bond, with two or more sufficient sureties, in such sum as the court orders, payable to the state with conditions as follows:

"1. To make and return to the court, on oath, within thirty days, a true inventory of all the moneys, goods, chattels, rights, and credits of the testator which are by law to be administered, and which come to his possession or knowledge; and, also if required by the court, an inventory of the real estate of the deceased;

"2. To administer according to law, and the will of the testator, all his goods, chattels, rights and credits, and the proceeds of all his real estate, sold for the payment of debts, or legacies, which comes to the possession of the executor, or to the possession of any other person for him;

"3. To render upon oath, a just and true account of his administration within twelve months and at other times when required by the court or the law. Failing to do so for thirty days after he has been notified of the expiration of the time by the probate judge, he may forthwith be removed by the court and he shall receive no allowance for services, unless the court enters upon its journal that such delay was necessary and reasonable." [R. S. § 5996; vol. 102-200.][63]

§ 83a. When bond not required. "When two or more persons are appointed executors, none shall intermeddle or act as such but those who give bond as before prescribed; except that when, by the terms of a last will, the testator expresses a wish that his executor may execute it without giving bond, the court admitting it to probate, at its discretion may grant letters testamentary, with or without bond; and when granted without bond, at any later period, upon the application of a party interested, may require bond to be given, and on default in giving it the executor may be removed." [R. S. § 5996.][63*]

[62b] *In re* Seasongood, 37 O. C. C. 200; 25 O. C. C. (N.S.) 369.

[62c] § 10605 G. C. · § 71.

[63] § 10606 G. C.

[63*] § 10607 G. C.

An order for a bond must comply with this section. *In re* Willson, 14 N. P. 443.

The bond must be in such a sum as the Court may direct, usually double the amount of the assets to be administered, and must be signed by two securities required by law to be inhabitants of the State; and usually required by the rules of the court to be freeholders and resident of the county. Valid letters testamentary cannot be granted until satisfactory bond is given.[64]

§ 84. Form of executor's bond.

Know all Men by these Presents, That we,..... and.....are held and firmly bound to the State of Ohio, in the penal sum of..... Dollars, to the payment of which sum, well and trly to be made, we do bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Signed by us and dated at.....Ohio, this..... day of....., in the year one thousand nine hundred and.....

The Condition of the above Obligation is such, That if the above bound .....Execut.....of the last Will and Testament of.....deceased late of ....., in the County of.....aforesaid:

First, Shall make and return to the Probate Court, within and for said County, on oath within thirty days, a true inventory of all the moneys, goods, chattels, rights and credits of the Testa.....which are by law to be administered, and which shall have come to ..h.... possession or knowledge; and, also, if required by said Court, an inventory of the real estate of the deceased;

Second, Shall administer, according to law, and the Will of the Testat....., all h.... goods, chattels, rights and credits, and the proceeds of all h.... real estate that may be sold for the payment of h.... debts or legacies, which shall at any time come to ..h.... possession, or to the possession of any other person for ..h....; and,

Third, Shall render, upon oath, a just and true account of ..h.... administration, within twelve months, and at any other times when required by said Court or the law; and failing so to do for thirty days after ..he.... shall have been notified of the expiration of the time by the

64 See § 233 *et seq.* on bonds.
See § 280 *et seq.* on inventory.
See § 506 *et seq.* Care and management.
See § 702 *et seq.* Accounting.
The matter of requiring a bond rests with the discretion of the court even where the will desires the same to be omitted. *In re* Willson, 14 N. P. 44.
A party "interested" is any one who has any right in the property to be administered. *Id.*

Probate Judge, ..he.... shall receive no allowance for services, unless the Court shall enter upon its journal that such delay was necessary and reasonable;

Then this obligation to be void; otherwise to remain in full force and virtue in law.

EXECUTED IN PRESENCE OF .....

This bond approved in open Court, this....day of.....A. D. 19....

....Probate Judge.

§ 85. When bond need not be given.

Statute provides that when the will expressly provides that the executor may be excused from giving bond that the letters may be issued without such bond. If the Court deems the same *expedient,* bond may be omitted. It may be difficult to say just what circumstances ought to exist to induce the Court to dispense with the bond. It seems to be left in the sole discretion of the Court. An Appellate Court would not interfere with this discretion unless it be plainly in conflict with the letter and spirit of the law.[65] I think, however, it may be stated that it is a general rule among Probate Judges that where any party in interest demands that the bond be given that it will then be required, otherwise the directions of the testator will be followed; and the Court should, if it has any reason to suspect the integrity, the mental capacity or financial ability of the executor, protect the estate and interest of all concerned by requiring such bond.[66]

It would seem from the wording of § 10607 G. C.; § 83, that only the court admitting the will to probate may dispense with the bond, and that if an application be made in a court other than that which admitted the will to probate, the general provision of the statute must be complied with and the bond given.[67]

§ 86. **Separate bonds.** "When two or more persons are appointed executors, administrators, or testamentary trustees, the court may take a separate bond, with sureties from each,

[65] Woerner on Admin. 544.

[66] See chapt. 16, § 243. New bonds.

[67] See §§ 1310, 1333 Gdns.

or a joint bond, with sureties from all of them together. In all bonds with sureties, given by executors, administrators, or trustees, all the sureties must be inhabitants of this state, and such as the court approves. The bonds shall be filed in the court taking them." [R. S. § 5999.][68]

If the executors, administrators or testamentary trustees so desire, it is a general practice to allow each of them to make a separate bond. But where there is no request of that kind it is usual to make a joint bond. The general form of bond hereinbefore given will answer the purpose of a separate or joint bond — it being treated as a separate one if executed by one and a joint bond if executed by all.[69]

§ 87. Form of executor's letters.

The State of Ohio,.....County, ss.

I,.....Judge of the Probate Court within and for said County, in the name and by the authority of the State of Ohio, do by these presents MAKE KNOWN that in said Probate Court at.....on the..... day of.....one thousand nine hundred and..... the last will and testament of..... late of.....in said Count, deceased (a copy of which is hereto annexed) was duly proved and allowed, by said Court, and that the administration of all and singular the Goods, Chattels, Rights and Credits of the said deceased any way concerning..... .....last Will and Testament was committed to..... .....in the County aforesaid, the Execut..... in the said Will and Testament named: and the said Execut.....shall:

First, Make and return to the Court, on oath, within thirty days, a true inventory of all the Moneys, Goods, Chattels, Rights and Credits of the Testa....., which are by law to be administered, and which shall have come to.....possession or knowledge, and have the same appraised by ....three suitable disinterested persons, and also, if required by the Court, an inventory of the real estate of the deceased.

Second, Shall administer according to law and the will and the Testa.....all.....Goods, Chattels, Rights and Credits, and the proceeds of all.....Real Estate that may be sold for the payment of .....debts or legacies, which shall at any time come to..... possession, or to the possession of any other person for.....; and

[68] § 10611 G. C.

[69] See chapt. 13, § 201, Co. Admin. See § 1264, Testamentary trustees. A person who is eligible may be legally appointed, although no letters are issued if the proper order is made in the journal. Fields vs. Block, 4 C. C. (N.S.) 216; 20 O. C. C. 113.

Third, Shall render, upon oath, a just and true account of..... administration within twelve months, and at any other times when required by said Probate Court or the law; and failing so to do, for 30 days after he shall have been notified by the expiration of the time, by the Probate Judge, he shall receive no allowance for services, unless the Court shall enter upon its journal that such delay was necessary and reasonable.

And we hereby appoint the said.....
.....Execut.....of all and singular the said Goods, Chattels, Rights and Credits which were of the said.....
.....deceased.

In testimony whereof, I have hereunto affixed the Seal of said Court at.....
.....in said County, this.....day of.....190...
.....Probate Judge.

§ 88. The order of appointment.

The order should designate the person and the estate over which he is appointed. An order granting letters on one estate out of a number, without stating which one, applies to none, and is void.[70]

An order providing that " A. be and hereby is appointed administrator on giving proper bond," fixing the amount of the bond (and the surety) is an absolute and not a conditional grant if the bond be filed on the same day [71] or before revoked. An order granting letters is an adjudication that all the facts existed which were necessary to give the court jurisdiction, and that all steps had been taken that were necessary to the issuance of the letters.[72]

The fact that the appointment is made hurriedly does not render it void,[73] even if made on the day of the death of the decedent.[74]

§ 89. Form of entry.

APPROVAL OF BOND AND GRANTING LETTERS.

This day came A. B. and filed his application to be appointed executor under the will of C. D., and at the same time filed his bond in sum of

[70] Harwood vs. Wylie, 70 Tex. 538; S. C., 7 S. W. Rep. 789.

[71] Tucker vs. Harris, 13 Ga. 1; Haskins vs. Miller, 2 Dev. L. 360.

[72] In re Griffith's Estate, 84 Cal. 107; S. C., 23 Pac. Rep. 528; 24 Pac. Rep 381.

[73] Bowen vs. Stewart, 128 Ind. 507.

[74] In re Comfort's Estate, 12 Pa. Co. Ct. Rep. 571.

.....Dollars with E. F. and G. H., sureties thereon. Whereupon the Court finds that the allegations of the said application are true, and that the bond is sufficient according to law and the same is hereby approved, and it is ordered that letters testamentary be granted to A. B.; and that H. I., J. K. and L. M. be appointed appraisers.[75]

§ 90. Effect of order.

The Probate Courts of this State being courts of record and competent to decide on their own jurisdiction, and exercise it to final judgment, their records import absolute verity.[76]

And therefore an order made of an appointment of an executor or administrator cannot be attacked collaterally.[76*] No evidence can be adduced showing anything contrary to the record. It will conclusively be presumed in all collateral proceedings that the order was made upon full proof of all the facts necessary to authorize it; and letters issued under the seal of the court are conclusive evidence of the authority of the executor to act. If any attack is to be made upon the order of the Court it must be made in a direct proceeding in the court in which the order itself was made.[77]

[75] If real estate is to be appraised, in view of the statute which requires appraisers of real estate to be freeholders, while, perhaps not absolutely essential, it will follow the spirit of the law if the appraisers be freeholders; and where real estate is expected to be appraised, the following should be added to the above entry. "And it is ordered that said executor include an inventory and appraisement of all real estate of said decease."

[76] Ry. Co. vs. Village of Belle Center, 48 O. S. 273; Astram vs. Ten Eck, 28 Bull. 265.

[76*] T. & O. C. Ry. vs. Beard, 20 C. C. 681.

[77] See § 208 et seq. on resignation and removal. See § 1558, assignments.

All questions necessarily arising in the case becomes *res adjudicata* by the final order of appointment, which binds all the world until set aside or reversed by a direct proceeding for that purpose. Schroyer vs. Richmond, 16 O. S. 455.

But the jurisdiction of the court is a matter into which inquiry may be made even in collateral proceedings where the record contains no finding of fact expressly showing jurisdiction. Scobey vs. Gano, 35 O. S. 550.

An inquiry into the truth or falsity of statements made to the court, is not a collateral attack upon the findings of the court, and a decree of court cannot estop a person from asserting that in procuring the decree a false statement was made, or perjury committed, that statement inducing a wrong finding. Commercial Gaz. Co. vs. Dean, 25 Bull. 251.

An order of the Probate Court, appointing an executor, if made without jurisdiction, is void, and it may be disregarded in any other court, but if made in the exercise of proper jurisdiction over the sub-

§ 91. How the order may be attacked.

The order of appointment may be attacked in the same manner as judgments of courts of general jurisdiction are; and for cause may be set aside or vacated. No appeal will lie from the order of the Probate Court making an appointment of an executor or administrator or guardian.[77a] If the order is to be set aside in a higher court it must be by proceedings in error.[78]

§ 92. Renunciation.

Renunciation is a declination of an executor to accept the trust. If he so desires he may do so voluntarily; if he neither takes nor declines the court may under sec. 10612 G. C. (§ 100), issue a citation for him to appear, either to take or decline; if he refuses to take, it will be held that he declines. It is very common practice for him to file a paper declining to serve. After letters have been granted and he has qualified as executor, he cannot renounce the appointment made in the will; he must then resign if he does not desire to administer the trust.[79]

And if he renounces the office he may retract such renunciation, provided no administrator has been appointed previous to his retraction.[80]

An agreement made with persons in interest before a testator's death and contrary to his expressed wishes by one named as executor, to renounce the executorship for a stated consideration, is contrary to public policy and void. In general, any agreement for a consideration to renounce an executorship is illegal, and a court of equity will refuse to enforce it.[81]

§ 93. Administration during the minority of an executor. "When a person appointed executor is under the age of twenty-one years at the time of proving the will, administration may be granted with the will annexed, during his mi-

ject-matter and estate, although based upon erroneous conclusions of law and fact, it can not be collaterally attacked. Bank vs. Telegraph Co., 79 O. S. 89.

77a This view is sustained by the recent case of Luburg vs. Luburg, 13 O. App. (1920). Appeal may be had from appointments of guardians for idiots, lunatics, improvidents, etc.

78 Can not be attacked collaterally. T. & O. C. R. vs. Beard, 20 C. C. 681.

Any person having a right to be heard in the Probate Court, may have an adverse judgment reviewed on error. McCallip vs. Sharp, 13 Dec. 650; affirmed, 69 O. S. 650; Miller vs. Miller, 36 O. C. C. 195, 19 O. C. C. (N.S.) 203.

79 Goods of Veiga, 32 L. J. P. 9.

80 Robertson vs. McGeoch, 11 Paige 640; Taylor vs. Tibbats, 13 B. Mon. 177; Casey vs. Gardiner, 4 Bradf. 13; Davis vs. Inscoe, 84 N. C. 396; Harrison vs. Harrison, 4 Notes Cas. 434. See § 119.

81 Sch. on Executor, § 48.

nority, unless there be another executor who will accept the trust, in which case the estate shall be administered by him until the minor arrives at full age, when he may be admitted as executor with the former, upon giving bond as before provided." [R. S. § 6001.][82]

It will be observed that this section only applies to where the person named in the will as executor is under the age of twenty-one years. There is in Ohio no such thing as an administrator to act while a person entitled to letters of administration is under age. The law favors the rapid settlement of estates; and even under this provision, if the estate can be settled in the ordinary time or by a provision of the will, before the person named as executor arrives at the age of maturity, it should be done; and it is only where the proper administration of the estate will require it to be prolonged until the minor arrives of age that he should be permitted to exercise his trust. The person appointed such administrator is governed by the law generally applicable to the administrations of estate.[83]

§ 94. An executor of an executor can not administer the trust of first testator. "The executor of an executor has no authority, as such, to administer the estate of the first testator. On the death of the sole or surviving executor of a last will, administration of the estate of the first testator, not already administered, may be granted, with the will annexed, to such person as the court deems fit to appoint." [R. S. § 6003.][84]

This section abrogates the common law rule, for it was according to the common law doctrine that an executor of an executor, how far soever in decree remote, stands as to the points

[82] § 10613 G. C.

[83] Administrators during minority are said to possess all the authority, for the time being, of general administrators, whatever may have been the prevailing opinion in earlier times; their acts are binding upon the estate, and when their office has expired by reason of the majority of the executor or administrator in his own right, they are liable to creditors for *devastavit*, but only to the executor or administrator for the assets; and if he has only administered and turned over the surplus, he may show this und r the plea of *plene administravit* in defense of a suit by creditors. Woerner on Admin. 404.

[84] § 10615 G. C.

An administrator with the will annexed means here the same as an administrator under § 10617 G. C. Seasongood vs. Seasongood, 23 O. C. C. (N.S.) 369.

If two are named and one dies the other should be appointed. *In re* Marsh, 50 Bull. 5.

both of being, having and doing in the same state and plight, as the first and immediate executor.[85]

When the executor dies then all his powers, or any one through him, so far as administration of the estate is concerned, ceases. The only thing the executor of the deceased executor can do, and that which he must do, is to file an account of the deceased executor's trust within six months after the date of the appointment of the executor or administrator of such deceased executor.[86] And for the purpose of compelling such accounting the court has the same power over the executor or administrator of the deceased executor or administrator as is had over the executor or administrator during his lifetime.[87]

§ 95. The power of executors and administrators during the contest of a will. "When a will is contested, the executor, or the administrator de bonis non, with the will annexed, or the testamentary trustee during the contest may control all the real estate not specifically devised, included in the will, and all the personal estate of the testator, not before such contest duly administered; collect the debts, and convert all assets into money, except such as are specifically bequeathed; pay all taxes on such real and personal property, and all debts according to law; if necessary to preserve the real property from waste, repair buildings and other improvements; insure them, upon an order therefor first obtained from the court having jurisdiction of such executor, administrator, or testamentary trustee, and for such repairs, taxes and insurance, advance or borrow money on the credit of such estate, which shall be a charge thereon. They also may receive and receipt for a distributive share of an estate or trust to which such testator would have been entitled, if living. The probate court may require such additional bonds as from time to time seems proper." [R. S. § 6019a.][88]

[85] Williams Ex. 959.

The reason given by Blackstone is, "for the power of the executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another in whom he has equal confidence. 2 Bl. Conn. 506.

While breaking the will may be sufficient cause for the Probate Court to remove the administrator. *In re* Schonacker, 58 Bull. 78, yet the Court of Common Pleas cannot declare it at an end. Sanker vs. Mattison, 11 C. D. 125; 20 O. C. C. 229.

[86] See §§ 10820-21 G. C.; § 707.

[87] See § 707, Admin. of deceased must file acct.

[88] § 10633 G. C. See § 10635 G. C. § 159, as to legality of sales made,

§ 96. Contest of will. May borrow money, etc.

Substantially by virtue of the provisions of this section the functions of the administrator as to the distribution of the estate are suspended. He has power to proceed to collect the debts and to convert all the assets into money, except such as are specifically bequeathed. Likewise he is to have control of the real estate included in the will, but not specifically devised; if specifically devised, it would be under the control of the legatee. Likewise, if not at all devised, it would be under the control of the heirs, unless an application would be made by the executor or administrator to sell the real estate to pay debts. For a contest of the will, will not suspend the right of an executor to file a petition to sell real estate to pay debts. As to the property under his control, both real and personal, he has the power to preserve the same; and whenever it is necessary to preserve the real estate from waste, or repair the buildings, he may insure the same, and may borrow money for that purpose. For it must be remembered that generally no administrator or executor can borrow money upon the responsibility of the estate; if he borrows money for a proper purpose he may credit himself with it in his account, but it is done upon his own responsibility. Even under this statute, if made a charge upon the estate, it must be done with the approbation of the Probate Court.[89] He can not sell real estate to make distribution.

An executor is not bound to assume the burden of the defense of a contest of the will by the heirs at law, but may properly throw the same upon the legatees or devisees.[90]

etc.,— if will is set aside, etc.— a new judgment setting aside the will does not revoke the order of appointment. Sanker vs. Mattison, 20 C. C. 229; 11 C. D. 125.

[89] As to borrowing money. See Smith vs. Hayward (aff. 45 Bull. 228) 5 N. P. 501; S. C., 5 Dec. 462; Welsh vs. Perkins, 5 O. 52.

[90] Andrews' Ex'rs vs. His Adm'rs, 7 O. S. 143; In matter of Estate of Jacob Seegar, 1 Dec. 113; 7 N. P. 208; *In re* Estate of Daniel Laws, 18 Bull. 198; 17 Bull. 80.

The Court of Common Pleas cannot appoint a receiver of real estate specifically devised in an action to contest a will devising the same. Burgess vs. Sullivan, 2 N. P. (N.S) 327; 14 Dec. 712.

As soon as a will is probated the devisee is entitled to control the same. This case does not decide that there might not be a receiver, but the mere fact of a contest will not be sufficient—no receiver can be appointed afterward.

§ 97. Application to repair buildings and borrow money.

This application is made in the discretion of the Probate Court, and while it may be granted without any notice to any interested party, yet where the sum is considerable, it should not be granted without notice to such parties. The application may be in the following form:

(*Title.*)

A. B. represents to the Court, that on the.....day of....., he was appointed executor under the will of C. D., that afterwards, on the.....day of....., a petition was filed in the Court of Common Pleas of.....county, by E. F. to contest said will, which said suit is still pending. Your petitioner further represents, that under the will of the said deceased, certain real estate (here described the same), came into his possession. That said buildings on said property are in a very bad condition, and badly in need of repairs. Likewise they should be kept insured, and that he has no money in his hands, that can be applied for that purpose. He represents, that it will require for repairs (here insert what it is proposed to be done), which will cost about .....dollars; and that insurance and taxes thereon will amount to.....dollars; therefore he asks that he may have authority to borrow the sum of.....dollars, to pay such taxes and insurances on said property, and make needed repairs thereon.

.....sign.

A. B. being duly sworn, says the allegations in the above application are true.

.....

§ 98. Form of entry.

This day this cause came on to be heard, upon the application of A. B., executor of C. D., for permission to borrow money to pay taxes, costs of insurance, and make certain repairs on the real estate, devised under the will of said C. D.; and it appearing to the Court that it is proper and necessary for a preservation of said estate that said expenditure be made, and that the amount asked for, is reasonable, and that such expenditure will be for the benefit of said estate. Wherefore authority is hereby granted to said A. B. to borrow the said sum of.....dollars, to bear interest not exceeding.....% and payable within .....months from this date; and the sum will be a charge upon the assets belonging to said estate.

CHAPTER VI.

ADMINISTRATOR WITH THE WILL ANNEXED.

§ 99 Definition.
§ 100 If executor renounces, etc., administration to be granted.
§ 101 Citation of executor.
§ 102 Entry ordering issue of citation.
§ 103 Form of citation to take or renounce administration.
§ 104 If executor does not qualify. Application, etc.
§ 105 Bond of administrator with the will annexed.
§ 106 Powers and duties — Personal trust.
§ 107 Estate directed or devised to be sold by executors, etc., failure of executors to act, who may sell.

§ 99. Definition.

Whenever the person designated in the will declines to serve, or where there is a will without designating any person as executor, the person appointed by the court to administer the estate is known in law as an administrator with the will annexed. Like an administrator, he receives his sole authority to act from the court making the appointment. But like an executor, he administers the estate in accordance with the directions of the will. His duties are therefore more closely allied to those of an executor than an administrator. When it is proper to make such an appointment is provided for in the following section:[a]

§ 100. If executor renounces, etc., administration to be granted. "If a person named as executor in the will of a decedent refuses to accept the trust, or, if after being duly cited for that purpose, neglects to appear and accept, or if he neglects for twenty days after probate of the will to give bond, as before prescribed, the court shall grant letters testamentary to the other executor, if there be any capable and willing to accept the trust, and if there is no such other executor named in the will, commit administration of the estate, with the will an-

[a] When a will is contested and broken the duties of an administrator with the will annexed ceases. *In re* Schonaker, 55 Bull. 78.

See § 161, as to the appointment of an administrator to act jointly with an executor.

nexed, to such person as would be entitled thereto if the deceased had died intestate." [R. S. § 6000.][1]

§ 101. Citation of executor.

If the person named in the will fails to accept within twenty days after probate of a will he must be cited to appear before the court, and either accept or decline. This citation may be issued on the court's own motion, but it would be more regular if some interested party would appear and file an application for the issue of such citation. The application may be in the following form:

(Title.)

The undersigned respectfully represents that he is interested in the estate of C. D., deceased, as....., that the will of the said C. D. was duly probated in Probate Court, of.....County, Ohio, on.....day of:.....190..., and that A. B. was named in said will as executor thereof. That twenty days time has elapsed since the said will was probated and the said A. B. has neglected to give bond and qualify as such executor. Wherefore the undersigned asks that he be cited by the Court to appear on a day to be named and accept or decline said trust.

.....sign

State of Ohio, ...County. ss.

The undersigned being duly sworn, says the facts stated in the foregoing application are true.

.....[2]

§ 102. Entry ordering issue of citation.

This day came.....and filed herein his application for an issue of the citation against....., who is named in the will of.....as executor therein; and has failed to accept said trust as required by law, and said cause is set for hearing on .....day of....., at.....o'clock, and it is ordered that a writ of citation be issued, directing the said..... .....to appear in this court on or before that day, and accept or decline said trust.

1 § 10612 G. C.

2 See § 1328, choice of Gdn.; § 1257, Trustees.

Where A and B were named joint executors. A refused to serve, the Probate Court must appoint B, if he is not mentally or physically disqualified. *In re* Sells, 5 N. P. 629, 52 B. 610.

§ 103. Form of citation to take or renounce administration.

Probate Court.....County, Ohio.

In the Matter of
the estate of
.....
Deceased.
No.....
Appointment of.....
CITATION.

To .....
of.....Deceased.

You are hereby cited to appear before the Probate Court within and for said County, at the Court House, in..... on or before the.....day of.....A. D. 190..., at..... o'clock.....M., and make known your intention to take or renounce the administration of the estate of said decedent, or the administration will then and there be committed to some other suitable person.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at .....this.....day of.....190....

.....
Probate Judge.[3]

§ 104. If executor does not qualify, application, etc.

If on the day set for hearing the executor appears and chooses to accept, he will be required to make application, as provided in the previous chapter. If he does not appear or declines to accept, and there is another person mentioned in the will as executor, then such other person shall be qualified as sole executor. If there is no other person mentioned in the will then the application for an appointment of an administrator with the will annexed should be made; and the form of this application would be similar to that used by an executor, and in addition should state that the executor has declined, etc. If the executor has made a written declination it should be attached to the application; and the party appointed would be required to give bond with similar conditions as those of an executor.[4] The persons entitled to such administration are to

[3] See § 1328.

[4] See next section.

When two persons are named in a will and one of said persons is deceased before the testator the court will appoint the survivor as sole executor and will not associate another person with him, unless for good reasons it is necessary so to do. It may be doubtful, unless all concerned agree, whether the court has a right so to do. *In re* Marsh, 50 Bull. 5.

See § 162.

be preferred in the order provided for in § 10617 G. C.[5] for the appointment of an administrator. In some States it is held that the legatees under the will are entitled to be appointed administrators with the will annexed. But such is not the law in Ohio. The entry providing for the appointment of an administrator with the will annexed should state the fact that the executor has declined or has been cited and refused to accept.[6]

§ 105. Bond of administrator with the will annexed. "Every person who is appointed administrator with the will annexed, before entering on the execution of his trust, must give bond in like manner and with like conditions as required of an executor." [R. S. § 6002.][7]

§ 106. Powers and duties. Personal trust.

It is provided by the Code in New York that where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed, and the administrator with such will annexed will have the rights, powers and are subject to the same duties as if they had been named executor in the will." While there is no statute similar to the above in our State, yet it very properly expresses the duties of such an administrator. While there is little doubt but what the above rule is the true one, the difficulty occurs in its application where the duties and trusts placed upon the original executor are not such as are usually needed in the administration of an estate.[8]

[5] Chapt. 7, Letters of Admin, § 114.

[6] Thompson vs. Meek, 7 Leigh. 419; Robertson vs. McGeoch, 11 Paige 640; DePeyster vs. Clendening, 8 Paige 295; Newton vs. Cocke, 10 Ark. 169.

[7] § 10614 G. C.

[8] "The debate has turned mainly upon the inquiry what were the distinctive duties of an executor as such, and when they were to be regarded as not appertaining to his office, but as personal to the trustee. Where the will gives a power to the donee in a capacity distinctively different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor; and where the power granted or the duty involved imply a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such case the power and duty are not those of ex-

An executor is always a trustee for the personal estate for those interested under the will.[9] It may be said that where the trust is a personal one, that is, one that is especially reposed in the executor, that it does not follow and vest in the administrator with the will annexed. This question is very ably discussed by a learned author, who deduces the following conclusion:

"The general rule, then, may be stated to be that where the provision defining the trust, when considered separately or in connection with the rest of the will, is imperative,[9*] or evidences no intention on the part of the testator of reposing any such special or personal confidence or discretion in the executors as would dissociate the trust confided to them from their office as executors, or prevent them from fully administering it, an administrator with the will annexed will be entitled to complete the execution of the trust.[10]

§ 107. Estate directed or devised to be sold by executors, etc., failure of executors to act, who may sell. "When a last will and testament is admitted to probate, or a will made out of this state is admitted to record as hereinbefore provided, and lands, tenements, or hereditaments are given or devised by such will to the executors therein named, or any of them, to be sold or conveyed, or such estate thereby is ordered to be sold by such executors, or any of them, and one or more of the executors so named dies, refuses to act, or neglects to take

ecutors, *virtute officii* and do not pass to the administrator with the will annexed. But outside of such cases the instances are numerous in which by the operation of a power in trust, authority over the real estate is given to the executor as such and the better to enable him to perform the requirements of the will." Jessup's Sur. Prac. 556; Wager vs. Wager, 89 N. Y. 161; DePeyster vs. Clendenning, 8 Paige 295; Conklin vs. Egerton, 21 Wend. 430; 25 Id. 224; Roome vs. Philips, 27 N. Y. 357; Bain vs. Matteson, 54 N. Y. 663; Bingham vs. Jones, 25 Hun 6; Pratt vs. Stewart, 49 Conn. 339.

[9] Wager vs. Wager, 89 N. Y. 161.

[9*] Clifford vs. Morrell, 22 App. Div. 470.

[10] Jessup's Sur. Prac. 557; Matter of Post, 9 N. Y. Supp. 449; Opinion of Ransom, Surr., Jessup's Sur. Prac. 558; Hood vs. Hood, 85 N. Y. 561, 571; Mott vs. Ackerman, 92 N. Y. 539; Bain vs. Matteson, 54 N. Y. 663; Matter of Clark, 5 Redf. 466. See § 1265 et seq., Surviving Trustee, etc.

upon himself the execution of the will, then all sales and conveyances of such estate by the executor or executors who took upon himself or themselves in this state the execution of the will, or the survivor or survivors of them, shall be as valid as if the residue of the executors had joined in the sale and conveyance. But if none of the executors named in such will take upon themselves its execution, or if all the executors who take out letters testamentary, die, resign, or are removed before the sale and conveyance of such estate, or die, resign or are removed after the sale and before the conveyance is made, the sale or conveyance or both shall be made by the administrator with the will annexed." [R. S. § 5980.][11]

In construing these statutes it is held that they confer upon the administrator with the will annexed all powers given to the executor for the purpose of paying debts or legacies or both, and especially when there is an equitable conversion of land into money for the purpose of such payment or distribution, and where the power of sale is imperative and does not grow out of a personal discretion confided to the individual; but no discretionary trust or power conferred upon the executor, or for a special purpose collateral to the ordinary duties of an executor or administrator, or indicating a special confidence reposed in the individual.[12]

11 § 10590 G. C.

12 Woerner on Admin. 724.

When the will names two executors and only one qualifies, he may sell real estate. Taylor vs. Galloway, 1 O. 117.

See Fleishman vs. Shoemaker, 2 C. C. 152; Williams vs. Beach, 17 O. 171; Mitchell vs. Dunlap, 10 O. 117.

CHAPTER VII.

LETTERS OF ADMINISTRATION.

§ 108 Definition, etc.
§ 109 Death of party.
§ 110 Who is an intestate.
§ 111 When and where application should be made.
§ 112 Application, etc.
§ 113 Form of application for letters of administration.
§ 114 To whom letters of administration shall be granted.
§ 115 Who are capable of being appointed.
§ 116 Residence of administrator.
§ 117 Order of priority among those entitled.
§ 118 When entitled in the same degree.
§ 119 Renunciation, waiver, etc.
§ 120 Husband and widow.
§ 121 The next of kin.
§ 122 The creditor.
§ 123 To such person as the Court may see fit.
§ 124 Must give bond, etc.
§ 125 Form of administrator's bond.
§ 126 Granting letters.
§ 127 Form of administrator's letters.

§ 108. Definition, etc.

An administrator is a person appointed by the Probate Court to administer the estate of a person who dies intestate. The important distinction under the laws of our State between executor and administrator is in the duties pertaining to the administration of an estate. Where not contrary to law, and the provisions of the will cover the matter of a settlement of the testator's estate, an executor must follow the directions of the will. And the authority of an administrator is measured by the law of the forum of his appointment, while the executor not only has those powers, but other and greater powers conferred by the will. Or the will may circumscribe or restrain the powers which the law confers on the administrator, so long as it is not repugnant to the law of the forum.[1]

As an administrator derives his authority solely from the court, as a general rule it has been said that his title to the property of the deceased vests from the time of his appointment. Yet for particular purposes it relates back to the death of the

[1] Saunderson vs. Stearns, 6 Mass. 37; Scott vs. West, 63 Wis. 529.

intestate, and allows the administrator to recover for injuries to the estate of the intestate which occurred before his appointment. And therefore the heirs have no right before the appointment of an administrator to bind the personal estate by an agreement.[2]

§ 109 Death of party.

The most important and essential point in appointing a person to administer an estate is that the party formerly owning the estate is dead. This means extinction of life, not what is known as a civil death; and while some very few cases hold to the contrary, the great weight of authority is that there can be no valid administration of the estate of a living person . If letters are granted upon such an estate they are absolutely void; and all action thereunder is invalid. It is therefore highly important that indisputable proof be offered to the court making the appointment of the death of a party. Where the proof is only such that may arise from unexplained absence for at least seven years it might be proper, together with other circumstances attending the case, to warrant the court in making the appointment. But the person accepting such appointment would do so at great risk, as well as the person dealing with such an administrator. Some States provide by statute that an unexplained absence for a certain number of years is conclusive proof of a party's death, for the purpose of administering upon his estate. It seems to me that such a law is a wise one, for usually the unexplained absence of a person for seven years is the fault of the absentee, and property ought not to be tied up in an uncertain manner for an indefinite time.[3]

Where the testator's death is controverted, or is not stated in the petition for probate, on positive personal knowledge, the burden of proving it is upon the proponent.[4]

[2] 1 Woerner on Admin. 383, 385; § 69, Distinction between Extr,; § 1251, Distinction between Test. Tr.

[3] 1 Woerner on Admin. 444, 449; Sch. Extr., 55.

[4] Prout vs. McNab, 6 Dem. 152.

A person in the penitentiary for life is not civilly dead.

The presumption of death arising from absence of seven years is but a *prima facie* presumption and may be rebutted, and one so absent is not thereby estopped from claiming his rights in property. Oglesby vs. Rose, 21 Dec. 291.

See Curry vs. Pierrot, 12 O. App. 506, where it was held that a presumption of death was not shown from the facts.

If the fact can only be imperfectly proved, circumstances must be shown sufficient to raise a legal presumption of death. It is necessarily impossible to give any standard by which to measure the sufficiency of circumstantial evidence of death; mere information and belief, founded on nothing, is of course not proof in any legal sense.[5]

It is not necessary, speaking generally, that any specific period of time should elapse to create the presumption of death, but it may arise whenever the facts of the case will warrant.[6]

§ 110. Who is an intestate?

An intestate is a person who dies without leaving any valid will to dispose of his real or personal property. A person may die intestate, first, as one who has never made a will; second, one who has made a will but revoked it validly prior to his death; third, one who has made a will defectively, executed so as not to be entitled to probate under our statute. So a man may leave a valid will to pass personal property, but not real estate. He will then be intestate as to real property, but testate as to personal.

There is no presumption that the deceased left a will.[7] But it should be proven to the satisfaction of the court making the appointment that there is no will, and for this purpose the

[5] Roderigas vs. East River Savings Bank, 76 N. Y. 316.

[6] In the matter of Nolting (43 Hun 456), it appeared that the alleged decedent had left his home under the depression following an attack of delirium tremens, declaring his intention to commit suicide, and had gone toward the river; that thereafter he had not been heard from for more than 10 years, although previously he had communicated regularly with his relatives. Held that, from his silent absence during 10 years, the law would raise a presumption of his death, which, coupled with the facts and circumstances produced to the surrogate, was sufficient to justify the issuing of letters of administration, and that the surrogate erred in refusing to do so. Redf. Sur. Prac. 153.

The fact that a passenger on an ocean vessel was last seen about 10 o'clock at night, when the steamer was in mid ocean, and was never seen or heard of afterwards, though diligent search was made, is sufficient to justify a finding that he is dead. Travelers Ins. Co. vs. Rosch, 23 C. C. 491.

[7] Stokesberry vs. Reynolds, 57 Ind. 425.

testimony of witnesses may be heard. If it appear that there has been a will, although it may be claimed that the will was revoked, or that it is invalid, the court ought not to grant administration until the fact is determined whether or not the will is still existing.[8] A special administrator might be appointed as provided by § 10619 G. C.[9]

§ 111. When and where application should be made.

There is no designated time in which a person entitled to be appointed administrator of an estate should apply for such authority. The application must be made within a reasonable time, depending upon the circumstances of each case. It has been held that eighteen days was not an unreasonable time for a person living in an adjoining county to make an application.[10]

In the State of Indiana it is provided by statute [12] that if the person who is entitled to administration does not qualify within twenty days from the time of the decedent's death that letters may be granted to the next of kin or such other persons as may be entitled thereto. In the State of New York it is said [13] that no administration can be granted other than to the person entitled thereto, unless they renounce their right in writing, or they be cited, if residents of the State, and to appear and take or decline to take. While such might not be the law in Ohio, yet it surely would be good practice, and no letters ought to be granted until those entitled thereto have renounced their right, unless a very considerable time has elapsed. The same rule which applies to the granting of letters testamentary, so far as the same relate to the court in which the same are granted, applies to the granting of letters of administration, and therefore whatever was said under that subject will apply here.[14] The jurisdiction of the court attaches from the time of filing the ap-

[8] *In re* Taggart's Estate, 16 N. Y. Supp. 514.

[9] See chapt. 8 on Special Administration, § 129.

[10] Todhunter vs. Stewart, 39 O. S. 181.

[12] § 2227 (1881); § 2380 (1894).

[13] Jessup's Sur. Prac. 62.

[14] § 72 Application for Extr.

The laws of Ohio are applicable to estates of deceased inmates of the National Soldiers' Home near Dayton, Ohio. Howell vs. Soldiers' Home, 8 O. L. R. 121.

plication, and the subsequent appointment by another court of the State is void.[15]

§ 112. Application, etc.

Whatever was said under the chapter of letters testamentary in reference to the importance of the application is true here, and in addition the application should state the time of the death of the party, and that there is no existing will. If the application is filed by a person other than the one who is entitled to the letters it should be stated that such a person has declined to serve. If none of the parties who are entitled to qualify appear within a reasonable time a citation should be issued, requiring them to appear in the court and accept or decline.[16]

§ 113. Form of application for letters of administration.

The State of Ohio,
.....County, ss.
IN PROBATE COURT.

.....being duly sworn, says that .....a resident of the Township of..... in said County, died on or about the.....day of..... A. D. 190..., and that there is not, to the knowledge of this affiant, any last Will and Testament of said decedent; that said decedent left..... .....h....widow....., whose postoffice address is .....and the following persons, h....only heirs at law.

NAME.	DEGREE OF KINSHIP.	POSTOFFICE ADDRESS.
.....	.....	.....

That .....
above named are children of said decedent under 15 years of age at the time of said decease.

The undersigned, whose Post Office address is.....asks to be appointed Administrator of the estate of said decedent, and on h.... Oath aforesaid says: That the applicant was.....indebted to the deceased in the sum of - - - - - - - - - - $.....

The amount of personal property will be about - - $.....
And of real estate, about - - - - - - - - $.....
Total, - - - - - - - - - - - $.....

That the applicant is indebted to deceased in the sum of $———.

[15] *In re* Worthington, 4 Dec. 381.

[16] The form of application for a citation against an executor and the proceedings thereunder used in the preceding chapter, may be adopted for proceedings against a person entitled to administration.

If there are several of a class entitled to act, the court might appoint one of the class—but it would be better to notify all in the class before one of their number is appointed.

And offers a bond as administrator of said estate in the sum of $....., with.....whose post office address is .....Ohio, and..... whose post office address is.....Ohio, as sureties thereon.

Sworn to before me and signed in my presence this.....day of .....190....

.....Probate Judge.

DECLINATION.

The undersigned.....of the said decedent, hereby declines the administration of said estate and recommends the appointment of.....as administrator.

.....

§ 114. To whom letters of administration shall be granted. "Administration of the estate of an intestate shall be granted to persons hereinafter mentioned, residents of this state, in the following order:

"1. The husband or widow of the deceased;

"2. One or more of the next of kin of the deceased. The court may grant letters of administration jointly to the husband or widow and one or more of such next of kin, and upon failure of the person or persons so entitled to administer the estate voluntarily either to take or renounce such administration, if resident within the county, they must be cited by the court for that purpose;

"3. If the persons so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if without sufficient cause they neglect to take administration of the estate, the court shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust;

"4. If there be no such creditor, and the court is satisfied the estate exceeds the value of one hundred dollars, it shall commit administration to such other person as it deems fit. Letters of administration shall not be issued upon the estate of an intestate until the person to be appointed has made and filed an affidavit that there is not, to his knowledge, a last will and testament of such intestate. Before being appointed executor or administrator, every person shall make and file an application under oath, which must contain the names of husband or widow and all the next of kin of the deceased to such person known, their postoffice addresses if known, and also a statement in general terms as to what the estate con-

sists of and the probable value thereof, and also a statement of any indebtedness the deceased had against such person making said application." [R. S. § 6005; 101 v. 226.] [17]

§ 115. Who are capable of being appointed.

The administrator receives his authority from the court making the appointment, and in no sense rests upon the wishes of the deceased; therefore the rule as to who are competent to receive the trust is not so strict in the cases of granting letters of administration as in granting letters testamentary. If any of the causes which would justify his removal by the court after the appointment is made, exist against the applicant, he might be considered as being *evidently unsuitable* and the appointment refused him. The court has a wide discretion in this matter and should not appoint any one that it is satisfied will not be for the welfare of the estate.[18]

The court is not bound to appoint an unsuitable person.[19]

In one case it was held that the husband who has a claim against the estate antagonistic to the heirs and legatees, and that their existed animosity of feeling between him and the heirs, that he was an unsuitable person and was refused the appointment.[20]

In other States it has been held that a professional gambler is not competent.[21] Nor a habitual drunkard.[22] Nor an improvident man, if his fault is so great as to be likely to endanger the estate.[23] Nor intestate's mistress.[24] Nor a felon convicted in this State.[25] Nor an insolvent or bankrupt.[26]

[17] § 10617 G. C.

[18] For causes of removal, see chapt. on resignation and removal, § 208 *et seq.* Marriage is now no disqualification, § 10036 G. C.

[19] *In re* Dillers Application, 5 N. P. 255; S. C., 6 Dec. 182.

[20] *In re* Brennan, 5 N. P. 490; 5 Dec. 499.

[21] McMahan vs. Harrison, 6 N. Y. 443; S. C., 10 Barb. 659.

[22] Elmer vs. Keehle, 1 Redf. 472; Smith vs. Moore, 3 How. (Miss.) 40.

[23] *In re* Cutting, 5 Dem. 456; McGregor vs. McGregor, 3 Abb. App. Dec. 92.

[24] Plaisance's Estate, Myr. Prob. (Cal.) 117.

[25] O'Brien's Estate, 67 How. Pr. 503.

[26] Cornpropst's Appeal, 33 Pa. St. 537.

Where a treaty with a foreign country provides that consuls may be appointed administrators of the estates of citizens of the country they represent, dying in this country, when such consul is absent he may designate one to act. *In re* Steinger, 22 Dec. 88; 12 N. P. 107.

Under a treaty with Sweden it has been held that the appointment of a foreign consul was still in the discretion of the court. Pazano vs. Cerri, 93 O. S. 345.

The same under treaty with Italy. *In re* Costanso, 60 Bull. 413.

See also Cerri vs. Telephone, 219 Fed. 285; 13 O. L. R. 425; *In re* Toderello, 15 N. P. 593; *In re* Balboa, 16 N. P. 9.

But a poor man may be.[29] Nor a person having any interest adverse to the estate.[30] Nor a debtor to the estate.[31] Nor one hostile to one or more of the distributees.[32] Nor a surviving partner of the individual estate.[33]

Illiteracy, as a general rule, is not a disqualification.[34] Neither will eccentricities of character,[35] nor old age,[36] unless they are such as make them evidently unsuitable.[37]

§ 116. Residence of administrator.

It will be observed that no person who resides out of the State shall be appointed administrator. In all cases the appointee must at least be a resident of the State. The Probate Court in Hamilton County has a rule, which, if it has received the sanction of the Supreme Court,[38] and I presume it has, may be enforced, that a non-resident of the county will not be appointed either as executor or administrator or guardian.[39] This rule, while a salutary one, may work a hardship in some cases, and while it ought to be generally enforced, it would not be wise in all instances.

In re estate of Ulhorn it was held that the Probate Court is authorized to refuse to appoint a son of the deceased as administrator of the estate on the ground that he is a non-resident of

[29] Levan's Appeal, 112 Pa. St. 294.

[30] State vs. Reinhardt, 31 Mo. 95; Wright vs. Wright, 72 Ind. 149; Jones vs. Whitehead, 66 Ga. 290; Heron's Estate, 6 Phila. 87.

[31] Territory vs. Valdez, 1 N. Mex. 533. Pr.; Succession of Chaler, 39 La. Ann. 308.

[32] Bridgman vs. Bridgman, 30 W. Va. 212; Drew's Appeal, 56 N. H. 319; Moody vs. Moody, 29 Ga. 519.

[33] Brown's Estate, 11 Phila. 127; *In re* Garber's Estate, 74 Cal. 338; Heward vs. Slegel, 52 Ill. 336; Altemus' Estate, 32 La. Ann. 364; Cornell vs. Gallagher, 16 Cal. 367.

[34] Gregg vs. Welson, 24 Ind. 227; Wilkey's Appeal, 108 Pa. 567; Emerson vs. Bower's 14 N. Y. 449.

[35] McGregor vs. McGregor, 1 Keyes 133.

[36] Matter of Berrien, 3 Dem. 263.

[37] See 1 Woerner on Admin. 524. See § 1332, Gdns.; § 222, Incompetency.

Under the Federal Reserve Act a national bank may be permitted to act as administrator, etc. 63 Bull. 6.

See chapter 13a as to trust companies.

[38] § 1591 G. C.

The court, however, refused to follow it in the case of an executor named in the will. *In re* Seasongood, 27 O. C. C. 200; 23 O. C. C. (N.S.) 369.

[39] Rule 14, Goebel Rep. See § 1502; Gdns.

the State, and instead grant letters of administration to a creditor of the estate not of kin of the deceased.[40]

§ 117. Order of priority among those entitled.

The order of priority established by statute is as follows: First, to the husband or widow of the deceased or next of kin; second, to a creditor; third, where the estate exceeds the value of one hundred dollars, any person the court may think fit. The court must pursue the order prescribed by the statute if the persons preferred have the proper qualifications. It has no discretion to vary the order.[41] This, however, does not prevent the person so preferred from associating one not preferred with him, even over the protest of the next in degree entitled to the appointment.[42] And if an administrator has been appointed the court can associate the person preferred with the appointee.[43]

§ 118. When entitled in the same degree.

If there is but one person in the same class the Court will have no discretion, if such person is not incompetent or evidently unsuitable. But where there are a number of persons in the same class the Court may find considerable difficulty in selecting. In such cases the Court has an absolute discretion which will not be disturbed on appeal except for a very gross case of abuse.[44]

In some States even where persons are in the same class the law provides where one of such class shall have preference over

[40] 12 C. C. 765; 4 C. D. 526, § 74, as to what constitutes residence.

[41] Hayes vs. Hayes, 75 Ind. 395; Pendleton vs. Pendleton, 6 Sm. & M. 448; Muirhead vs. Muirhead, 6 Sm. & M. 451; Matter of Williams, 5 Dem. 292 (approved 44 Hun 67); Cook vs. Carr, 19 Md. 1; Wickwire vs. Chapman, 15 Barb. 302; Smith vs. Young, 5 Gill 197; *In re* Scanlon's Estate, 2 Pa. Dist. Rep. 742; Fox vs. Kiester, 6 N. P. 216; 8 Dec. 636.

[42] Shropshire vs. Withers, 5 J. J. Marsh 210; Quintard vs. Morgan, 4 Dem. 168.

[43] Read vs. Howe, 13 Ia. 50.

[44] Bowie vs. Bowie, 73 Md. 232; Wallis vs. Cooper, 123 Ind. 40; Succession of Boudreaux, 42 La. Ann. 296; State vs. Fowler, 108 Mo. 465.

the other. But in our State there is no such provision, and while resting in the absolute discretion of the Probate Judge, it will not be amiss to give some instances of the manner in which such discretion has been exercised.* In cases of conflicting claims, the applicant upon whom a majority of the parties in interest agree will generally be preferred.[45] But not, of course, unless the nominee belongs to the same class. Other things being precisely even, the scale may be inclined by the preference of an older over a younger person,[46] or of a male over a female,[47] and an unmarried over a married woman;[48] one accustomed to business over one inexperienced.[49]

It is said that the fact that an applicant had twice been a bankrupt militates against him to the preference of one who had not been bankrupt.[50] And so does the fact that one being next of kin is also a creditor.[51] Nor will one be appointed who is in such hostility to the others as will disqualify him from fairly considering their claims.[52]

It has been the practice, whether fully justified in the law or not, where the members of a class cannot agree on one of their class, or where there is exceeding great hostility between the members of one class and another class, where they may sustain the relation of parent, brother and sister, that the Court will appoint none of them, but will grant the administration to a disinterested person. Experience has demonstrated that this is a very salutary rule, and without question results in the best administration of the estate and for the welfare of all con-

[45] Mandeville vs. Mandeville, 35 Ga. 243, 247; McBeth vs. Hunt, 2 Strob. L. 335, 341; Cartwright *in re* (Eng.), 1 Freem. 258; Sawbridge vs. Hill, L. R., 2 P. & D. 219; Murdock vs. Hunt, 68 Ga. 164, 166.

[46] Wms. Ex. (427); Warwick vs. Greville, 1 Phillim. 123, 125; Coppin vs. Dillon, 4 Hagg. 361. 376; Hill's Case, 55 N. J. Eq. 764.

[47] In re Drowne, 1 Connolly 163, 169; Hill's Case, *supra;* Iredale vs. Ford, 1 Sw. & Tr. 305; Chittenden vs. Knight, 2 Lee. 559; Wickwire vs. Chapman, 15 Barb. 302.

[48] Administration of Curser, 89 N. Y. 401, 404.

[49] Williams vs. Wilkins, 2 Phillim. 100; Atkinson vs. Hasty, 21 Neb. 663, 667.

[50] Bell vs. Timiswood, 2 Phillim. 22.

[51] Wms. Ex. (427); Webb. vs. Needham, 1 Add. 494; Owings vs. Bates, 9 Gill 463, 466.

[52] Drew's Appeal, 58 N. H. 319.

* This discretion will not be reviewed, unless abused. McCallip vs. Sharp, 13 Dec. 650.

A finding of the Probate Court that the next of kin is evidently unsuitable, will not be disturbed unless the court has abused the discretion. Affirmed, 69 O. S. 500.

cerned. Whether or not when that condition exists they are evidently unsuitable within the statute I am not fully prepared to aver, but there are cases in which I think it may justly be held that when this condition of the affairs exist they are all evidently unsuitable.

It is said that no notice is necessary to the other parties in the same class with the applicant, and the appointment may be made *ex parte* to any of those who are equally entitled.[53]

§ 119. Renunciation, waiver, etc.

The right given by statute to administer may be renounced. But no appointment should be made over the right of a person entitled to an appointment without the record in some manner showing the fact that the right has been lost. The renunciation may be spontaneous, in which case it should be in writing and filed with the court, or it may be under citation of an interested party. The renunciation may be absolute or conditional; in any case it may be retracted before an appointment is made. If the renunciation is made on the condition that a certain person be appointed, and such person does not receive the appointment, the renunciation is void.[54]

The right may be waived by neglect to appear and qualify for an unreasonable length of time. It may also be waived by contract expressly made, in which such right for a valuable consideration is surrendered. The safe way, however, is where

[53] Woerner on Admin. 531. Notice ought to be given, however.

[54] Compensation cannot be collected for introducing a person to another for the purpose of having the person introduced appointed administrator. Swiggett vs. White, 8 Bull. 22.

All the next of kin having renounced in favor of the eldest among them, if he could find security, the appointment of his nominee, on his failing to obtain security, was held void. Rinehart vs. Rinehart, 27 N. J. Eq. 475.

So a widow, renouncing in favor of a particular person, is not bound by the renunciation if this person is not appointed. See § 92 McClellan's Appeal, 16 Pa. St. 110, 116.

And a widow renouncing her right as administratrix is, nevertheless, on the discovery of a will, entitled to letters *cum testamento annexo*, if the executors do not qualify. Brodie vs. Mitchell, 85 Md. 516.

See § 115.

the person entitled has not appeared and qualified, to cite him to appear in court for that purpose.

An agreement to secure an appointment as administrator of one not entitled thereto by law and furnish him with bond is void.[55]

§ 120. Husband and widow.

The surviving husband or wife is entitled if not evidently unsuitable or incompetent to letters of administration. This right exists only where there is an actual marriage relation.[56]

A marriage absolutely void from the beginning confers no right.[57]

But if the marriage was only voidable and not avoided before the death of the consort the right exists.[58]

The abandonment by the one of the other does not destroy the right.[59]

The fact that they lived apart for several years before death occurred will not destroy the right,[60] even though the surviving party agree to make no claim on the deceased's estate.[61]

It is a disputed matter whether such a right can be surrendered by an ante-nuptial agreement.[62] But if the contract is clear that it was the intention to relinquish this right it will be valid.[63]

It is also held that the adultery of the consort might destroy the right.[64]

[55] Clifford vs. Brown, 15 Bull. 386. See Woerner on Admin. 529, *et seq.* See § 1094, Probate of Will.

[56] O'Gara vs. Isenlohr, 38 N. Y. 296; See Smith vs. Smith, 1 Tex. 621; S. C., 46 Am. Dec. 121.

[57] Bowning vs. Reave, 2 Phillim. 69.

[58] Elliott vs. Gurr, 2 Phillim. 16; White vs. Lowe, 1 Redf. 376; Parker's Appeal, 44 Pa. St. 309; Smith vs. Smith, 1 Tex. 621.

[59] Coover's Appeal, 52 Pa. St. 427; Nusz vs. Grove, 27 Md. 391; Altemus' Case, 1 Ashm. 49.

[60] *In re* Ross' Estate, 11 Pa. Co. Ct. Rep. 601; S. C., 1 Pa. Dist. Rep. 744.

[61] Garretson vs. Garretson, 4 Ohio C. C. 336; S. C. Geobel, 187; 21 Bull. 54. Case discussed.

[62] Fowler vs. Kell, 14 Sm. & M. 68; Ward vs. Thompson, 6 Gill. & J. 349; Bray vs. Dudgeon, 6 Mnf. 132; Maurer vs. Naill, 5 Md. 324; Grovane vs. Grovane, 1 Har. & M. 346. See § 327.

[63] 19 Am. & Eng. Ency. of Law, 192.

[64] See 21 Bull. 54.

§ 121. The next of kin.

If there be no surviving husband or wife, or if such husband or wife renounce the trust, then the right is conferred on the next of kin. Who are such next of kin is given in Williams on "Executors," and it is said the rule there made is substantially followed in most of the American States. The rule given by him is as follows: "In the first place the children; and on the failure of children the parents of the deceased are entitled to the administration; then followed by brothers and sisters; then grandfathers and grandmothers; then nieces and nephews; great-grandfathers and great-grandmothers; and lastly cousins." [65]

If the husband is entitled to his wife's property, and if the next of kin be a married woman and she renounces, the grant is made to the husband, for he is interested, and the grant must follow the interest and the wife cannot by renouncing deprive her husband of his right.[66]

It has been held that in determining who are the next of kin, adopted children must be considered.[67]

The court is not bound to appoint two because they have equal claims.[68]

§ 122. The creditor.

The next in order to which the statute gives the right of appointment is the creditor.

A person applying under this head should have a prima facie claim against the estate of the deceased. If two creditors have equal claims, the first applying should be appointed even if the claims are doubtful, if the applicant is a person of good character he ought to be appointed.

The creditor of an alleged distributee has no right as such to apply for letters of administration upon the estate of the ancestor, nor to intervene in such a proceeding.[69]

[65] Wms. on Ex. 425.

The words "next of kin," as used in § 10617 G. C., mean those relatives who, at the time of appointment, would inherit in case of intestacy. Hence, children and other relatives of such persons, *in esse*, are not included. McCallip vs. Sharp, 13 Dec. 650.

[66] Woerner on Admin. 522.

[67] Estate of McCully, 13 Phila. 296.

[68] Succession of Gains, 7 So. Rep. 788. See § 913, Descent, etc.; § 1199, Construction of Wills.

[69] *In re* Pitchlynn's Estate, 19 Wash. Law Rep. 563.

A cashier of a corporation may be appointed, where the corporation is a creditor. McCallip vs. Sharp, 13 Dec. 650.

A tender by the heirs to the creditor of the amount of his claim deprives the creditor of his statutory right to be appointed administrator.[70]

A cause of action which does not survive the debtor does not support his claim to administer the estate.[71]

The practice in Probate Court generally is that where the next of kin and the husband or wife declines, the person recommended by them to be appointed, receives the appointment. The right of such appointee is perhaps under the statute not superior to that of the creditor, but unless the creditor is in danger of losing his claim by insolvency of the estate the reasons for appointing such recommended person are very strong, for he has the confidence of those who are most familiar with the estate and presumably are most interested in its welfare, and is more likely to receive their aid in securing a good administration, etc.

§123. To such person as the court may see fit.

Further provision is that if there be no creditor competent to undertake the trust it should be given to such person as the court may think fit, but the appointment in such case is limited to the fact that it must be shown that the estate exceeds the value of one hundred dollars;[72] and in such case it is important, for it goes to the jurisdiction of the court that it be shown affirmatively in the application and that the court make a finding that the estate exceeds one hundred dollars in value; for without such finding the appointment is void as being beyond the jurisdiction of the court.

§ 124. Must give bond, etc.

The court having determined that the party is dead upon whose estate an administrator is desired, and that the deceased left an estate and that a certain person is entitled to be ap-

[70] Culley vs. Mohlenbrock, 36 Ill. App. 84.

[71] Woerner on Admin. 522.

[72] As to amount and kind of assets, generally to entitle administration, see § 75, chapt. on Letters Testamentary.

Other things being equal, the court will appoint as administrator the one desired by the beneficiaries. Sargent vs. Corbley, 7 C. C. (N.S) 226; 28 O. C. C. 125.

pointed, the next matter in order will be the giving of a proper bond. This bond must be signed by two securities, who must be inhabitants of the State and should be residents of the county and freeholders; and the practice is to make the penalty in double the amount of the supposed assets. The statute relative to giving bonds is as follows:

"Before entering on the execution of his trust, every administrator shall give bond with two or more sufficient sureties, in such sum as the court orders, payable to the state, with conditions as follows:

"1. To make and return into court on oath, within thirty days, a true inventory of all moneys, goods, chattels, rights and credits of the deceased, which have or may come to his possession, or knowledge, and, if required by the court, an inventory of the decedent's real estate;

"2. To administer according to law all the moneys, goods, chattels, rights and credits of the deceased, and the proceeds of all his real estate sold for payment of his debts, which come to the possession of the administrator or to the possession of any person for him;

"3. Upon oath to render a true account of his administration, within twelve months, and at other times when required by the court or the law. Failing so to do for thirty days after he has been notified by the probate judge of the expiration of the time, he may forthwith be removed by the court and he shall receive no allowance for services, unless the court enters upon its journal that such delay was necessary and reasonable.

"4. To pay any balance remaining in his hands, upon the settlement of his accounts, to such persons as the court or the law directs;

"5. To deliver the letters of administration into court in case a will of the deceased be thereafter duly proved and allowed." [R. S. 6006; vol. 102 v. 200.] [73]

§ 125. Form of administrator's bond.

(Revised Statutes, § 6006.)

Know all Men by these Presents, That we.....
..... and .....

[73] § 10618 G. C. See § 1333 Gdns.; see § 233 on Bonds.

The bond can not be extended beyond its plain term. Murphy vs. Dorsey, 3 C. C. (N.S.) 119; 23 O. C. C. 157.

Where an industrial insurance paid the money and it was used to pay funeral expenses, unpaid board, and suit was brought against the company a motion to arrest from the jury was sustained. Insurance Co. vs. Burbank, 3 App. 302, 19 O. C. C. (N.S.) 557, 26 O. C. C. 280.

are held and firmly bound unto the State of Ohio, in the penal sum of .....Dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors and administrators if default be made in the condition following:

Whereas, Letters of Administration upon the estate of..... .....deceased, were granted to the said.....by the Probate Court of .....County, in the State of Ohio, on the.....day of .....A. D. 190...; Now if the said..... as Administrat....of the estate of said..... deceased shall:

First, Make and return into Court, on oath; within thirty days; a true inventory of all Moneys, Goods, Chattels, Rights and Credits of the deceased, which have or shall come to ..h.... possession or knowledge; and, also, if required by the Court, an inventory of the real estate of the deceased.

Second, Administer according to law, all the Moneys, Goods, Chattels, Rights and Credits of the deceased, and the proceeds of all h.... real estate that may be sold for the payment of h.... debts, which shall at any time come to the possession of the administrat...., or to the possession of any other person for ..h.....

Third, Render, upon oath, a true account of ..h.... administration within twelve months, and at any other times when required by the Court or the law, and failing so to do for thirty days after ..he.. shall have been notified of the expiration of the time by the Probate Judge, ..he ..shall receive no allowance for services, unless the Court shall enter upon its journal that such delay was necessary and reasonable.

Fourth, Pay any balance remaining in ..h.. hands upon the settlement of ..h.. accounts, to such persons as the Court or the law shall direct; and,

Fifth, Deliver the letters of administration into Court, in case any will of the deceased shall be thereafter duly proved and allowed;

Then this obligation to be void; otherwise to remain in full force and virtue in law.

Signed by us, and dated at.....Ohio, this.....day of .....190....

EXECUTED IN PRESENCE OF

.....

.....

This bond approved in open Court, this.....day of.....190...

.....Probate Judge.

§ 126. Granting letters.

The entry granting letters of administration ought to show that all the jurisdictional facts have been affirmatively passed upon by the Court. For the form of a proper entry[74] the one

[74] § 89, Executors, etc.
One who signs in blank the printed form, consents by implication that the blanks may be filled. Sonrada vs. David, 15 N. P. 257.

under the chapter on letters of administration can be easily adopted.[75]

§ 127. Form of administrator's letters.

The State of Ohio, ...County, ss.

To All who shall see these Presents, Greeting:

BE IT KNOWN, That by the Court of Probate, of said County, Administration of all and singular the Goods, Chattels, Rights, Credits and Estate, which were of.....late of said County, deceased, has been granted unto.....
.....whose duty it shall be to have all and singular the said Goods, Chattels, Rights and Credits appraised by..... and to return upon oath, within thirty days, a true inventory thereof, also of the moneys belonging to the said decedent at the time of h....death; to administer, according to law, all the said Moneys, Goods, Chattels, Rights and Credits, (and also the proceeds of the Real Estate of said decedent, which may be sold for the payment of h....debts), which shall at any time come into the possession of said Administrat....or of any person for.....; to render upon oath a true account of.....administration, (within twelve months, and at any other times when required by the Probate Court or the law, and failing so to do for thirty days after..... shall have been notified of the expiration of the time by the Probate Judge, ...shall receive no allowance for services unless the Court shall enter upon its journal that such delay was necessary and reasonable; and to pay any balance remaining in.....hands upon settlement.....accounts, to such persons as the Court or the law shall direct).

Witness my hand and the Seal of said Court, at.....
Ohio, this.....day of.....A. D. 190...
.....
Probate Judge.

By.....
Deputy Clerk.

The State of Ohio, ...County, ss

I, Sole Judge and Ex-Officio Clerk of the Probate Court within and for the said County, certify that the foregoing is a true copy of the original Letters of Administration, granted in the premises by said Court, and remaining on file in my office.

Witness my hand and the seal of said Court, at
.....this.....day of
.....A. D. 190....
.....
Probate Judge and Ex-Officio Clerk of the Probate Court.

75 As to the manner of setting aside an illegal appointment. See chapter on resignation and removal. An appointment, although illegally made can not be attacked collaterally. Carr vs. Hull, 65 O. S. 394.

CHAPTER VIII.

SPECIAL ADMINISTRATION.

§ 128 Definition.
§ 129 When to be appointed.
§ 130 Delay warranting appointment.
§ 131 Application, jurisdiction, etc.
§ 132 Who may be appointed.
§ 133 Must give bond.
§ 134 Form of Special Administrator's bond.
§ 135 Form of entry appointing special administrator.
§ 136 Form of special administrator's letters.
§ 137 Powers, duties and compensation of special administrator.
§ 138 Power to collect, suit, etc.
§ 139 Power to sell.
§ 140 Power to pay debts, fees, etc.
§ 141 When the powers cease.
§ 142 How special administrator may be proceeded against by the executor, etc.
§ 143 Application for citation, etc.
§ 144 Form of application.
§ 145 Form of entry ordering citation.
§ 146 Form of citation.
§ 147 Journal entry ordering writ of attachment.
§ 148 Form of writ of attachment.
§ 149 Entry committing to jail.
§ 150 Special administrator not liable to creditors — limitation of action against executor, etc.

§ 128. Definition.

A temporary or special administrator is an officer appointed by the Probate Court to take charge of a decedent's estate until a final appointment can be made. This kind of administration it is said, seldom occurs, the Probate Courts preferring, for the convenience and security of all concerned, to have the administration of the settlement of estates as simple as practicable.[1]

It is said that they are limited in their powers, usually to the collection and preservation of the property of a decedent, until a proper administrator is appointed, and that it is not necessary for them to file an inventory.[2]

[1] 3 Redf. on Wills 113; Sch. Ex. § 135; Wms. on Ex. 513; Woerner on Admin. 406.

[2] Tomlinson vs. Wright, 12 Ind. App. 292.

But our law contemplates that there be an inventory, for it is provided that it shall be a condition of the bond that an inventory be returned within thirty days, etc.[3]

§ 129. **When to be appointed.** "When, by reason of a suit concerning the proof of a will, or from other cause, there is delay in granting letters testamentary or of administration, the court may appoint a special administrator to collect and preserve the effects of the deceased." [R. S. § 6007.][4]

It will be noticed that two things exist by virtue of this statute before such an administrator can be appointed. First, that there is a suit concerning the proof of the will; second, if from any other cause there shall be a delay in granting letters. As to what is meant to be included within the phrase of *any other cause,* the statute gives no directions. In some of the States it has been provided what should constitute at least some of the other causes for the appointment of a special administrator. In New York it is provided that if a person is supposed to be dead and his abode cannot be ascertained, and there are circumstances which afford reasonable grounds to believe either that he is dead, or becomes a lunatic, or that he has been secreted, confined or otherwise unlawfully made away with, a temporary administrator may be appointed.[5]

And in Indiana it is provided that where anyone is intermeddling with the estate, or that there is no one having authority to take care of the same, a special administrator may be appointed.[6] Special letters may be granted if a will is lost.[7]

§ 130. Delay warranting appointment.

It is not every delay that will warrant the appointment of a special administrator. It is not to be taken as warranting the exercise of the power unless the condition of the estate may be

3 § 10620 G. C.; § 133; § 310, Prosecution against, etc.

4 § 10619 G. C.

5 § 2670 Civil Code.

6 § 2391 R. S. 1894.

7 Goods of Campbell, 2 Hazz. 555; Goods of Metcalf, 1 Add. Ec. Rep. 343.

When for any cause there is a delay in granting letters, a special administrator may be appointed, to collect and preserve the assets of the estate. McBride vs. Vance, 73 O. S. 298.

such that possible harm or inconvenience could result from such delay to the party interested. But where there are no such conditions, or the estate is not of such character that necessary delay in having some person authorized to take charge of the estate will necessarily or probably cause the loss of the estate, or likely to impair the rights or remedies of persons interested therein, a case is not made out for the appointment of a temporary administrator.[8] Customarily, where a contest occasions a delay in the issuance of letters, a temporary administrator will be appointed for the purpose of getting in assets and conserving the estate.

It has been held to be a clear case for the granting of such letters when there are outstanding numerous promissory notes, unsecured, to realize on which diligence in prosecuting the same would be required.[10]

A special administrator may be appointed for the sole purpose of prosecuting or defending a particular suit instituted by or against a person who may die while it is pending.[11]

So an administrator may be appointed for the sole purpose of instituting and carrying on a particular suit if there be a present necessity for it.[12]

§ 131. Application, jurisdiction, etc.

The application may be made by any person interested, and it must be made in the same court in which it would be proper for an administrator to be appointed.[13] It must be sworn to and be in writing, and should give the probable value of the assets, the time of death and residence of the deceased and such other facts as will warrant the court in making the appointment. It may be very much doubted whether the applicant will be re-

[8] Matter of Eddy (N. Y.) 10 Misc. 211.

[10] Matter of Eddy, 10 Misc. 211; Matthews vs. Am. Cent. Ins. Co., 154 N. Y. 449.

[11] Wade vs. Bridges, 24 Ark. 569; Lothrop's Case, 33 N. J. Eq. 248; Wolffe vs. Eberlein, 74 Ala. 99.

[12] Goods of the Elector of Hesse, 1 Hagg. 93; Woolley vs. Green, 3 Phillim. 314; *Ex parte* Lyon, 60 Ala. 650; McArthur vs. Scott, 113 U. S. 340.

[13] § 111, when application made for Admin.; § 72, when application made for Exec.

quired to set out the names and addresses, and ages, if minors, of the heirs at law, yet no harm could be done if this was followed. Therefore the form given for the appointment of an administrator or executor might be used in making the application for a special administration; and in addition to the facts therein set forth it should be alleged that there was a contest pending for the proof of the will, or some other fact, which would show the necessity of the appointment of an administrator to serve until a regular administrator could be appointed.

§ 132. Who may be appointed.

It will be observed that the granting of a special administration and the selection of a person to be appointed is given by the statute to the *discretion* of a judge; and it has been held that it is an absolute discretion.[14]

As to the manner in which this discretion should be exercised it has been said: "It is important that a person intrusted with temporary administration should be not only competent and honest, but disinterested; and if he had to be either a relative or a creditor of the deceased it might often be very difficult to select a temporary administrator who should be indifferent as between the parties to a contest among applicants for permanent administration or a contest over the probate of a will." [15]

In one case the Court declined to appoint a party to the litigation.[16]

Also if the person be named as executor in the will and as the chief beneficiary thereunder, or if he has any hostile interest to the heirs or next of kin, he should not be appointed.[17]

So where the person named as executor in the will is charged by the contestants with having exercised undue influence upon the deceased he will be rejected as temporary administrator.[18]

[14] Greece vs. Helm, 91 Mich. 450.

[15] Judge Bartlett. In matter of Plath, 56 Hun 223.

[16] Crandell vs. Shaw, 2 Redf. (N. Y.) 100.

[17] Howard vs. Dougherty, 3 Redf. 535.

[18] Cornwell vs. Cornwell, 1 Dem. 1; In re Wanninger's Estate, 3 N. Y. Supp. 137.

§ 133. Must give bond. "Before entering upon the duties of his trust, every such administrator must give bond, with two or more sufficient sureties, in such sum as the court orders, payable to the state, with condition that he will make and return into court, within three months, a true inventory of the moneys, goods, chattels, rights, and credits of the deceased, which have or may come to his possession or knowledge, and that he will truly account, on oath, for the moneys, goods, chattels, debts, and effects of the deceased, received by him as such special administrator, whenever required by the court, and deliver them to the person appointed executor or administrator of the deceased, or to such person as is lawfully authorized to receive them." [R. S. § 6008.][19]

It will be observed that as to surety, penalty, etc., the same law applies to the bond of a special administrator as to a general administrator.[20]

§ 134. Form of special administrator's bond.

Know all Men by these Presents, That we.....and....., are held and firmly bound unto the State of Ohio in the penal sum of..... Dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors and administrators if default be made in the condition following:

Whereas, Letters of Special Administration upon the estate of....., deceased, were granted to the said .....by the Probate Court of.....County, in the State of Ohio, on the.....day of..... A. D. 190...; Now if the said.....as Special Administrat.....of the estate of said..... deceased, shall:

First, Make and return into Court, on oath; within three months, a true inventory of all Moneys, Goods, Chattels, Rights and Credits of the deceased, which have or shall come to..h..possession or knowledge; and, also, if required by the Court, an inventory of the real estate of the deceased.

Second, That..h..will render a true account under oath of all the Moneys, Goods, Chattels, Debts and Effects of the deceased that shall be received by ..h.. as such Special Administrator whenever required by the Court; and will deliver the same to the person who shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully authorized to receive the same.

[19] § 10620 G. C.

[20] § 233 *et seq.* on bonds.

Then this obligation to be void; otherwise to remain in full force and virtue in law.

Signed by us, and dated at....., Ohio, this..... day of.....190....

EXECUTED IN THE PRESENCE OF

.....

.....

This bond approved in open Court, this.....day of.....190...

.....Probate Judge.

§ 135. Form of entry appointing special administrator.

This day this cause came on to be heard upon the application of A. B. filed herein for a special administrator upon the estate of C. D.; and the same was submitted to the Court, whereupon the Court finds the allegations of said application are true; and it further appearing to the Court, that said A. B. has filed his bond herein in the sum of..... Dollars, with.....and..... sureties thereon. The said bond is hereby proved, and it is ordered that letters of Special Administration be granted to said A. B. as in such cases made, and provided by statute; and....., ... and....., are appointed appraisers of said estate.

§ 136. Form of special administrator's letters.

The State of Ohio, ...County, ss.

To All who shall see these Presents, Greeting:

BE IT KNOWN, That by the Court of Probate, of said County, Administration of all and singular the Goods, Chattels, Rights, Credits and Estate, which were of....., late of said County, deceased, has been granted unto....., ... whose duty it shall be to have all and singular the said Goods, Chattels, Rights and Credits appraised by....., ...and to return upon oath, within three months, a true inventory thereof, also of the moneys belonging to the said decedent at the time of h.. death; to administer, according to law, all the said Moneys, Goods, Chattels, Rights and Credits, which shall at any time come into the possession of said Administrat....or of any person for.....; to render upon oath a true account of.....administration, at such time as the Court direct, and deliver all the Goods, Chattels, Debts and Effects of the deceased, received by him to the person who shall be appointed executor (or administrator of said estate), whenever required.

Witness my hand and the Seal of said Court, at..... Ohio, this.....day of.....A. D. 190...

.....

Probate Judge.

By.....

Deputy Clerk.

§ 137. Powers, duties and compensation of special administrator. "Such special administrator must collect the goods, chattels, and debts of the deceased, and preserve them for the executor or administrator who thereafter is appointed. For that purpose he may begin and maintain suits as administrator, and also sell such perishable and other goods as the court orders sold. He shall be allowed such compensation for his services as the court thinks reasonable, if he forthwith delivers over to the executor or administrator who supersedes him, the property and effects of the estate, as hereinafter provided." [R. S. § 6009.][21]

§ 138. Power to collect, suit, etc.

It is one of the principal duties of a special administrator to preserve the estate, and to accomplish this he has the same power as a general administrator. He may employ persons to assist him in taking care of it, gathering crops, feeding stock, etc., the same as a general administrator. Likewise he has power to bring suit to collect outstanding debts due the estate. In this respect he occupies the same relation as that known in law as an administrator *pendente lite*. The power of a special administrator is limited by the statute. But whatever he may lawfully do, it is binding upon the estate.[22]

This power to collect is undisputable, and it necessarily implies the further power to do whatever is requisite in order to perfect the chose in action so that collection can be enforced.[23]

The power to do any act includes the power to do all that is reasonable to do it effectively.[24]

The general power to collect being conferred on the special administrator, I have no doubt that by permission of court he may compound, compromise or sell desperate claims in like manner as a general administrator could.

[21] § 10621 G. C.

[22] Woerner on Admin. 401. See § 440, Collection of assets.

[23] Matthews vs. American Cent. Ins. Co., 154 N. Y. 449, 460.

[24] Id. by Vann, J., at page 460; Hall vs. Lauderdale, 46 N. Y. 70, 73; Parker vs. Supervisors, 106 N. Y. 392.

§ 139. Power to sell.

A special administrator has no power to sell any property except by order of court. The power given a general administrator to sell personal property at public sale without an order of court does not exist in a special administrator. The statute does not seem to confer any power whatever upon a special administrator to sell real estate; and I very much doubt if he has any control whatever over real estate. Possibly if he were appointed to take charge during the contest on proof of a will he might take control of property devised in the will, other than that which is specifically devised, and perform such acts in its preservation as is provided under sec. 10633 C. C.[25] If personal property is sold an application should be made to the court as is provided for the private sale of personal property.

§ 140. Power to pay debts, fees, etc.

Our statute is silent upon the power of a temporary administrator to pay debts, and if he has no power to pay debts he could not sell real estate for that purpose. Indeed it is very questionable whether under our statute a special administrator has any authority whatever over real estate. It is said that in the absence of statutory authority he has no power other than may be necessary to collect the effects; not even to invest or distribute them, nor to pay legacies or debts, but if they were to be paid *bona fide* they will be allowed.[26]

It seems that the only power he has to pay out moneys of the estate is for his own necessary expenses.[27]

It has even been held that he had no power to pay funeral expenses.[28]

It is provided by statute that a special administrator is entitled to such compensation as the court may think reasonable. As incidental to the powers to sue, a temporary administrator

[25] § 95.
[26] Woerner on Admin. 401.
[27] Pharisbe's Estate, 29 Barb. 627.
[28] Cogswell's Estate, 4 Redf. 241.

has of course the power to employ counsel and to pay them a reasonable sum for necessary legal services.

§ 141. When the powers cease. "Upon the granting of letters testamentary or of administration, the power of the special administrator shall cease, and he forthwith must deliver to the executor or administrator all the goods, chattels, moneys, and effects of the deceased in his hands. The executor or administrator may be admitted to prosecute any suit begun by the special administrator, as an administrator de bonis non is authorized to prosecute a suit commenced by a former executor or administrator." [R. S. § 6010.][29]

The functions of a temporary administrator of a decedent continue until the qualification of the executor or of the administrator-in-chief; that is to say, until the issuance of permanent letters. It is not necessary that an application for the revocation of letters of temporary administrators of decedents should be made. The very term temporary administrator suggests that the authority of such an officer is to be deemed extinguished by the issuance of letters testamentary or letters of administration-in-chief.[30]

§ 142. How special administrator may be proceeded against by the executor, etc. "If such special administrator neglects or refuses to deliver over the property and estate to the executor or administrator, as provided in the next preceding section, by citation and attachment the court may compel him to do so. The executor or administrator also may proceed, by civil action, to recover the value of the assets from him and his sureties." [R. S. § 6011.][31]

§ 143. Application for citation, etc.

If upon demand of the general administrator the special administrator should neglect to turn over to the general administrator the funds, property and papers in his possession belonging to the estate, it would be the duty of the general administrator to

[29] § 10622 G. C.
[30] Jes. Sur. Prac. 595 (N. Y.).
[31] § 10623 G. C.

file an application in the Probate Court asking that a citation be issued against him for his failure to perform the duties devolving upon him in reference to the delivery of such property. In addition to the proceedings provided by citation the general administrator may commence a suit against such special administrator for the goods in his possession as provided for an administrator *de bonis non*.

§ 144. Form of application.

(*Title.*)

The undersigned respectfuly represents that on the.....day of..... .....he was duly appointed administrator (or executor) of the estate of C. D., deceased, lately a resident of said county. That prior to his appointment as such administrator E. F. was appointed by the Pobate Cout of this county as a special administrator of the estate of said C. D., deceased. That he has demanded of said special administrator that he deliver to him (here specify the poperty by name) as he is required by law to do. But the said C. D. as such special administrator has refused and neglected to do so. Wherefore, the said administrator (or executor) asks the Court for a writ of citation against the said C. D. that such proceedings may be had to enforce such delivery as may be authorized and required of him by law.

.....Sign.

Sworn to and subscribed in my presence this.....day of..... .....Sign.

§ 145. Form of entry ordering citation.

(*Title.*)

This day came A. B., administrator of the estate of C. D., and filed herein his application for a citation against C. D., a special administrator of said estate. The same appearing in proper form and duly verified, it is ordered that a citation be issued against said C. D. to appear before this court on the.....day of.....to answer for his neglect and refusal to deliver to said administrator the effects in his possession belonging to said estate.

§ 146. Form of citation.

State of Ohio, ... county, ss.

To A. B., special administrator of the estate of [*or* executor of the last will and testament] of C. D. deceased:

You are hereby required, on or before the .... day of .... A. D. 190.. to deliver to E. F., executor of the last will and testament [*or* administrator of the estate] of C. D. deceased, all the goods, chattels, moneys and effects of said decedent in your hands according to law, or to appear

in this court on .... day of .... 190.., and show cause why an attachment should not issue against you for your default.

Witness my signature and the seal of the Probate Court, at.....this .... day of .... A. D. 190...

[seal] .....Probate Judge.[32]

§ 147. Journal entry ordering writ of attachment.

State of Ohio, on application of E. F., executor, etc., vs. A. B., special administrator, etc. The writ of citation having been returned served, upon said A. B., defendant, requiring him on or before the .... day of .... A. D. 190.., to deliver to said E. F., executor, etc., all the goods, chattels, moneys and effects of said decedent in his hands; and said A. B. having failed to comply with the order aforesaid, or to show cause why an attachment should not issue against him for his default, it is ordered that a writ of attachment issue to the sheriff of —— county, to bring the body of said A. B. into this court forthwith, to abide such order as the court may make concerning him in this behalf.[33]

§ 148. Form of writ of attachment.

State of Ohio, ... county, ss.

To the sheriff of said county, greeting:

Whereas, A. B., special administrator of the estate of C. D., deceased, was by the order of the Probate Court of said county required to deliver to E. F., the duly appointed executor [*or* administrator of the estate] of the last will and testament of said decedent, all the goods, chattels, moneys and effects of said decedent in his hands, on or before the .... day of ...., 190.., or to show cause why an attachment should not issue against him for his default, and the said A. B. having failed to comply with the order aforesaid, you are therefore commanded to take the said A. B. and have his body forthwith before said court, to abide such order as may be made concerning him in this behalf. Hereof fail not and bring this writ with you.

Witness my signature and the seal of said Probate Court, etc.[34]

§ 149. Entry committing to jail.

This day this cause came on to be heard upon the application for a citation filed by A. B., administrator of E. F., against C. D., special administrator of the estate of E. F., and the said C. D. was examined by the Court under oath in reference to his neglect and refusal to deliver to A. B. the administrator of E. F., property belonging to said estate in his possession. Whereupon after hearing the testimony, the Court finds that said administrator is entitled to the following: (Here describe property),

[32] Whit. Prob. Code 235.

[33] Whittaker Probate Code, § 235.

[34] Whittaker's Probate Code, 235.

now in possession of said C. D.; and that said C. D. is detaining the same without cause. It is therefore ordered that the said C. D. be committed to the jail of this county, there to remain until he shall deliver said property, when he will otherwise be legally discharged.

§ 150. **Special administrator not liable to creditors—limitation of action against executor, etc.** "Such special administrator shall not be liable to an action by a creditor of the deceased. The time of limitation for suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, as if such special administration had not been granted." [R. S. § 6012.][35]

It will be observed under the provisions of the above section that no suit can be brought or maintained against such special administrator. From this the opinion is strengthened that a special administrator is not to pay any of the debts of the decedent, for if it be within his province to pay the debts, it would also be within the power of a creditor to enforce such payment by suit.

[35] § 10624 G. C.

As a special administrator has no power to pay debts it may be questionable whether he must give notice of his appointment.

CHAPTER IX.

ADMINISTRATOR DE BONIS NON.

§ 151 Definition, etc.
§ 152 When to be granted.
§ 153 Must be some estate to administer.
§ 154 Time within which appointment must be made.
§ 155 To whom granted and where.
§ 156 Application, etc.
§ 157 Proceedings by administrator or executor against former administrator or executor.
§ 158 Recovery of assets, etc.
§ 159 Sales, etc., of former executor or administrator valid.
§ 160 Notice, bond, inventory, etc.

§ 151. Definition, etc.

Where the office of the ordinary administrator becomes vacant by death, resignation or removal, and the estate remains unsettled, and a person is appointed to complete the administration, such person is known as an administrator *de bonis non.*[1]

In Foster vs. Wise it is said: "In legal propriety there is no such office as administrator *de bonis non* under our statute regulating the settlement of the estate of a deceased person. An administrator appointed to fill the place of a personal representative who resigns or has been removed is a successor in the trust of his predecessors, and he is clothed with all the rights of the estate he is appointed to administer, and is therefore entitled to recover the indebtedness of his predecessors to the estate or assets received and conferred to his own use, as well as such as remains in specie." [2]

§ 152. When to be granted.

The statute providing when such an administrator shall be appointed and who the appointee shall be is as follows:

[1] 12 Am. & Eng. Ency. of Law 219.

[2] 46 O. S. 25. If an executor dies or resigns it is the duty of his successor to compel an accounting of the trust. Railway vs. White, 80 O. S. 413.

"When a sole executor or administrator dies without having fully administered the estate, the court shall grant letters of administration, with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased not administered, in case there be personal estate to be administered to the amount of twenty dollars, or debts to that amount due from the estate." [R. S. § 6018.][3]

It will be observed that the above section only alludes to vacancies occurring by death. The filling of such vacancy occurring from other causes is provided for in other sections. Thus in § 10627 G. C.,[4] provision is made that where the executor or administrator resigns a successor may be appointed. And § 10629-30 G. C.[5] provides[6] that where an executor or administrator is removed a successor shall be appointed in like manner as if the administrator or executor so removed were dead.

§ 153. Must be some estate to administer.

The above section provides not only that there must be some estate yet remaining unadministered, but also further provides that there must be personal estate to the amount of at least twenty dollars unadministered before a legal appointment can be made. A full compliance with these provisions must be shown; and if the goods had been converted by the ordinary administrator, representative or creditor they would have been entitled by law to maintain an action for a conversion. But such action could not be maintained by an administrator *de bonis non,* and therefore conversion by the former administrator of the assets of an estate is in law a complete administration of the assets so converted.[7]

Likewise it was held where it was claimed that under a will the executor had made a wrong distribution that there was noth-

3 § 10631 G. C.
4 § 210.
5 See chapter 14 on removals, etc.
6 § 213.
7 *In re* Herckelrath, 1 Dec. 696. See Carr vs. Hull, 65 O. S. 394. *In re* Hess, 3 N. P. 62, 4 Dec. 413.

ing to be administered on, an application for an administrator *de bonis non* was refused.[8]

An estate is not fully administered upon so long as anything remains to be done to vest the title of the estate in the beneficiary, whether a creditor, devisee, legatee or next of kin, which no one but the administrator can do. Such would be paying a legacy or distributing the assets,[9] even though all the assets have been reduced to money,[10] and all the assets distributed if there be debts to pay.[11]

Likewise one may be appointed to defend a suit, even though all the assets have been distributed for the purpose of defending the distributees.[12]

If the final settlement of an administrator be set aside an administrator *de bonis non* may be appointed.[13] So one is necessary where money is to be paid to an estate.[14] But such an administrator cannot be appointed solely to make a conveyance of real estate which the former administrator failed to make.[15]

The owner of a claim against an estate, holding unadministered property, may properly procure the appointment of an administrator *de bonis non* to take possession of the property and surrender the property to him.[16]

An administrator, who was one of the residuary legatees, having partly administered the estate, left his home, and, though several years had elapsed, no trace of him could be discovered. It was held that the court might revoke the grant made to him, and make a fresh grant *de bonis non* to another of the residuary legatees.[17]

[8] *In re* Estate of Sophia Hess, 3 N. P. 62; S. C. 4 Dec. 413

[9] Alexander vs. Stewart, 8 G. & J. 226; University vs. Hughes, 90 N. C. 537; Scott vs. Crews, 72 Mo. 261.

[10] Donaldson vs. Raborg, 26 Md. 312; De Valengin vs. Duffy, 14 Pet. 282.

[11] Brattle vs. Converse, 1 Root 174; Brattle vs. Gustin, 1 Root 425; Bancroft vs. Andrews, 6 Cush. 493; State vs. Framer, 54 Mo. 439.

[12] Scott vs. Crews, 72 Mo. 261; Hayward vs. Place, 4 Dem. 487.

[13] Byerly vs. Donlin, 72 Mo. 270.

[14] Hinton vs. Bland, 81 Va. 588.

[15] Grayson vs. Weddle, 63 Mo. 523; Long vs. Joplin Mining Co., 68 Mo. 422.

Contra—Adams vs. Richardson, 5 Tex. Civ. App. 439; S. C., 27 S. W. Rep. 29.

[16] Deans vs. Wilcoxon (Fla.), 7 So. Rep. 163.

[17] *In re* Covell, 15 Prob. Div. 8.

Under our statute the assets of an estate are not regarded as administered until they have been collected and applied as required by law or the will of the testator.[18]

§ 154. Time within which appointment must be made.

There is no specified time within which an appointment of an administrator *de bonis non* may be made. It may be stated that as a general rule, so long as there are assets remaining unadministered the appointment may be made; for it has been held that an executor's or administrator's office does not end until all the outstanding assets are administered, and thus new assets were administered over twenty years after distribution.[19]

The statute limiting the granting of letters to within twenty years after the death of the decedent is limited in its language to the granting of original letters of administration.[20]

A distinguished author says: "The administration *de bonis non* may be granted after any length of time, but lapse of time and other circumstances may raise a presumption that all debts against an estate are barred or paid, and that the remaining assets belong to the heirs, in which case the administration cannot be reopened by the appointment of an administrator *de bonis non*. If nothing remains to be done to complete administration the grant of letters *de bonis non* is merely nugatory.[21]

Of course there never can be any valid appointment of an administrator *de bonis non* so long as there does not exist a vacancy; in other words, until the general administrator or executor has been removed either by resignation, order of court, or death.

But the court need not wait until the former administrator has filed an account, for jurisdiction over such former administrator is retained until the account is passed upon.[22]

[18] Slagle vs. Entrekin, 44 O. S. 639. Citing; Tracy vs. Card, 2 Ohio St. 431; Curtis vs. Lynch, Admr., 19 Ohio St. 392; Douglas vs. Day, 28 Ohio St. 175; Casoni vs. Jerome, 58 N. Y. 315; Balch vs. Hooper, 32 Minn. 158.

[19] Taylor vs. Thorn, 29 O. S. 569; Lafferty vs. Shinn, 38 O. S. 46.

[20] § 10626 G. C.; § 64.

[21] Woerner on Admin. 395.

[22] Slagle vs. Entrekin, 44 O. S. 639.

§ 155. To whom granted and where.

Of course only the court granting the original letters can appoint an administrator *de bonis non.* For the court once having jurisdiction of the matter will retain it to the exclusion of every other court until the matter is fully adjudicated. This is a general principle of law, and I have no doubt will be followed in the law of administration. The statute does not give to any particular person the right to be appointed administrator *de bonis non* if cause for the same should exist, but leaves the same to the discretion of the court when it says that letters may be granted to a *suitable person.* While the court in the exercise of its discretion may appoint any one it deems suitable, yet it would be well, following the general theory of to whom administration should be granted, that the order provided for in the appointment of a general administrator should be followed.[23]

§ 156. Application, etc.

The essentials laid down in the application for a general administrator should be followed [24] in the making of an application for an administrator *de bonis non,* except that the allegation of death may be omitted. It must be particular in setting out the fact and making the showing to the court that assets remain unadministered in an amount of not less than twenty dollars. It also ought to contain the further allegation showing that the former administrator is dead, has resigned or been removed, and should include the date of such removal. While the records of the court may show this fact, yet as this is substantially a new proceeding and this being a jurisdictional fact, it should be alleged in the application. With these few alterations the form of application given in the chapter on letters of administration may be used. Likewise the forms given in that chapter may be readily changed for use in the appointment of an administrator *de bonis non.* The entry granting letters

[23] See § 117, Order of Priority.

[24] § 112, Letters of Administration.

Error will not lie unless the record shows that the court denied the appointment to some one that under the statute had the right to be appointed. The executrix of a deceased administrator has no right to prosecute error. Gastrier vs. Meyer, 27 Dec. 198, 19 N. P. 353.

ought to show the jurisdictional fact that the former administrator has been removed.

§ 157. Proceedings by administrator or executor against former administrator or executor. "An administrator or executor appointed in the place of an executor or administrator who has resigned, been removed, or whose letters have been revoked, or authority extinguished, shall be entitled to the possession of all the personal effects and assets of the estate unadministered, and may maintain a suit against the former executor or administrator and his sureties on administration bond, for them and for all damages arising from the maladministration or omissions of the former executor or administrator." [R. S. § 6020.][25]

§ 158. Recovery of assets, etc.

When the administrator *de bonis non* is qualified he is entitled to all the assets belonging to the deceased, whether the same had been converted by a general administrator or still remain in specie. If they have not been converted by the general administrator the title at once vests in the administrator *de bonis non*, and he may recover the same from any person who owes or wrongfully detains the same in the same manner that a general administrator could.[26] If, however, the general administrator has converted them, that is, has changed them into money, then if the same are not turned over to the administrator *de bonis non* he must sue as provided in the above section, that is, upon the bond, for without this statutory provision [27] an administrator *de bonis non* could not sue the general administrator; and the only provision given by statute is that upon the bond, and therefore that course must be followed.

In Slagle vs. Entrekin it is said "that under § 10634 G. C. an administrator or executor appointed to fill the place of one who has resigned or been removed, etc., is entitled to receive from the latter his indebtedness to the estate on account of assets received and converted to his own use; the language

[25] § 10634 G. C.
At common law no suit could be maintained. Blizzard vs. Filler, 20 O. 479.

[26] Jelke vs. Goldsmith, 52 O. S. 499.

[27] Wilson vs. Pelton, 40 O. S. 306.
The object of this section is to transfer the whole of the estate to the administrator *de bonis non*. Tracy vs. Card, 2 O. S. 432.

'personal effects and assets of the estate unadministered,' as used in this section, includes such indebtedness as well as such 'effects' and 'assets' as remain in specie, and he may maintain a suit against such former administrator or executor, and his sureties on his administration bond and recover the same." [28]

The usual way will be to have a former administrator file an account and thus have the court to determine the amount that is owing from that source before an action is brought. But this is not necessary.[29]

Likewise no notice of the appointment is necessary to be given before suit is brought. All the parties are bound to take notice.[30]

Assets received and not accounted for by a removed administrator gives a recovery on his bond for their value.[30*]

Leave of court to sue on an executor's bond need not be obtained.[31]

If the estate is not finally settled and the administrator has gone away suit can be brought.[32]

And his sureties may be sued alone without following the principal debtor into another jurisdiction.[33]

And judgment against the former administrator for assets not accounted for is evidence against his sureties, and can only be impeached by them for fraud or mistake.[34]

No liquidation of the amount is necessary before suit,[35] nor is it necessary to have the claim reduced to judgment.[36] Where

[28] 44 O. S. 639; Foster vs. Wise, 46 O. S. 25; Hodge vs. Hodge, 90 Me. 505; 40 L. R. A. 33.

[29] Douglas vs. Day, 28 O. S. 175; Montgomery vs. Goepper, 4 Bull. 67.

[30] Treasurer vs. McElvain, 5 O. 200.

[30*] O'Connor vs. State, 18 O. 225. See Woerner on Admin. 751 for general discussion of this matter.

[31] Gutridge vs. Vanatta, 27 O. S. 366, 369.

[32] Luce vs. Treasurer, W. 654.

[33] Luce vs. Treasurer, W. 654.

[34] O'Connor vs. State, 18 O. 225; Gandolfo vs. Walker, 15 O. S. 251, 278; Slagle vs. Entrekin, 44 O. S. 637.

See Faran vs. Robinson, 17 O. S. 242.

For discussion of suit on bond, see Kinkead's Pleading 323; and for form of petition, see Whitt. Code Forms, 136.

See § 278, Suit by succeeding administrator.

[35] Douglass vs. Day, 28 O. S. 175; Montgomery vs. Goepfer, 4 B. 67.

[36] Treasurer vs. McElvain, 5, 6, 200.

no assets come into the possession of the previous administrator no action can be maintained.[37]

§ 159. **Sales, etc., of former executor or administrator valid.** "When letters of administration are revoked, or an executor or administrator, or administrator with the will annexed, is removed or resigns, or a will is declared invalid, all previous sales, whether of real or personal property, made lawfully and in good faith by the executor or administrator, or administrator with the will annexed, and with good faith of the purchasers, and all lawful acts done in the settlement of the estate or execution of the will, shall be valid as to such executor or administrator, or administrator with the will annexed. But the sums paid out or distributed to legatees or other distributees, when necessary for the proper execution of a will or administration of an estate, may be recovered from the persons receiving them." [R. S. § 6021.][38]

The provisions of this section placed in statutory form that which is recognized as a general rule of law, and it would therefore follow that whatever acts the general administrator did in the execution of his trust, which were within his authority, would not only bind the administrator *de bonis non,* but also give to an administrator *de bonis non* the right to enforce such contracts for the benefit of the estate.[39]

It would also follow from this rule that if the general administrator has performed an illegal act, going beyond the bounds of his legal duty, such act would not be binding upon the administrator *de bonis non.* Hence it has been held that an administrator *de bonis non* may proceed against his predecessor as well as purchasers from him to annul a fraudulent sale of the property of the estate.[40] And he is not liable for a warranty of the preceding administrator, because an administrator cannot bind the estate by a contract of warranty. If a claim against the estate is presented to a former administrator it need not again be presented to the administrator *de bonis non.*[41]

[37] Jones vs. Willis, 47 Bull. 342.

[38] § 10635 G. C.

[39] Woerner on Admin. 752.

[40] Jelke vs. Goldsmith, 52 O. S. 499.

[41] Thomas vs. Chamberlain, 39 O. S. 112.

Where a will is discovered after a full settlement of the estate, there can be no interference with the former settlement. Barkaloo vs. Emerick, 18 O. 268.

But the allowance of such claim would not be conclusive as to its validity, for it might afterwards be disputed and contested by an administrator.[42]

§ 160. Notice, bond, inventory, etc.

It is the duty of an administrator *de bonis non* to give a notice of his appointment, the same as a general administrator.[43]

The statute makes no specific provisions as to the giving of a bond by an administrator *de bonis non*. But there is no doubt but what he is required to give it the same as a general administrator. An inventory shall not be required unless in the opinion of the court this is necessary.[44] It seems to me this matter may well be left in the discretion of the Court. If the only assets that remain unadministered have been converted by a former administrator, there can be no practical use for going through the forms of filing an inventory. Especially is this true where the former administrator has filed an account in the court, for such an account will then show all the assets with which the administrator *de bonis non* may be chargeable. But if for some reason, such as a former administrator going beyond the jurisdiction of the court, so that the court could not compel the filing of an account, or if there existed assets unadministered in specie, then it would be advisable to have an inventory made and filed in the court. This should be done for the protection of an administrator *de bonis non* as well as for those who may be interested in such a trust.

An administrator of a deceased or insane administrator must file an account within six months from his appointment.[45]

42 Id. 121.
Where an estate has been fully settled, and all the money in the hands of the administrator have been paid over in pursuance of an order of court, should a will be discovered and proved subsequent to such settlement, the executor can not compel the former administrator to account for the money or property by him received and paid over. Barkloo vs. Emerick, 18 Ohio 268.

43 § 10757 G. C.
Cited Croxton-Murray Co. vs Hubbard, 28 C. C. 354.
The fact that the statute now puts that duty on the Probate Judge does not create a new or different rule.

44 §§ 11637-38 G. C. See § 281.

45 § 11822 G. C. See § 707, 230.

CHAPTER X.

ADMINISTRATOR DE BONIS NON WITH THE WILL ANNEXED.

§ 161 Definition, etc.
§ 162 Appointment, etc.
§ 162a Power to appoint stranger to serve with executor.
§ 163 If, after administration granted, as of an intestate, a will be proved, the same shall be revoked, unless, etc.
§ 164 Power of executor or administrator in such cases.

§ 161. Definition, etc.

Where the authority of a sole or surviving executor or administrator with the will annexed is extinguished before the estate is completely administered, the person appointed by the court to finish the administration of such an estate is known as an administrator *de bonis non* with the will annexed. He occupies a position different from that of any other person whose duty it is to administer an estate. In his relation to the estate of the deceased he occupies the same position as an administrator with the will annexed. That is, he must administer the estate according to the will of the deceased. In his relation to the previous executor or administrator he occupies the same position as an administrator *de bonis non*. By the common law an executor of an executor having had the right to administer the estate over which the deceased executor was executor, the position of an administrator *de bonis non* with the will annexed as such was not often met with. But that rule of the common law having been abolished by statute,[1] it makes a not infrequent kind of administration.

§ 162. Appointment, etc.

The same rule as was heretofore laid down in the appointment of an administrator *de bonis non* and an administrator

[1] § 10615 G. C.: § 94.

with the will annexed applies to an administrator *de bonis non* with the will annexed. Likewise the duties and general powers of such an officer will be similar to either that of an administrator with the will annexed or an administrator *de bonis non.* As to who should be appointed, the same section that provides for an administrator *de bonis non* also applies for an administrator *de bonis non* with the will annexed.[2]

He must give bond, must account and generally perform the duties mentioned in the preceding chapters. The forms provided there can with little alteration be adopted for an appointment of an administrator *de bonis non* with the will annexed. Care should be taken in the filing of the application to see that it contains an allegation that the previous executor or administrator has resigned or been removed. Likewise it should show that assets remain unadministered to the value of twenty dollars, and the entry making the appointment should also contain these jurisdictional facts.

§ 162a. Power to appoint stranger to serve with executor. If several persons are named in a will and one refuses to qualify, can someone else be appointed in the place of the one refusing to serve? I am satisfied this can not be done if the remaining executors do not give their assent. and there is much doubt if it can be done with their consent. If one executor resigns or refuses to qualify the others have the right to administer the estate, and so long as the remaining executors are competent and qualify it is not in the power of the court to appoint one not named in the will. It is directly so held in Terry's appeal, 67 Conn. 181. It is nowhere expressly so provided, but the language of section 10615, G. C. (§ 94), and other provisions lead to the same conclusion; where it is desirable that all concerned should act with the remaining executors, all had better resign or decine to accept, and then let the court appoint all as administrators *de bonis non* with the will annexed.

§ 163. If, after administration granted, as of an intestate, a will be proved, the same shall be revoked, unless, etc. "After granting letters of administration as of an intestate estate, if a will of the deceased be duly proved and allowed, the first administration shall be revoked, unless before such revocation a petition contesting the probate of such will, be filed in the court of common pleas; in which case, in the discretion of the probate court, the administration may be continued in the hands of the original administrator, until the final determination of such contest. If the will is sustained, the first admin-

[2] § 10631 G. C.; § 152.

istration must be revoked. In either case, upon the revocation of the first administration and the appointment of an executor or administrator with the will annexed, he shall be admitted to prosecute or defend any suit, proceeding, or matter begun by or against the original administrator, in like manner as an administrator de bonis non is authorized to prosecute or defend a suit commenced by a former executor or administrator." [R. S. § 6019.] [2*]

§ 164. Power of executor or administrator in such cases.

Under the above section where the power of an administrator has been extinguished by the establishment of a will, then an executor is appointed under the will. Such former administrator would be required to settle his accounts the same as if removed or resigned, and the original executor would in some respects occupy the position of an administrator *de bonis non* with the will annexed. So far as his relation to the previous administrator would exist, they would be similar to an administrator *de bonis non.* If the case is appealed, the Court may in its discretion continue the administration in the hands of the first administrator until the final proceedings of the contest have been accomplished. This section particularly confers upon the new executor or administrator with the will annexed, power to prosecute and defend any suit, proceeding, or matter commenced by or against the original administrator. Distinction between the administrator originally appointed under the above section, and that of a special administrator, is that he was regularly appointed for the purpose of accomplishing the full administration of the estate, and not for a special purpose, but whose administration was terminated by the fact that a valid will of the testator was established in court.[3]

2* § 10632 G. C.

3 If the will is contested a verdict rendered setting aside the will, and proceedings in error commenced, the court will not appoint a receiver. If an executor dies or resigns it is the duty of his successor to compel an accounting of the trust. Railway vs. White, 87 O. S. 413.

CHAPTER XI.

ANCILLARY ADMINISTRATION.

§ 165 Definition, etc.
§ 166 Not favored and limited to necessity of appointment.
§ 167 Difference between ancillary and principal administration.
§ 168 When appointment may be generally made.
§ 169 Powers of executor and administrator under will made out of this State.
§ 170 Administration and proceeding when decedent was not a resident of the State, but engaged in business therein, etc.
§ 171 Where appointment shall be made.
§ 172 To whom and in what time granted.
§ 173 Application, etc.
§ 174 Application for administration.
§ 175 Form of application for administration under section.
§ 176 Notice — proof, etc., required.
§ 177 Entry, etc.
§ 178 Form of entry ordering administration.
§ 179 Form of application for letters of administration.
§ 180 Form of administrator's bond.
§ 181 Form of entry.
§ 182 Form of administrator's letters.
§ 183 Powers, duties, etc.
§ 184 Payment of debts and distribution.
§ 185 Several administration for one estate, situate in different States.[1]

§ 165. Definition, etc.

The words "ancillary administration" have been thus defined: "A local and subordinate administration of such part of the assets of a decedent as are found within a State other than that of his domicile, and which the law of the State where they are found requires to be collected under its authority in order that they may be applied first to satisfy the claims of its own citizens, instead of requiring the latter to resort to the jurisdiction of principal administration to obtain payment; the surplus, after satisfying such claims, to be remitted to the place of principal administration." [2]

[1] See § 749. Ancillary accounting.

[2] Century Dictionary.

There may be instances where the tax commission might proceed to have an ancillary administration to collect the inheritance tax, although this can generally be done, by application to have the value fixed by the Probate Court. Where it appears in the order of the court appointing an administrator that the deceased was a resident of another state, the administration in Ohio must be ancillary to that of the other state of which he was a resident. Miswald vs. Marks, 19 C. C. 605, 10 C. D. 355.

This definition is an excellent one and emphasizes the fact that ancillary administration is a secondary or subordinate one. The statutory provisions consequently providing for the granting of ancillary letters testamentary or of administration with the will annexed or of administration upon a foreign grant of administration, are conditioned, first, by a regard for the rights of creditors resident in the State and their protection, and second, by principles of comity under which the Ohio law recognizes the status of a foreign executor or administrator in his own State or country, whose right to distribute the estate after the payment of debts and administration expenses in this State is safeguarded.[3]

§ 166. Not favored and limited to necessity of appointment.

It was a well-settled rule of common law, that executors and administrators could not sue or be sued except in the country from which they derived their appointment. Therefore if a creditor wished to bring suit, to reach the estate he must first have a representative appointed by the local court. But our statute, having provided that executors and administrators may both sue and be sued if within the jurisdiction of our State in the same manner as local administrators or executors; the necessity for an ancillary administration does not exist to the same extent that it formerly did. It is the general policy of the law to have the administration of the estate as simple as possible. Therefore ancillary administration is not favored, and such an administrator will only be appointed when it is actually necessary to protect the interest of a resident of this State. And that no ancillary administrator will be appointed until all remedies against the foreign administrator have been exhausted; and that if the resident creditor has had ample opportunity to present his claim to the foreign administrator, and if rejected to have brought suit against him within the jurisdiction of the court in which an ancillary administration is asked for, and has

[3] Jessup's Sur. Prac. 650.
See interesting art in 21 Cent. Law J. 186.
See § 1318, Ancillary guardians; § 749, Ancillary accounting.

failed to so act, the court might refuse to make such an appointment.[4]

The administration of an ancillary administrator is limited to the purpose for which appointment has been made; and if he goes beyond his powers he will be responsible even if done by the sanction of the court.[5]

§ 167. Difference between ancillary and principal administration.

The difference between an ancillary and principal administration is material and important when there are several administrations. When the deceased dies in another State or country, custody, management and distribution is proper in that State, and are exclusively under the control of the administrator there appointed.[6]

The administration granted in the country of the decedent's residence is principal administration, the other is ancillary. The ancillary administrator is auxiliary to the original foreign administrator, and subordinate to him so far as the collection of the assets and proper distribution of them, and is confined to the collection of the assets and the payment of the debts due the citizens of the State, leaving any balances that may remain to be remitted to the State of the decedent's domicile, and there be disposed of in accordance with the laws of such State.[7]

It is the object of the ancillary administrator to administer the assets found within the State and remit the proceeds to the parent administration. But if there are many creditors, the courts having control of such ancillary administration will not allow the estate to be remitted to the foreign State until such creditors are first paid. If the general estate is solvent they are paid in full, but if not, they are paid *pro rata*, taking all the estate and all liabilities in account to ascertain such *pro rata* payments.[8]

[4] *In re* McCreight, 6 N. P. 481.

[5] Swearingen vs. Morris, 14 O. S. 428.

[6] Wms. on Ex. 291; 3 Redf. on Wills 28.

[7] Swearingen vs. Morris, 14 O. S. 430.

[8] Williams vs. Welton, 28 O. S. 451.

So far as it may be necessary to protect the resident creditor, the assets belonging to the decedent in this State must be converted into money and such debts paid; and if it be necessary such an administrator might file a petition to sell real estate of a decedent in this State.

§ 168. When appointment may be generally made.

There seem to be three statutes, to-wit, § 10604,[9] § 10625[10] and § 10540,[11] which provide for the appointment of what may be termed an ancillary administrator. Under § 10604, G. C., which is the section which provides for the appointment of an original executor or administrator, it also provides "that when any person shall die intestate in any other State or country, leaving an estate to be administered within this State, the administration thereon shall be granted by the Probate Court in any county in the State in which there is any estate to be administered; and the administration which shall first be lawfully granted shall extend to all the estate of the deceased within the State and shall exclude the jurisdiction of the Probate Court of every other county."

The above part of § 10604 provides for the appointment where a non-resident should die intestate. If the non-resident should die testate the appointment would be made under the following section.

§ 169. Powers of executor or administrator under will made out of this State. "After allowing and admitting to record a will, pursuant to either of the next four preceding sections, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and must proceed in the settlement of the estate found in this state. The executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real or personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed." [R. S. § 5941.][12]

[9] § 72.
[10] § 170.
[11] § 169.
[12] § 10540 G. C.

It would seem that the provisions of sections 10604 and 10540 G. C., were broad enough to enable the court to appoint an ancillary administrator in every case where one was needed. But for some reason, which has never been very clear, the following was also enacted into our statute law.

§ 170. Administration and proceeding when decedent was not a resident of the State but engaged in business therein, etc. "When a person dies, whether testate or intestate, not being at the time of death a resident of this state, but having been engaged in business herein, as partner or otherwise, and leaving in this state property belonging in whole or in part to his estate, the probate court of the county in which such business was prosecuted, or of any county in which the property is situated, or where a debtor of such decedent resides, upon the application of a creditor of his, whose claim is founded on a contract made or a right of action which accrued in this state, shall grant to such creditor or other person, administration of all and singular the assets of such decedent in this state. The proceeds of such assets shall be applied to the payment of the debts proved against such estate before the administrator. The surplus, if any, must be paid into the court granting administration for the benefit of the estate of the decedent, in the state where he resided at the time of his death." [R. S. § 6013.][13]

§ 171. Where appointment shall be made.

By the general provisions mentioned in § 10604 G. C., the Court may grant an administration in any county in which there are assets to be administered. This right seems to be enlarged under § 10625 G. C., so that the application may be made either in the county in which his business has been prosecuted or the county in which the property is situated, or in the county where the debtor may reside. It will be observed further that a considerable number of conditions must exist in order to enable the application to be made under § 10625 G. C. that are not

[13] § 10625 G. C.

required if made under § 10604. The only thing that is required under § 10604 is that there is an estate in the county, and that the party has died intestate in another country. While under § 10625, if the decedent, whether he died testate or intestate, was a non-resident of the State, and engaged in business here, whether it was partnership or not, leaving an estate in this State, the administrator may be appointed. But it is further provided that the creditor in making such an application must have a claim which is founded on a contract made, or right of action, which accrued within this State before the grant could be made.

In that it provides that an administrator may be appointed for a testate in the county other than that in which there are assets § 10625 is broader than § 10604. But in requiring that it can only be made by a creditor who has a claim founded on a contract made, or right of action accrued, in this State, § 6013 is narrower than § 10604.

Even if the person would have died testate an application might have been made under the general provision, for if no will would have been produced the court might have made an appointment.[14]

If an appointment is sought under a foreign will as a matter of course the appointment would be made in the county in which the foreign will had been admitted to probate, as provided in § 10540 G. C.

§ 172. To whom and in what time granted.

There is no statutory limit within which the application for an appointment of an ancillary administrator must be made. I have no doubt the rule applicable to the appointment of administrators and executors generally would be applicable, and it has been held that it might be granted at any time, at least within twenty years after the decedent's death.[15]

Neither is there any provision as to whom letters should be

[14] Bustard vs. Dabney, 4 O. 68.

[15] McKee vs. Simpson, 36 Fed. R. 248.

granted, except in § 10625 G. C., where it is said that it may be granted to the creditor making the application, or some other person. I am inclined to believe that in the appointment of an ancillary administrator or administration of a non-resident deceased person, the Court may use its discretion and appoint whoever will administer the estate for the best interest of all concerned. Generally it might be said that this should be the creditor, but unless the estate is insolvent a creditor's right would not be superior to that of any other suitable person; and there might exist many substantial reasons why the creditor should not receive the appointment.

§ 173. Application, etc.

If the application be made under § 10604 G. C., the allegations required will be that the decedent died intestate, residing in a State other than our own, and that there is an estate to be administered in the county in which the application is made. In addition there must be shown that there is some reason for the administration. The mere fact that the non-resident dies intestate, owning property in this State, will not alone warrant an appointment. But if it is shown that there is personal property in this State, or outstanding debts, or credits of the decedent, it would be proper to make an appointment. But if there was only real estate and no debts or credits, no appointment should be made. If the application is filed under § 10625 G. C., it ought to state that the person died, and at the time of his death he was not a resident of this State, but he was engaged in business here; and that he had property in the county within which the application was made; or that a person owing the decedent resided in such county; and further it must be alleged that the claim of the creditor making the application is founded on a right of action which accrued within this State. It seems the practice has been that when making the appointment for an ancillary administrator that the court must first pass upon the question whether or not an appointment will be made.

This practice should undoubtedly be followed if the applica-

tion is made under the provisions of § 10625, G. C. It might not be unwise to follow it if the application is made under § 10604, G. C. But if the application be made under § 10540, G. C., it should be made as an original application is made for the appointment of an executor or administrator with the will annexed. The admitting to record of a foreign will would make out a case justifying an administration; and the allegation of such admission to record in the application would be sufficient.

§ 174. Application for administration.

(Under § 6013 Revised Statutes.)

To the Probate Court of.....County, Ohio.

The undersigned, a creditor of the decedent, asks of this Court that Administration be granted upon all and singular the assets, situate within the State of Ohio, of....., deceased, who, at the time of h.... death was a resident of the county of....., in the State of.....and whose death occurred on the.....day of....., 190..., and who at that time was engaged in the prosecution of business in the County of....., in the State of Ohio, as..... and left in said County of....., in the State of Ohio, property belonging to his estate:—the undersigned, creditor, states that ....., a debtor....of said decedent, resides in said.....County, Ohio. He further states that his claim against said decedent is founded on a contract made or right of action accrued within this State, viz.:..... (Here state if there was, or is, an administrator in the State where decedent died.) Wherefore petitioner asks that an administrator be appointed to administer upon the property of said decedent intestate in this State.

Dated....., 190...

The State of Ohio,.....County, ss.

....., named in the foregoing petition, being sworn, says that the statements therein are true as..he verily believes.

.....

Sworn to and subcribed before me this.....day of....., A. D. 190...

....., Probate Judge.

§ 175. Form of application for administration under § 10604.

To the Probate Court of.....County, Ohio:

The undersigned (here state the fact showing the interest of the petitioner) asks of this court that an administration be granted upon all and

singular assets, situated within the State of Ohio, of A. B., deceased, who died on or about the.....day of....., and was a resident of the county of....., in the State of....., and that said A. B. died intestate,[16] leaving the following described property within this county to be administered upon. To wit:

.....

Further alleges (here allege the reason why the application is made). (If the applicant knows, he should further state than an administrator was appointed in the State in which the decedent lived and whether or not the said administrator is still acting.)

Wherefore the Petitioner requests that there be an administrator appointed to administer upon the property of the said A. B., situated in the State of Ohio.

.....Sign.

Sworn to and subscribed before me and in my presence this.....day of.....

§ 176. Notice — proof, etc., required.

As no one has a preference in the right of appointment, but the same rests in the discretion of the Court. Notice is not required before an administrator of a non-resident be appointed. But if no notice is given, a motion to set aside an appointment filed within a reasonable short time after it is made, and by one not having had notice, will be entertained, the same as if objections would have been made to the appointment in the first instance. It is held, that if an appointment is sought under § 10625, G. C., that the Court must be satisfied that there is strong probability that the creditor applicant can in a court of law establish the fact that he is the creditor of the decedent, and that upon the question whether or not the applicant is a creditor the Court may hear such testimony as it deems advisable; and further that the decedent must not only at his decease have been a non-resident of this State, but he must also have been engaged in the prosecution of business in this State.[17]

Likewise it has been held that in order to justify the Court in making such appointment, it must appear that it is necessary to do so to protect the interest of the creditor in this State; and that a creditor by his laches may lose his right to enforce such

[16] If said party died testate and the will has been admitted to record, state that fact as provided under § 10540 G. C.

[17] *In re* McCreight, 6 N. P. 479.

appointment, at least unless he affirmatively shows that he has no other remedy by which to protect himself.[18] If the appointment is sought under § 10604, G. C., the same evidence will be required as to jurisdiction, etc., other than the decedent was a non-resident of the State, as if the application were made for an original administrator. If made under § 10540, G. C., it must of course show that the will had been admitted to record. While a non resident person may be appointed executor under a foreign will, yet it is not obligatory on the Court to do so, for if it is good cause to remove a local administrator or executor because he moves from the State, it certainly would be good cause not to appoint him in the first instance, by reason of his non residence.

§ 177. Entry, etc.

The entry should show an affirmative finding on all the jurisdictional facts; and in one case it was held that where these words appeared in an entry to-wit: "It is ordered that said Mitchell, a brother, be and is hereby appointed administrator of the estate of the deceased, late of the City of Marine, Michigan"; that this was a substantial finding by the Court, that the deceased was not at the time of his death a resident of Ohio.[19]

§ 178. Form of entry ordering administration.

(*Title.*)

This day came A. B. (here designate character in which the application is made), and filed herein his application that there be an administration ordered on the estate of late C. D., a resident of..... county, ...State; and the same was submitted to the Court. Whereupon the Court finds the allegations contained in the said application are true, and that there ought to be an administration upon the estate of the said C. D., situate in the State of Ohio.

§ 179. Form of application for letters of administration.

.... Deceased.

To the Probate Court of.....County, Ohio:

Administration having been heretofore ordered upon all and singular the

[18] *In re* McCreight, 6 N. P. 481.

[19] In re Meswald vs. Marks, 19 C. C. 605; 10 C. D. 355.

assets situate within this State, of.....
deceased, who at the time of h....death was a resident of the County of
....., in the State of..... ..... the undersigned, whose postoffice address is ....,
.....County, Ohio, asks that such administration be granted unto h...., and upon h.... oath says that the applicant was .....
indebted to the deceased in the sum of $.....; that all the property, situate within the State of Ohio, belonging to the estate of said decedent, is about as follows, to-wit:

Personal Estate, - - - - - - $.....
Real Estate, - - - - - - $.....
Total, - - - - - - $.....

And offers a bond in the sum of $....., with.....
.....and ..... as sureties thereon, and suggests.....and
.....as appraisers.

.....

Sworn to and subscribed before me this.....day of.....
A. D. 190....

....., Probate Judge
By....., Deputy Clerk.

§ 180. Form of administrator's bond.

In the Probate Court of.....County, Ohio.

In the Matter of the Estate of.....Deceased.

Know all Men by these Presents:

That we.....
..... and .....
are held and firmly bound unto the State of Ohio, in the penal sum of
.....Dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors and administrators if default be made in the conditions following:

Whereas, An application duly made to said Court, administration had been before that time ordered by the Probate Court of.....
County, Ohio, "upon all and singular the assets, situate within the State of Ohio, of.....deceased, who at the time of h....death, was a resident of.....
County, in the State of.....and such administration was on the.....day of.....A. D. 190..., granted by said Court unto.....

Now, if the said.....as administrat....
as aforesaid, shall:

First, Make and return into said Court, on oath, with thirty days, a true inventory of all Moneys, Goods, Chattels, Rights and Credits of the deceased, situate within the State of Ohio, which have or shall come to h....possession or knowledge; and also, if required by said Court, an inventory of the real estate of said deceased.

Second, Shall administer according to law all the Moneys, Goods, Chattels, Rights and Credits of the said deceased, situate within the State of

Ohio, and the proceeds of all h.... real estate within said State, that may be sold for the payment of h.... debts, which shall at any time come to the possession of said administrat...., or to the possession of any other person for h.....

Third, Shall render upon oath a just and true account of h.... administration, within twelve months, and at any other time when required by said Court or the law, and failing so to do for thirty days after h....shall have been notified of the expiration of the time by the Probate Judge h.... shall receive no allowance for h....services, unless the Court shall enter upon its journal that such delay was necessary and reasonable.

Fourth, Shall pay any balance remaining in h....hands upon the settlement of h....accounts, to such persons as said Court or the law shall direct.

Sealed with our seals, and dated this.....day of.....A. D. 190...

EXECUTED IN PRESENCE OF

.....

§ 181. Form of entry.

This day came A. B. and filed herein his application for letters of administration upon the estate of C. D., a non-resident of this State; and at the same time filed herein his bond in the sum of.....Dollars, with E. F. and G. H. sureties thereon; and the same was submitted to the Court. Whereupon the Court finds that said application is in proper form and the allegations therein are true; and that the bond given is sufficient in amount and proper in form; and the same is hereoy approved and the Court further finds the said A. B. is a suitable person to administer upon the said estate.

Wherefore it is ordered by the Court, that letters of administration be granted to said A. B.; and that G. H., H. I. and J. K. be appointed appraisers of said estate.[20]

§ 182. Form of administrator's letters.

The State of Ohio, ...*County, ss.*

To All who shall see these Presents, Greeting:

Be it known, That by the Court of Probate of said County, administration of all and singular the assets, situate within the State of Ohio, which were

[20] This form of entry may be changed to some extent where required for an application made under §§ 10540 and 10604. I do not think it is necessary to provide in the entry that the administration is an ancillary one. There may be occasions arising when, if the application be made under §§ 10540 G. C. and 10604 G. C., that the administration never becomes ancillary. For if no administration be held or required at the domicile of the decedent, the administration here might be original; and the entry of the court in making the appointment could not change the law in this respect.

See Swearingen vs. Morris, 14 O. S. 424.

of .....late of .....
County, in the State of ....., deceased, has been granted unto....., whose duty it shall be to have all and singular the said assets, appraised by .....
and to return upon oath, within thirty days, a true inventory thereof, to administer according to law all the said assets, and also the proceeds of the real estate of said decedent, situate within said State of Ohio, which may be sold for the payment of.....debts, which shall at any time come into the possession of said administrat....or any person for.....; to render upon oath a true account of.....administration months, and at any other time when required by the Probate Court or the law; and failing so to do for thirty days after he shall have been notified of the expiration of the time by the Probate Judge, he shall receive no allowance for services, unless the Court shall enter upon its journal that such delay was necessary and reasonable; and to pay any balance remaining in..... hands upon settlement of.....accounts to such persons as the Court or the law shall direct.

Witness, ..., Judge of said Court
at....., this.....day
of.....A. D. 190....
....., Probate Judge,
And Ex-officio Clerk of Said Court.
By....., Deputy Clerk.

The State of Ohio,.....*County, ss.*
I,....., Judge of the Probate Court within and for said county, certify that the above is a true copy of the original Letters of Administration granted in the premises by said Court, and remaining on file in my office.
Witness my hand and the seal of said Court, at.....
this.....day of.....A. D. 190....
....., Probate Judge.
And Ex-officio Clerk of the Probate Court.

§ 183. Powers, duties, etc.

It is not every administration of the estate of a non-resident that is ancillary, but whether it be ancillary or not, so far as the law is applicable to that part of the administration of the estate which applies to the appointment, collection of assets, and payment of the debts to creditors residing in this State, the laws of this State apply; and may be said to be similar to those applicable to an adminstration of an estate of a deceased resident. It is only when it comes to the distribution of what remains in the administrator's hands after the debts of local

creditors have been paid, that any other law other than the laws of our own State apply. Then it becomes very important.[21]

§ 184. Payment of debts and distribution.

As above mentioned the first thing for an administrator of the estate of a non-resident in the matter of distributing what he has collected, is, that he first pay the expenses of administration; second, such debts as may be proved against the estate by the creditor here; and if there are legatees who reside here a distribution will be made to them. But it is here vitally important to distinguish whether the assets come from personal property or real estate. If they come from personal property, they must be distributed according to the laws of the domicile of the deceased. After distribution has been made to local creditors and heirs or legatees residing here, the residue may be remitted to the original administrator. But this is not obligatory and the court may use its discretion.[22] It seems that under the provisions of § 10625 G. C.,[22*] it is contemplated that such remaining sum be paid over to the original administrator; and I doubt if the Court could make any other order if the appointment was made under that section. If the assets in

[21] Woerner on Admin. 374.

If an ancillary executor or administrator has been properly appointed he becomes, so far as our courts are concerned in protecting his rights, and those of the creditors within this State, a local executor or administrator.

In Phelps, 2 W. L. G. 120.

[22*] § 170.

[22] See Matter of accounting of Hughes, 95 N. Y. 55, at p. 60. In the Hughes case, the decedent was a resident of Pennsylvania, where he died intestate. Soon after his death his brother was appointed administrator of his estate, in N. Y., by the Surrogate of Kings County. A week later an administrator of the property of the deceased was appointed in Pittsburg, Penn. There were no creditors in N. Y., but all the next of kin of the intestate, five brothers and five sisters all resided in N. Y. On the application of the Kings County administrator for a final accounting, the foreign administrator presented a petition claiming the right to intervene as principal administrator and asking for the transmission of the property to him for distribution under the Pennsylvania law. The Court of Appeals in reversing the decree of the Surrogate which granted his application, held that as it did not sufficiently appear that there were creditors to be paid in Pennsylvania, and as all the next of kin were all residents of the State presumably consenting to distribution in N. Y., and as the

the hands of the administrator came from the sale of real estate, then the law of the place of the real estate would control its distribution.[23]

§ 185. Several administrations for one estate, situated in different States.[23a]

As each administration of a non-resident of the State is controlled exclusively by the laws of the State in which each respective appointment is made the following general principles will be applicable to such administration and that if decedent leave property in different States, there must be, as a rule, an administrator in each State, although there will be only one domestic administrator and the remainder will usually be ancillary. Usually the same person will be appointed in each State, unless his non-residence disqualifies him, and that person is the one who takes out letters at the domicile of the decedent.[24]

The administration in one State is wholly independent of that in another.[25] And the fact that administration has been granted in one State does not impair or abridge that in another.[26] There is no privity between administrators in different States,[27] although there may be between executors of the same estate in different States.[28] The personal estate is to be distributed to

transmission of the funds under such circumstances to the Pennsylvania administrator would merely subject the assets to double commissions, it would be an idle show of courtesy to remit the funds to a foreign jurisdiction. "When the only effect would be to deplete it by unnecessary charges and expenses to the prejudice of all parties interested." Opinion of Andrews, J., at page 63.

23 Woerner on Admin. 375.

23a Cited Albrecht vs. Hoffman, 24 Dec. 21, 16 N. P. 209.

24 Woodruff vs. Schultz, 49 Ia. 430; Sherman vs. Page, 85 N. Y. 123; Fletcher vs. Sanders, 7 Dana 345; Schultze vs. Pulver, 11 Wend. 361; Hunter vs. Bryson, 5 Gill & J. 483.

25 Sherman vs. Page, *supra.*

26 Henderson vs. Clark, 4 Litt. 277; Naylor vs. Moody, 2 Blackf. 247; Grant vs. Reese, 94 N. C. 720; Aspden vs. Nixon, 4 How. 467; Pond vs. Makepeace, 2 Met. 114; McLean vs. Meek, 18 How. 16.

27 Taylor vs. Barron, 35 N. H. 484; Stacy vs. Thrasher, 6 How. 44; Hill vs. Tucker, 13 How. 458; Creswell vs. Slack, 68 Ia. 110.

28 Hill vs. Tucker, *supra;* Goodall vs. Tucker, 13 How. 469.

(*Contra*—Grant vs. Reese, 94 N. C. 720); Hooper vs. Hooper, 125 N. Y. 400; Garland vs. Garland, 84 Va. 181.

See Woerner on Admin. 360.

heirs and legatees, however, according to the law of the domicile of the deceased.[29] Each administration is limited to the property having a *situs* within its jurisdiction.[30] A judgment against one cannot be used as a cause of action against another, so as to affect assets under the control of the other.[31] A judgment obtained by a foreign administrator against a debtor of the estate cannot be sued upon by the domiciliary administrator, nor by any other administrator who does not succeed the one so obtaining such judgment.[32] But see as to construction of wills to the contrary.[33] If a judgment be rendered against an estate in one State and partly paid, and then suit brought against the estate on the same claim in another, it is not necessary to plead such judgment and part payment; and such administrator is not estopped from disputing such claim by reason of the fact that he had defended it in the first State; for he cannot bind the estate outside of the last State.[34]

[29] Russell vs. Madden, 95 Ill. 485.

[30] McCord vs. Thompson, 92 Ind. 565; Reynolds vs. McMullen, 55 Mich. 568.

[31] Brodie vs. Brickley, 2 Rawle. 431; Braithwaite vs. Harvey, 36 Pac. Rep. 38; Slauter vs. Chenowith, 7 Ind. 211; Low vs. Bartlett, 8 Allen, 259; Judy vs. Kelley, 11 Ill. 211; Rentschler vs. Jamison, 6 Mo. App. 135.

Where the decedent was, at the time of his death, a resident of another State, administration must be ancillary, and funds in the hands of the administrator here are properly ordered over to the administrator in the other State. Meswald vs. Marks, 10 C. D. 357; 19 O. C. C. 605.

[32] Talmage vs. Chapel, 16 Mass. 71.

[33] Washburn vs. Van Steenwyk, 32 Minn. 336; McCartney vs. Osburn, 118 Ill. 403; S. C., 121 Ill. 408; Staigg vs. Atkinson, 144 Mass. 564, as to real estate.

[34] Braithwaite vs. Harvey, 36 Pac. Rep. 38.

A judgment recovered against a domicillary administrator in Alabama can not furnish a right of action brought by a judgment-creditor against an ancillary administrator of the same estate. Albrecht vs. Hoffman, 24 Dec. 19; 16 N. P. 209.

CHAPTER XII.

FOREIGN ADMINISTRATION.

§ 186 Definition, etc.
§ 187 Foreign executors and administrators may be sued here.
§ 188 Law governing local administrators applies to foreign.
§ 188a Jurisdiction of courts.
§ 189 Same—continued.
§ 190 Procedure of heir, etc., against foreign administrator.
§ 191 Suit against foreign administrator by heir or legatee.
§ 192 Form of refunding bond.
§ 193 May be required to secure distributees and indemnify sureties.
§ 193a Other remedies.
§ 194 Form of bond to secure distributee or surety from foreign executor.
§ 195 May prosecute suits in this State.
§ 196 Validity of voluntary payment to foreign administrators.
§ 197 Foreign executor or administrator may be authorized to sell real estate.
§ 198 Law applicable to such sales.
§ 199 Foreign executor or administrator to give bond unless already bound.
§ 200 Foreign executor, etc., to give further bond to account for surplus when he sells more than is necessary to pay debts, etc.[1]

§ 186. Definition, etc.

By the phrase foreign executor or administrator, the Court never means the mere non-residence of the individual holding the office, but the foreign origin of the representative capacity.[2] It is not the residence of an executor or administrator outside of the State which makes a foreign executor or administrator, but the creation of his official character under and by force of law foreign to our own. The representative character therefore is the sole product of the foreign will and depending upon it for existence, cannot pass beyond or have any force or effect outside of the jurisdiction of its origin. But by the comity of States by which one State always respects the jurisdiction of

[1] See chapt. 11, § 165 *et seq.* Ancillary Administration.

[2] Hopper vs. Hopper, 125 N. Y. 400.

another when not in conflict with the rights of citizens of its own jurisdiction, the duties, powers and rights of such foreign executors or administrators are generally respected and followed. The foreign executor or administrator may reside in this State, and the local executor or administrator may reside in any other State. A foreign executor or administrator may be ancillary to one in this State or the local executor or administrator may be ancillary to one residing here and appointed by a foreign Court. The common law rule, that executors and administrators have no authority beyond the jurisdiction of the State that gave them their appointment and cannot be sued or sue in their representative capacity in any other State, has been completely abrogated by statutory provision in our State, as will be seen from the following sections of the General Code made a part of this chapter. They have particularly all the rights and all the liabilities of a local administrator or executor and there would seem to be no necessity for appointing an ancillary or local administrator in this State, *when jurisdiction could be acquired over the foreign executor.*[3]

§ 187. Foreign executors and administrators may be sued here. "An executor or administrator, duly appointed in any other state or country, or his legal representatives, may be prosecuted in an appropriate court in this state, in his capacity of executor or administrator." [R. S. § 6129.][4]

The above section only gives jurisdiction over foreign executors when service can be gotten upon them in this State. If they do not place themselves in such a position that a legal service could be had upon them no valid judgment could be recovered. A foreign administrator cannot be compelled to appear in any of our courts unless as above stated he brings himself within the jurisdiction of the local court, but he may

[3] See § 1132, Powers under will made out of state. § 165, Ancillary Administration.

[4] § 10763 G. C.

It is a generally accepted rule that the power of an administrator or executor over the estate of a deceased person emanates from the laws of the State where he receives his appointment. It does not *de jure* extend to other States and can not confer, as a matter of right, any authority to collect assets of the deceased in another State.

A Probate Court in this State has, although the will has been probated therein, no right to review accounts of an executor appointed in another State, over property situate in this State. *In re* Crawford, 68 O. S. 58; affirming 21 C. C. 554; 11 Cir. D. 605.

This section has stood for forty years and never been constitutionally attacked. Craig vs. Ry., 2 N. P. 56; 3 Dec. 74.

An administrator appointed in Michigan can not bring an action in the Federal Court for wrongful death in Illinois. See Bernard vs. Shane, 201 Fed. 453; 11 O. L. R. 43.

do so voluntarily.[5] "It is a matter concerned where the authorities differ," says a distinguished author,[6] "Whether an administrator is guilty of laches or negligence in failing to collect assets beyond the jurisdiction of his forum, or obtaining letters in the foreign jurisdiction in which there may be property belonging to the estate." At most an administrator of this State cannot be charged with assets in another State, unless it be shown that he could, under the laws of that State, have collected and recovered such assets, using ordinary diligence in order to do so.[7] If a foreign administrator appears in court and proceeds to trial without objection he cannot then be heard, that the Court has no jurisdiction to hear and determine the cause.[8]

Concerning the above section it was said, by Judge Ranney,[9] "that by the administration laws, all foreign executors and administrators may sue and be sued in this State, like those of our own appointment, thereby in most cases making it unnecessary that an ancillary administration should be instituted. In quite an extended opinion in one of our lower courts[10] it was held that the above section was constitutional and that a Court in our State would not go into the question whether or not a judgment recovered against a foreign administrator would be effective. It has been laid down in a reconsideration of the matter, that it is a rule in Pennsylvania that a foreign executor within the jurisdiction of their court is liable to be sued by a resident creditor of his decedent; and such suit will be sustained unless it entrenches unduly upon the jurisdiction of another court already attached, or would expose parties to inequitable burdens, although in that State there is no statute specifically making them liable.[11]

[5] Lampton vs. Nichols, 2 C. S. C. R. 55.

[6] Woerner on Administration 364.

[7] Goodwin vs. Jones, 3 Mass. 514; Hamilton vs. Carrington (S. C.), 19 S. E. Rep. 616; Leonard vs. Putman, 51 N. H. 247; Judge vs. Kelley, 11 Ill. 211; Sheldon vs. Rice, 30 Mich. 296.

[8] Hamilton vs. Taylor, 2 C. S. C. R. 402.

[9] Swearingen vs. Morris, 14 O. S. 424.

[10] Craig vs. Ry. Co., 2 N. P. 64; 3 Dec. 146.

[11] Laughlin vs. Solomon, 180 Pa. St. 177; 2 Prob. Rep. Ann. 74 and notes.

Service may be had by attachment against a non-resident executor, if the property of the decedent, which is attached, is in this State. Am. Steel Wire Co. vs. Meyers, 22 Dec. 733.

See Williams vs. Welton, 28 O. S. 457.

§ 188. Law governing local administrators applies to foreign. "The provisions concerning settlements of the estates of deceased persons, and the remedies and proceedings herein given against executors and administrators appointed by the law of this state, shall also apply to foreign administrators or executors appointed by the laws of any state or country, and residing in this state, or having assets or property herein." [R. S. § 6130.][12]

§ 188a. Jurisdiction of courts. "The several courts of probate, common pleas and superior courts, shall have the same power and authority over such foreign executors and administrators as if they were appointed under the laws of this state." [R. S. § 6130.][12*]

§ 189. Same — continued.

There are no judicial decisions to aid in the construction of the above section, but it would seem that if the foreign administrator resided in any county in this State, or brought himself within the jurisdiction of any Probate Court of a county in which there were assets of a non-resident decedent,[13] that such foreign administrator might by citation, be brought into a Probate Court of such county and compelled to give bond, make an inventory and sale of the estate and file an account just the same as if he were a local administrator; and

A very interesting case in which it was sought to compel an administrator in this State to go into another State and litigate a claim against an estate is that of Cross vs. Armstrong, 44 O. S. 613.

The decedent had had his life insured with a Pennsylvania company for $10,000, payable on its face to his wife. After his death the wife had possession of the policy and entered suit thereon in the Common Pleas Court of Philadelphia; and made the administrator of the deceased a party to that action. The administrator did not appear, nor did anything which voluntarily brought him within the jurisdiction of the Philadelphia court so that a personal service might be had on him. The Philadelphia court therefore rendered a judgment in favor of the wife and paid her the claim. Under the laws of Ohio (§ 3628), a part of this policy would have belonged to the creditors of the deceased; and in a suit by the administrator against the widow for such portion of the money paid to her by the Insurance Co. it was held that the Court of Pennsylvania could not determine a right against the administrator in Ohio and that the administrator was not bound by the Philadelphia suit.

12 § 10764 G. C.

12* § 10765 G. C.

13 Cross vs. Armstrong, 44 O. S. 613.

that, if a Court once acquired jurisdiction of such an administrator in a proceeding to compel him to do any of the things which the law requires of a local administrator, such administrator would thereafter be within the jurisdiction of such Court; and if he failed to comply, a local administrator *de bonis non* might be appointed to take charge of the effects; and then after paying local creditors or resident heirs and legatees, the Court might order the remainder paid to the foreign administrator. Of course, here like in the other provisions of our statutes, a foreign administrator must bring himself within the jurisdiction of a local court, before any proceedings can be had. Such foreign administrator might be compelled to file an account and thereafter suit can be brought by any distributee as provided in the case of local administrator. Likewise in the matter of the presentation of claims, and the statutory limit applicable to suits on rejected claims, and generally it may be said that such foreign administrator having been brought within the jurisdiction of a certain Probate Court of our State would be held responsible in all the administration of such estate, the same as a local administrator.

§ 190. Procedure of heir, etc., against foreign administrator. "Any common pleas court or superior court may compel a foreign administrator or executor residing in this state, or having assets or property herein, to account at the suit of an heir, distributee, or legatee, who is resident in this state, and make distribution of the amount found in his hands to the respective heirs, distributees, or legatees, according to the law of the state granting such letters. When suits are pending, or unsettled demands against such estate, the court also may require a refunding bond to be given to such executor or administrator by the heirs, distributees, or legatees entitled thereto in case the amount paid is needed to pay debts of the estate." [R. S. § 6131.][14]

§ 191. Suit against foreign administrator by heir or legatee.

The above section further enlarges the right of residents to enforce claims they may have against foreign administra-

[14] § 10766 G. C.

tors, provided such administrators reside in this State, or have property here belonging to the decedent. It would seem that the previous section (6130) would have provided for every case that might have occurred, but the above section is probably intended to more particularly apply to a case where in a foreign administration, it had been found that a certain amount was due to a resident of Ohio. But whatever may have been the intent, it certainly confers on a Superior or Common Pleas Court full power to protect any local distributee, legatee or heir; and probably puts into statute, a rule which would have been enforced by a court of equity without statute. The above statute seems to have an equity proceeding in contemplation when it provides that a foreign administrator may be compelled to *account,* accounting being a proceeding in equity. For it has been elsewhere held, that an executor may be compelled by a court of equity in a State to which he may have removed, to disclose with what funds he has purchased property, the character of the funds, whether he holds the property as trustee and for what use and trust.[15] And also that where an executor or administrator removes the property of the estate in his charge without having completed the administration, to any other State, and fails to obtain new letters of administration there, a court of equity will grant relief to any person whose interest is thereby jeopardized, on the ground that where the trust fund is in danger of being wasted or misapplied, the court of chancery on application of those interested will interfere to protect the funds from loss.[16]

It is said that it may be stated, however, as a general proposition, that the liability of an administrator for property fraudulently or without having been fully administered, brought from the State in which he received his appointment to another State, is to the creditors and distributees alone, and does not authorize the grant of letters in the latter State.[17]

[15] Woerner on Admin. 371.

[16] Woerner on Admin. 370; Calhoun vs. King, 5 Ala. 523; Beller vs. Dunn, 3 Head. 87; Dillard vs. Harris, 2 Tenn. Ch. 193.

[17] McCabe vs. Lewis, 76 Mo. 296. When a married woman died domiciled in this State and her husband obtains letters in Pennsylvania, suit cannot be maintained in this State

§ 192. Form of refunding bond.

Know all Men by these Presents:

That we, E. F., G. H. and I. J., are firmly bound unto C. D., the administrator (or executor) of A. B., deceased, and his successors in the sum of .....Dollars (double the amount of the liability) to the payment of which we hereby jointly and severally bind ourselves, if default be made in the condition following:

Whereas, on the.....day of.....in the county of .....State of.....C. D. was duly appointed and qualified as administrator (or executor) of the estate of A. B., deceased. *Whereas*, afterwards there was proceedings had in the .....Court, of.....County in the State of Ohio, C. D. to account to..... .....and heir (distributee or legatee) who is resident in this State, for his said share of said estate. And whereas afterwards, to-wit: On the.....day of....., an order was made in said Court of.....County, Ohio. Finding that the said K. L. is entitled to the sum of.....Dollars, as such heir etc., of A. B., deceased. And, whereas it was ordered that the said K. L. make to said C. D. a refunding bond to save the said C. D. harmless from any liability which might result to him from the payment of said sum to K. L. There now being unsettled demands (or suit pending in the..... .....Court, of.....County) against said estate. Now if the said K. L. shall refund the said amount of .....Dollars, so ordered paid to him by the .....Court, of.....County, so much thereon as may be necessary to satisfy any demand that may arise from pending suits or unsettled claims or otherwise that may be recovered against the estate of said A. B., deceased; and shall indemnify C. D. against all loss and damage on account of payment of such sums as ordered by the Court. Then this obligation shall be void; otherwise it shall remain in full force.

Signed by us this.....day of..... 190....

§ 193. May be required to secure distributees and indemnify sureties. "When a foreign administrator or executor has wasted, misapplied, or converted assets of such estate, or has insufficient property to discharge his liability on account of the trust, or his sureties are irresponsible, distributees, heirs, or legatees, in any such court may compel him to secure the amounts respectively due to them, and any of his sureties may require indemnity on account of their liability as bail." [R. S. § 6132.][18]

by an heir while the matter remains unsettled in the Pennsylvania court. Adams vs. Adams, 7 O. S. 84.

[18] § 10767 G. C.

§ 193a. **Other remedies.** "The several provisional remedies and proceedings authorized in such courts, also apply to the person and property of such administrator or executor. Such courts may make any order or decree touching his property and effects, or the assets of such estate, necessary for the safety and security of those interested therein." [R. S. § 6132.][18*]

This section is a continuation of the matters referred to in § 10766, G. C., and specifically confers on the Court, ample power to protect a resident distributee, heir or legatee, and seems to apply further, that if he has given surety, that the Court may order him to protect such surety. Neither § 10747 G. C., nor § 10766 give any rights to creditors. A creditor must work out his right through § 10764-65 G. C.

§ 194. Form of bond to secure distributee or surety from foreign executor.

Know all Men by these Presents:

That we, E. F., G. H. and I. J., are firmly bound unto C. D. an heir (distributee or legatee) of A. B., deceased, in the sum of..... Dollars to the payment of which we hereby jointly and severally bind ourselves if default be made in the condition following:

Whereas, on the.....day of....., in the county of ....., State of....., E. F. was duly qualified and appointed administrator (or executor) of the estate of A. B., deceased. *Whereas,* afterwards there was proceedings had in the..... .....Court, of....., in the county of .....in the State of Ohio, to compel the said E. F. to secure the sum of.....Dollars, which was due to the said C. D. as such heir (distributee or legatee) from the estate of said A. B.; and, whereas, afterwards, to-wit: on the.....day of..... an order was made in the said Court of.....County, Ohio, in which it was ordered and decreed that the said E. F. should execute and deliver to the said C. D. a bond in the sum of.....Dollars, to secure him in the payment of the said sum so found due him. Now if the said E. F. shall pay to the said C. D. the said amount of..... Dollars so found due him by the.....Court, of..... ....., and fully satisfy the said C. D. in all demands therefor, then this obligation shall be void, otherwise it shall remain in full force.

Signed by us this.....day of.....A. D. 190....

.....

18* 10768 G. C.

§ 195. May prosecute suits in this State. "An executor or administrator, duly appointed in any other state or country, may commence and prosecute an action or proceeding in any court in this state, in his capacity as such, in like manner and under like restriction, as a non-resident is permitted to sue." [R. S. § 6133.][19]

This section places a foreign administrator on the same plane of any non-resident person in the bringing of suits in the interest of the estate. In the absence of such statute no action could be brought.[19a] Where an administrator had brought suit to collect assets belonging to his decedent it was sought to raise a question in the higher court that an ancillary administrator ought to have been appointed in this State. The court declined to go into that question, saying that whether or not an ancillary administrator ought to be appointed was a matter that rests in the Probate Court; and that where there were no creditors in Ohio and the effect would be to accumulate necessary charges to the estate the Probate Court might probably refuse to grant letters, or where they might have been granted, revoke them. But this was a matter proper only for a consideration of the Probate Court.[20]

It has also been held in this State that where a foreign administrator appeals a case that he must give an appeal bond. In that respect differing from a local administrator.[21]

§ 196. Validity of voluntary payment to foreign administrators.

It is said that upon the question of the validity of the voluntary payment of a debt to a foreign executor or administrator the authorities are not unanimous, and that the tendency is in the direction of recognizing the validity of such payment, unless there are creditors in the home State whose debts are unpaid or there exists a local administration.[22]

In our own State where plaintiff's intestate resided in Ten-

19 § 10769 G. C.

19a Bernard vs. Shane, 220 Fed. 220.

20 Purcell vs. Heinberger, 1 W. L. B. 205; 3 Dec. (Rep.) 343.

21 Work vs. Massie, 6 Ohio 503. See Kinkead's Pl., § 41 for manner of bringing suits against non-residents.

22 Woerner on Admin. 364.

Payment by an Ohio debtor to an administrator appointed by another state than Ohio, prior to the appointment of an administrator in Ohio is a satisfaction of the debt. Crawford vs. Missionary Society, 22 Dec. 804.

nessee, where he died, and had on deposit money in this State, and administration was first granted in Tennessee and afterwards in this State, the parties with whom he had made the deposit promised to pay the same to the Tennessee administrator, without notice that one had been appointed in this State. The local administrator brought suit, and it was held that he could not recover, because, by the law of Ohio, a foreign administrator has authority to collect debts and the liability attached at the time of making the promise.[23]

From this proposition it is said that a debtor is liable to pay whenever he may be reached by the administrator.[24]

It has been held that a foreign administrator cannot release the mortgage on land against the domestic administrator.[25] But I very much doubt whether this would be the law in Ohio, for the Supreme Court now holds that the debt is the principal thing and the mortgage an incident. If the foreign administrator has power to receive payment of the debt it would follow that he could cancel the mortgage.

§ 197. Foreign executor or administrator may be authorized to sell real estate. "When an executor or administrator

[23] Weitzell Admr. vs. Cinn. Savings, 1 W. L. J. 393; Stevens vs. Gaylord, 11 Mass. 264.

[24] Woerner on Admin. 364.

Nelson, J., of the Supreme Court of the United States, says: "There is doubtless some plausibility in it (the objection to the validity of the voluntary payment to a foreign administrator), growing out of the interest of the home creditors. But it has not been regarded of sufficient weight to carry with it the judicial mind of the country. With the exception of the case in Tennessee none have been referred to, nor have our own researches found any maintaining the invalidity of the payment. The question has been directly and indirectly before several of the courts of the States, and the opinions have all been in one direction, in favor of the validity."

Wilkins vs. Ellett, 9 Wall. 740, 742, referred to with approval in Wyman vs. Halstead, 109 U. S. 654. The cases referred to by Justice Nelson are: Williams vs. Storrs, 6 John. Ch. 353; Doolittle vs. Lewis, *supra;* Vroom vs. Van Horne, 10 Pai. 549, 557; Schulz vs. Pulver, 11 Wend. 361; Trecothick vs. Austin, 4 Mason 16, 33; Stevens vs. Gaylord, 11 Mass. 256; Nisbet vs. Stewart, 2 Dev. & B. L. 24; Parsons vs. Lyman, 20 N. Y. 103, 108.

Some of these decisions contain mere dicta or intimations on the point under consideration.

[25] Stone vs. Scripture, 4 Lans. 186; Stevens vs. Gaylord, 11 Mass. 256.

is appointed in any other state, territory, or foreign country, on the estate of a person dying out of this state, and no executor or administrator thereon is appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there is real estate of the deceased, together with an authenticated copy of the will, if there be one; after which, under an order of the court, he may be authorized to sell real estate for the payment of debts or legacies and charges of administration, in the manner and upon the terms and conditions prescribed in the case of an executor or administrator appointed in this state, excepting in particulars wherein a different provision is hereinafter made." [R. S. § 6168.][26]

§ 198. Law applicable to such sales.

This statute confers upon foreign administrators the right to sell real estate situated in this State under the same rules applicable to local administrators. Statutes authorizing these sales are liberally construed, but prescribed formality cannot be supplied by presumption.[27] It would therefore be essential that all formalities be complied with. A decree of another State authorizing an administrator to sell Ohio lands to pay debts is wholly void and passes no title.[28]

But where one of the heirs assented to and promoted the foreign decree his interest passes to the buyer at the sale.[29]

The buyer at such sale cannot compel the heirs to reimburse him, but the court will require the taxes to be repaid as a condition of quieting the title.[30]

The Indiana statute, in conferring the power on foreign administrators to sell real estate, is very similar to our own, and comments under their statute will be applicable to our own.

The executor derives his authority to sell from the laws of the place where he attempts to operate, and in the case of a for-

[26] § 10813 G. C.

[27] Goforth vs. Longworth, 4 O. 129.

[28] Nowler vs. Coit, 1 O. 519; Salmond vs. Price, 13 O. 368; Blake vs. Davis, 20 O. 231, 244; Price vs. Johnston, 1 O. S. 390. See also Henry vs. Doctor, 9 O. 49.

[29] Salmond vs. Price, 13 O. 368.

[30] Nowler vs. Coit, 1 O. 519.

Power to sell under a will becomes legally inoperative when the estate is settled. Ward vs. Barrows, 2 O. S. 241.

eign administrator, where local laws exist, he must substantially comply with them before he can secure the authority to sell lands.[31]

In a proceeding for the sale of real estate in this State by a foreign executor, the sale is to be authorized in the same manner and upon the same terms as in the case of an executor appointed in this State, except that, if it is shown that sufficient surety for application of the proceeds has been given in the State or county where the executor is appointed, and a duly authenticated copy of such bond is filed in the court where the petition is made, no further bond will be required.[32]

The petition must show: First, what amount of personal property, if any, has come to his hands; second, the amount of the debts outstanding against the estate of the deceased, so far as the same can be ascertained, and the insufficiency of the personal estate to pay the same; third, a description of the real estate of the deceased liable to be made assets, showing the State and county where the same is located; fourth, the names and ages of the heirs, legatees or devisees of the deceased; fifth, that the executor has filed in the court an authenticated copy of his appointment; sixth, that the will of the testator has been duly probated.[33]

§ 199. Foreign executor or administrator to give bond unless already bound. "When it appears to the court granting the order of sale that such foreign executor or administrator is bound with sufficient surety or sureties in the state or country in which he was appointed, to account for the proceeds of such sale, for the payment of debts or legacies and charges of administration, and a copy of such bond, duly authenticated, is filed in court, no further bond for that purpose shall be required of him here. Otherwise, before making such sale, he must give bond to the state of Ohio with two or more sufficient sureties, conditioned to account for and dispose of such proceeds for the payment of the debts or legacies of the deceased and the charges

[31] Lucas vs. Tucker, 17 Ind. 41. Thornton and Blackledge on Admin. (Indiana).
[32] Rapp vs. Matthias, 35 Ind. 332.
[33] Rapp vs. Matthias, 35 Ind. 332.

of administration, according to the laws of the state or country in which he was appointed." [R. S. § 6169.][34]

§ 200. **Foreign executor, etc., to give further bond to account for surplus when he sells more than is necessary to pay debts, etc.** "When such foreign executor or administrator is authorized by order of the court to sell more than is necessary for the payment of debts, legacies, and charges of administration, before making the sale, he shall give bond, with two or more sufficient sureties, to the state of Ohio, conditioned to account, before the court, for all the proceeds of the sale that remain, after payment of such debts, legacies, and charges and to dispose of them according to law." [R. S. § 6170.][35]

The two preceding sections relate to bonds of such foreign administrators. If there is any doubt about the bonds being insufficient or there are local creditors, heirs, distributees or legatees, I have no doubt that under the provisions of § 10764 G. C., § 188, the bond might be required and perhaps should be required, for it is the duty of our local courts to protect the people of our own State, and not require them to go into a foreign jurisdiction to secure their rights. The form generally applicable in such cases will be very similar to the one required by local administrators in the sale of real estate.[36]

[34] § 10814 G. C.

[35] § 10815 G. C.

[36] For the law applicable to the sale of real estate by an executor or administrator, see chapt. 46 on that subject.

§ 811, *et seq.*

Additional bond may be required when bond is insufficient. Wade vs. Graham, 4 O. 126.

See Griswold vs. Frink, 22 O. S. 79, as to surplus, etc.

CHAPTER XIII.

JOINT OR CO-ADMINISTRATION.

§ 201 Definition, etc.
§ 202 Separate or joint bonds.
§ 203 Power of one to bind the other in the co-administration of the estate.
§ 204 Liability for act of co-administrator.
§ 205 Situs of property — Taxation.
§ 206 Remedies against each other.
§ 207 Division of commissions.

§ 201. Definition, etc.

Joint executors are those who are joined in the execution of a will. In law, however numerous joint executors may be, they constitute but one person.[1]

Formerly a distinction seems to have been made between joint executors and joint administrators.[2] But now, in respect to their rights, duties and liabilities, co-administrators stand upon the same footing as co-executors, with this difference: that their powers and duties, being defined by positive law, are not capable of any special variation as may be those of executors.[3]

Joint executors or joint administrators may act independently, the act of any one, within the scope of his authority, being considered the act of all. As is said: "If a man appoint several executors they are esteemed in law but as one person, representing the testator, and therefore the act done by any one of them which relate either to the delivery, gift, sale, payment, possession or release of the testator's goods are deemed the act of all, for they have a joint and entire authority over the whole."[4]

[1] Schouler Extrs. & Admrs., § 400, Bouvier Law Dict.; Ames vs. Armstrong, 106 Mass. 15; Barry vs. Lambert, 98 N. Y. 300.

See § 162a as to the appointment of an administrator to act with an executor. The same rule applies where a purchase is made by a joint executor of the assets of the estate from his co-executor as in the case where there is but one executor, unless assented by all parties in interest it would be void.

[2] Hudson vs. Hudson, 1 Atk. 460.

[3] Schouler Extrs. & Admrs., § 404.

[4] Bacon's Abridg., p. 37; Herald vs. Harper, 8 Blkf. 170; Long vs. Rodman, 58 Ind. 58; Schouler Extrs. & Admrs., § 400.

One executor cannot prevent a co-executor from taking possession of the assets of the estate, nor can he take such assets from him after he has taken possession.[5]

Joint letters should not be granted where one of the parties thereto objects.[6]

In this State every person named in a will as executor must qualify and give bond if required to entitle him to letters. Failing in this he shall have no power to act as executor.

One executor may qualify for general purposes and another for a special purpose, if such appears from the will to be the intention of the testator.[7]

And where one executor fails to qualify or renounces his trust, letters may issue to others named in the will.[8]

§ 202. Separate or joint bonds.

It is provided by § 10611, G. C., § 86, that where two or more persons are appointed administrators or executors or testamentary trustees that a bond may be taken, which is joint or several. I think it might be stated as a general rule that several bonds are preferable to joint bonds, and where a separate bond is given the penalty in each should be in the same amount as that in the joint bond, for as one administrator has full control and power over the estate, he may take to himself a complete administration of the estate. Therefore his bond should

[5] Hall vs. Carter, 8 Ga. 388; Wood vs. Brown, 34 N. Y. 337.

[6] Brubaker's App., 98 Pa. St. 21.

[7] Schouler Extrs., § 40.

[8] Schouler Extrs. & Admrs., § 41, § 10621 G. C., § 137; Miller vs. Meetch, 8 Pa. St. 417.

As a general rule it may be said, that joint administration of an estate is not to be commended. For usually the entire administration of the estate depends upon one, even though there be a number of persons appointed. Where the estate is large and the interests intrusted to the administrator or executor are vast and complicated, it may be well to join with him some one to share the responsibility and give advice, etc. But from the fact that one possesses the power of all, if he is of a mind to exercise the power, association with others does not necessarily result in a benefit to the estate; and where the estate is small my observation and experience has been in favor of the single administration in preference to a joint administration.

See § 709, Successive Administration; § 1264, Joint Trustee.

be in full amount. If a separate bond were given, the bondsmen would only be liable for that which came within the administration of such administrator giving the bond. But if the bond is joint, additional difficulties are incurred, and where the property comes into joint possession, if waste is committed by one of the administrators after the death of the other, it will be the right of the surety that the estates of both the administrators shall be exhausted before the surety shall be subjected to the surviving administrator's fraud. Such administrators, as between themselves and the surety, are principals, and the surviving administrator and the representatives of the deceased administrator will be jointly liable to indemnify the surety if he has been subjected to the waste committed by one of the principals after the death of his associates.[9]

§ 203. Power of one to bind the other in the co-administration of the estate.

Since joint executors and joint administrators are regarded in law as constituting but one person and the title of each extends to the entire personal estate of the testator or intestate, each one has for most purposes as full and ample power over the estate as if he were the sole representative, unless otherwise provided by statute; and therefore one may collect the assets of the estate and give a receipt to debtors, compound, compromise or release debts due, or causes of action belonging to the estate, discharge mortgages, pledge or mortgage the estate to secure advances of money necessary for administration purposes, where the same is permitted by the court or statute, sell or otherwise dispose of the assets of the estate, notes and other choses in action, submit matters to arbitration and assent to legacies.[10]

[9] Eckert vs. Myers, 45 O. S. 525.

Where two executors give a joint and several bond with sureties, they are liable for the misconduct of each other, and are each bound to indemnify the sureties against loss by misconduct of the other. Seymour vs. Stone, 4 W. L. M. 323.

Overruling—Chenniel vs. Stone, 3 W. L. M.

[10] 17 Am. & Eng. Ency. of Law, 2nd ed. 620; Woerner on Admin. 733; Schouler on Extrs. 400.

In the conveyance of real estate, as a matter of course, where it rests in the discretion of the executors to make the sale, a valid sale cannot be made unless they all join. But if the sale is made by an order of the court on petition for that purpose, I apprehend that a deed executed by one in conformance to such order would be valid, although there are some holdings that all the administrators must join in the petition.[11]

One administrator may accept a claim that is presented to him for allowance against the estate, but such acceptance will not preclude the other administrators from resisting its payment.[12]

A notice of dishonor or protest to one or several co-executors of the deceased endorser is sufficient.[13]

One executor cannot bind his co-executor by confession of judgment.[14] Of course one executor cannot bind a co-executor to an act which by the will was extended to all in the nature of a trust.[15]

§ 204. Liability for act of co-administrator.

Ordinarily one joint executor or administrator is not liable for the assets which come into the hands of another, nor for the laches or mismanagement of the co-executor or administrator, unless he consent to or join in any act which results in a loss to the estate. In which case, though the loss be the direct consequence of the default, carelessness or mismanagement of the other, they will all be equally liable. So if the executor mismanage or waste the estate he becomes liable. What constitutes such negligence as to make one liable for *devastavit* or mismanagement of the estate by his co-executor or co-administrator, depends largely on the circumstances of each case.[16]

If the executor is conscious of the mismanagement of the co-

[11] See Woerner on Admin. 734.

[12] Forsyth vs. Ganson, 5 Wend. 558; Hall vs. Boyd, 6 Pa. St. 267; Hammon vs. Huntley, 4 Cow. 493; Weston vs. Murnan, 4 Ind. 271; McCann vs. Sloan, 25 Md. 575.

[13] Bank vs. Wallace, 13 S. C. 347; Beals vs. Peck, 12 Barb. 245.

[14] Forsyth vs. Ganson, 5 Wend. 558; S. C., 21 Am. Dec. 241.

[15] See Seymour vs. Stone. § 202, Separate and joint bonds.

[16] Woerner on Admin. 738.

administrator and acquiesce in it, or if he be negligent in taking steps to prevent the loss, he will be liable.[17]

But if he could show that his own conduct was within the usual rule of prudence under like circumstances, and that he did not contribute to the loss upon such a standard of liability, he is excused; for the cardinal doctrine is that co-executors are liable for their own acts and conduct, and not for the acts or conduct of their co-executors.[18]

In our own State it was held that although where one of two executors is insolvent during the whole period of his executorship, the claim due from him to his testator ought to be included in the inventory among the credits and effects of the decedent, as required in § 10691, G. C. Such executors will not be held liable for the same as for so much money in their hands, nor will they be required to apply and distribute the same in payment of the debts and legacies and among the next of kin as part of the personal estate of the deceased.[19]

If co-trustees authorize one of their number to manage a fund, etc., they will all be responsible.[21]

Generally mere passive conduct will not be sufficient, but some positive act on the part of the co-administrator is necessary.[22]

[17] 17 Am. & Eng. Ency. of Law, 2nd ed. 620, and authorities there cited.

[18] Schouler on Extrs. 402.

[19] Brown vs. Harshman, 9 C. C. 1; 6 C. D. 10. This case is cited with approval in the case of McCoy vs. Allen, 608 (6 C. D. 659), of the same volume, but is denied in the case of Perkins vs. Scott, 212, in the same volume. The case of Allen vs. McCoy was reversed in the 57 O. S. 641 on the authority of McGaughey vs. Jacoby, 54 O. S. 487. The same principle would reverse the decision made by the Circuit Court in Brown vs. Harshman; and would establish the opposite rule and would make a joint executor liable for a debt due from the insolvent co-executor to the estate. In order for one co-executor to only be liable for his own acts, presupposes entirely independent actions on the part of the one in default; and the other is liable if he in any way contributes thereto, whether intentionally or otherwise, as by voluntary and unnecessary paying over or delivering assets of the estate to him, or enabling him in any way to obtain possession of the assets. If, however, there are good reasons for turning over the assets, and the parties act in good faith, he might not be responsible.[20]

[20] *In re* Osborn, 87 Cal. 1.

[21] State vs. Gulford, 15 O. 593.

[22] 17 Am. & Eng. Ency. of Law, 2nd ed. 628.

It is not negligence, however, to fail to examine a co-administrator's bank account for two years;,[23] nor failure to attempt to withdraw the funds from his hands on notice of his insolvency;[24] nor is the estate of an administrator liable for a waste committed by the other administrator after the death of his co-administrator.[25] But if several administrators agree among themselves that each shall take a certain distinct part of the estate, and none of them shall intermeddle with the other's portion, they will be all liable for any act of neglect of one of their number resulting in loss to the estate.[26]

If two joint administrators sign a receipt for money it raises a presumption that both received it, and the burden of showing that one did not receive the money and that he had not the power to control or secure it is upon him who denies liability.[27]

[23] Irwin's Appeal, 35 Pa. St. 294.

[24] Worth vs. McAden, 1 Dev. & B. Eq. 199.

[25] Young's Appeal, 99 Pa. St. 74.

[26] Knight vs. Haynie, 74 Ala. 542; Weldy's Appeal, 102 Pa. St. 454.

[27] Monell vs. Monell, 5 Johns. Ch. 283; Sterrett's Appeal, 2 Pen. & W. 419; Hall vs. Carter, 8 Ga. 388; Stewart vs. Conner, 9 Ala. 803; Nettman vs. Schremm, 23 Ia. 521; Edmonds vs. Crenshaw, 1 Harp. Ch. 224; McKim vs. Aulbach, 130 Mass. 481.

But see Wilson's Appeal, 115 Pa. St. 95.

The fact that legatees complain continuously to two co-executors, both before and after an accounting by the managing executor, of the non-payment of their legacies by the managing executor, and that such co-executors are chargeable with knowledge of the mingling by the managing executor of the money of the estate with his private funds does not render them liable for waste committed by him in an amount greater than the balance shown to be due the estate by the account, the acquiescence of the legatees in such account, and the managing executor's reputation of pecuniary ability and personal integrity, excusing the co-executors from making further inquiries which would lead to the ascertainment of such waste. Weyman vs. Thompson (N. J. Ch.), 25 Atl. Rep. 205.

Though the entire management of an estate was in the hands of one of three executors, and though two co-executors never had possession of any assets, yet such co-executors by joining the other in an account final, in so far as allowance for disbursements and the ascertainment of assets acknowledge to have been received are concerned, become jointly chargeable for the balance due the estate by such accounting and by the decree of the orphans' court allowing it with interest; and the fact that the account was prepared by the managing executor, and that the two co-executors signed it on his request without investigation, because of their confidence in his integrity and on his assurance that they would be relieved of all responsibil-

§ 205. Situs of property. Taxation.[27a]

It sometimes becomes important where there are two executors to determine the *situs* of the property. Generally it may be said that the *situs* of the property is at the residence of the executor or administrator who has actual possession and control of it. The question arises perhaps oftener in the matter of listing the property for taxation. In Ohio v. Matthews [28] it was held, that where three executors of an estate resided in the same township, two of them within the corporate limits of a village, the other without such limits, and the three having possession, in the law of taxable moneys, bonds, and stocks of the estate, the same must, in view of the equities and analogies of the statutes — which does not expressly provide for such case — be entered for taxation, one-third as of the place of residence of each executor.

In another case,[29] where there were four executors and two of them resided in Mahoning county, the late domicile of the decedent, and one resided in the same county but in the city of Youngstown, and the other in the city of Cleveland; and the assets of the estate were kept at the late residence of the deceased, it was held that one-fourth of the assets were taxable in Youngstown and the balance in the county of Mahoning. No

ity thereby, does not relieve them of such liability, as such conduct of the managing executor does not amount to a fraud on his co-executors. Weyman vs. Thompson (N. J. Ch.), 25 Atl. Rep. 205. An executor being about to leave the State temporarily, turned over to his co-executor the funds in his hands. Thereafter he took no part in the management of the estate, but his co-executor attended to the business. The executors filed a joint account four years after the time prescribed by the statute. At this time said executor knew that there was a shortage, which he personally made up without reporting it. He never made any effort to have a final settlement on such account. It was held that his co-executor having thereafter used the funds on hand at the time of such report, and having become insolvent, the executor was liable therefor. The fact that the money and sole management of the estate was turned over to said co-executor with the concurrence of one having a power of attorney to collect moneys due non-resident beneficiaries of the estate in no way relieves said executor from responsibility. *In re* Osborn's Estate, 87 Cal. 1; S. C. 25 Pac. Rep. 157.

[27a] The statute now requires that the property be listed from the place where decedent died. See § 5371-3; 107 v. 31.

[28] 10 O. S. 431.

[29] Todd vs. Hughes, 3 O. L. J. 206.

part of it being assessed against the executor residing in Cleveland.

In a later case [30] it was held that where an estate was committed to two or more persons residing in different counties the property must be listed by the executor having actual possession and control and at his place of residence.[31]

§ 206. Remedies against each other.

As co-executors or administrators are considered in law as one, as a matter of course they could not sue each other for matters pertaining to the administration of the estate. Yet it has been held that this rule only holds good while the co-executors are both alive, and that if one dies the survivor might bring suit against the representatives of the deceased co-administrator. Also where only one qualifies under a will he may sue the executor who has not qualified.[32]

Where one of two executors has in his hands the balance remaining for distribution an action can be maintained against him without joining his co-executor or administrator.[33]

A court of equity would not aid one co-executor against the wrongful acts of the other so long as there was a remedy elsewhere. Our statutes confer full and ample jurisdiction on the Probate Court to remove a mismanaging executor or admin-

[30] Brown vs. Noble, 42 O. S. 405.

[31] See Sommers vs. Boyd, 48 O. S. 648; Woerner on Admin. 691a.

A resident of New York died in that State, having appointed four executors of his last will. Three so appointed lived in New York, one in Erie county, Ohio. One executor failed to qualify, one qualified and subsequently resigned, leaving the other two in charge of the estate—one residing in New York and the other in Ohio. The property of the estate was all held in New York, none of it being brought in Ohio. The executors qualified before and reported to the Surrogate's Court of New York. Under these circumstances, the Auditor of Erie county has no right to place at least one-half of the personal property of the estate upon the tax duplicate of said county for taxation, and plaintiff had a remedy by injunction to prevent him from doing so. Hawk vs. Benn, 6 C. C. 452; 3 C. D. 535.

See § 511 as to Taxation.

[32] Marsh vs. Oliver, 14 N. J. Eq. 259.

[33] Negley vs. Guard, 20 O. 310.

istrator, or require him to give additional bond. In this State a court of equity would hardly interfere.[34]

§ 207. Division of commissions.

When the compensation is made in the form of commissions on the value or amount of the estate, the rate of the commission is not ordinarily affected by the number of the executors or administrators, but the amount which may be allowed will be divided among them, and as a general rule an equal division will be made. There is, however, no rule of law or equity which declares that co-representatives, without regard to the time spent, responsibility assumed or service rendered, are entitled to an equal *pro rata* share of the statutory fees. On the contrary, it has often been held that if their services are unequal the Court of Probate will give to each a share of the commissions in proportion to the services rendered by him.[35]

But such apportionment cannot, it seems, be made by a court of law in an action by one executor or administrator against another to recover a share of the commissions. The parties may also, by agreement, arrange with one another as to the duties and compensation of each.[36]

[34] See Woerner on Admin. 740; Schouler Extrs. 403.

[35] See § 658. Commissions joint admrs.; Andress vs. Andress, 46 N. J. Eq. 528; Hill vs. Nelson, 1 Dem. (N. Y.) 357; Matter of Harris, 4 Dem. (N. Y.) 463; Waddill vs. Martin, 3 Ired. Eq. (38 N. Car.) 562; Grand vs. Pride 1 Dev. Eq. (16 N. Car.) 269; Hodge vs. Hawkins, 1 Dev. & B. St. Eq. 564; Walker's Estate, 9 S. & R. (Pa.) 223; Stevenson's Estate, 1 Pars. Eq. Cas. (Pa.) 18.

See also Mount vs. Slack, 39 N. J. Eq. 230; 45 N. J. Eq. 129. The court may apportion commissions between coexecutors. Meyers vs. Hopkins, 7 C. C. (N.S.) 240; 28 O. C. C. 208.

Where one administrator died almost at the beginning of the administration, and the survivor did substantially all the work of settling the estate, it was held that he was entitled to the entire commissions, to the exclusion of the representative of the deceased executor. Martin vs. Jones, 87 Md. 43, distinguishing Richardson vs. Stansbury, 4 Har. & J. (Md.) 275.

[36] 17 Am. & Eng. Ency. of Law, 2nd ed. 633.

See § 645 *et seq.* Commission of Extrs.

CHAPTER XIV.

REVOCATION OF LETTERS — RESIGNATION AND REMOVAL.

§ 208 Power of court — Nature proceedings, etc.
§ 209 Jurisdiction to revoke letters.
§ 210 Resignation, etc.
§ 211 Revocation where wrongfully made.
§ 212 Form of resignation and entry, etc.
§ 213 Removal of executor for cause, etc.
§ 213a Proceedings after removal.
§ 214 Who must file application, etc.
§ 215 Application.
§ 216 Form of application.
§ 217 Form of entry for hearing, etc.
§ 218 Notice, etc.
§ 219 Form of notice.
§ 220 Causes — Habitual drunkenness.
§ 221 Gross neglect of duty.
§ 222 Incompetency.
§ 223 Fraudulent conduct.
§ 224 Removal from the State.
§ 225 Unsettled demands.
§ 226 Any other causes.
§ 227 Other statutory causes.
§ 228 Hearing and entry.
§ 229 Effect of order of removal.
§ 230 Acts after his removal, etc.
§ 231 Termination of authority by completion of trust.
§ 232 Appeal and error.[1*]

§ 208. Power of court. Nature proceedings, etc.

As the Probate Courts of this State are courts of record, competent to decide on their own jurisdiction and exercise it to final judgment, and their records import absolute verity;[1] it follows that where an appointment of an administrator or executor is made, however erroneous it may be, it could not be ignored or set aside except by the court that made it, and in a direct proceeding for that purpose. Although some courts have held that if a Probate Court made an appointment where it had no jurisdiction in the matter, that such appointment would be

[1*] See § 1300 *et seq.*, For removal of trustee. See § 1358, For removal of gdn. See § 151, Admr. *de bonis non.*

[1] Ry. Co. vs. Belle Center, 48 O. S. 273; Astram vs. Ten Eck, 28 Bull. 265.

a nullity, and that another court having jurisdiction might make a valid appointment without the first being revoked.[2]

But such, it occurs to me, is not the law in Ohio. The grant of letters of administration are said to be in the purest sense proceedings *in rem*, and in a contest for the right of administration there are strictly no parties plaintiff or defendant. The applicants are all actors, some of whom may withdraw and others come in at any time during the progress of the cause, even after the appeal. Objections to the grant of letters will be heard from any person claiming to be interested. If his right to appear is disputed the question will be decided upon proof.[3]

The authority of an administrator or executor to act may be extinguished in a number of ways. First, the grant may have been improperly made, as for instance, if made in the wrong court or to the wrong person, or if granted to an administrator when there was an existing will, or an administrator already appointed, or for a living person; second, it may be terminated by a voluntary act, that is, by resignation of the administrator or by death; third, it may be terminated by the removal of the administrator or executor for cause by the court; fourth, it may be terminated by a completion of the administration. These different methods will be treated of more fully in the following sections.[4]

§ 209. Jurisdiction to revoke letters.

Among the matters which are intrusted to the exclusive jurisdiction of the Probate Court is "To grant and revoke letters testamentary and of administration."[5] This settles beyond question that no court but the Probate Court can exercise jurisdiction to revoke letters of administration; and it may be said further, upon the principle that where a court of competent jurisdiction once acquires control of the subject matter in litiga-

[2] Woerner on Admin. 569.

[3] Woerner on Admin. 565.

[4] See § 707, Admr. of deceased to file account; § 1301, Removal of trustee; § 1359, Removal of gdn.; § 1558, Removal of assignee.

[5] § 10492 G. C.

tion, that it will retain control to the exclusion of every other court, that the court which grants the letters of administration is the only court which has jurisdiction to revoke them.[6]

The mere fact of a will being set aside, in a suit on contest, will not vacate the order appointing an administrator.[7]

§ 210. Resignation, etc.

At common law an executor could not resign after having accepted the trust, nor could an administrator; and it is said that even now it is very much doubted whether an administrator can resign if the court declines to accept the resignation.[8] This matter is, however, definitely settled in Ohio by the following statute:

"The court issuing letters testamentary or appointing an administrator, if it deems fit, upon good cause shown, may receive the resignation of such executor or administrator, and appoint an administrator in his place." [R. S. § 6015.][9]

[6] Formerly neither appeal nor error would lie from the decision of the Probate Judge. § 24, § 232.

[7] Sanker vs. Mattison, 20 C. C. 230; 11 C. D. 125.

A note given for the purpose of securing a resignation where the trustee is subject to removal for misconduct, etc., is without consideration and cannot be enforced. Withers vs. Ewing, 46 O. S. 400.

[8] Baier vs. Baier, 4 Dem. 162.

[9] § 10627 G. C.

A testator, domiciled in Mississippi, devised his entire estate to C., his heirs and assigns, with full power to dispose of the same and apply the proceeds upon specified trusts. By subsequent clauses he named C. co-executor with two others, limiting the power to sell and convey to C. alone; and provided that if C. should die or should "refuse to take upon himself the execution of the will," C.'s power should pass to W. C., accepted the trust, was qualified as executor and took upon himself the execution of the will. Afterward he executed a resignation, both as trustee and as executor, and on an *ex parte* application, an orphan's court in Mississippi made an order accepting it, and appointed W. his successor. No law of that State gave power to any court, upon such an application, to divest a trustee, holding title, of his powers or estate. Soon after C. (who did not convey to W.) resumed action as trustee; for value conveyed part of the Ohio land to a *bona fide* purchaser, received the purchase money, and placed it in the hands of the chief executor, who duly applied and accounted for it. W. never acted or claimed to act as to the land.

Held: 1. The resignation was not such a "refusal to take upon himself the execution of the will" as transferred title to W. Veazie vs. McGugin, 40 O. S. 365.

It is not necessary to state in the entry "that the removal was made that the court deems it fit and upon good cause shown" the resignation is received. State vs. Moffit, 13 C. C. (N.S.) 152, 169; 23 O. C. C. 238; affirmed, no opinion, 82 O. S. 433.

§ 211. Revocation, where wrongfully made.

It may be said to be an inherent power residing in every court to correct an error which it may have committed. Thus the court might of its own motion, although it will not generally do so, set aside an appointment which has been wrongfully made. "This power," says Judge Gray, "does not make the decree of the Court of Probate less conclusive in any other court or in any way impair probate jurisdiction. But renders that jurisdiction more complete and effectual." [11]

Thus where an appointment was made without notice the same was on motion reheard upon the application of an interested party and revoked.[12] Also where letters of administration had been granted to the wrong person, a motion to set the same aside was sustained.[13] Other instances of the exercise of such power is as follows: Such as issuing them in the wrong county,[14] or when the alleged decedent is alive; [15] or, in the case of an executor, that the will was admitted to probate through fraud,[16] or that a later will should be admitted,[17] or where a will had been previously probated and overlooked,[18] or discovered after the grant; [19] even a foreign will; [20] or where a person not preferred is appointed before the expiration of the time during which preference is given by the statute to another, where a time is given by statute; [21] or where there is no estate to be

2. The action of the orphan's court did not affect C.'s powers as trustee, and his deed was valid. Veazie vs. McGugin, 40 O. S. 365.

[11] Waters vs. Stickney, 12 Allen 1, 15.

[12] *In re* McCreight, 6 N. P. 479.

[13] Todhunter vs. Stewart, 39 O. S. 181.

[14] Jeffersonville R. R. Co. vs. Swayne, 26 Ind. 477; Croxton vs. Renner, 103 Ind. 223; Wilson vs. Frazier, 2 Humph. 30.

[15] Donaldson vs. Lewis, 7 Mo. App. 403.

[16] Hamberlin vs. Terry, 1 Sm. & M. Ch. 589.

[17] Waters vs. Stickney, 12 Allen 1.

[18] Watson vs. Glover, 77 Ala. 323.

[19] Edelen vs. Edelen, 10 Md. 52; Patton's Appeal, 31 Pa. St. 465.

[20] Dalrymple vs. Gamble, 66 Md. 298.

[21] Mills vs. Carter, 8 Blackf. 203; Skelly vs. Veerkamp, 30 Mo. App. 49; Mullanphy vs. County Court, 6 Mo. 563; Dunham vs. Roberts, 27 Ala. 701; Public Admr. vs. Peters, 1 Bradf. 100; Kerr vs. Kerr, 41 N. Y. 272.

administered,[22] or granted to a person disqualified,[23] as to a minor,[24] or to one not preferred,[25] or where an administrator *de bonis non* is appointed before there is a vacancy in the office.[26]

If the court revoke letters of administration it will be presumed, until the contrary appear, that the same court granted them.[27]

§ 212. Form of resignation and entry, etc.

As a general rule, the administrator wishing to resign, will prepare his account and tender his resignation with the filing of such account by writing the same in the account. If for some reason it was desired to have the resignation acted upon before the filing of an account, or the passing thereon by the Probate Court, such resignation might be made in open Court; but it would be better to make it in writing and the following might be used as a form:

To the Honorable Probate Judge of.....County, Ohio:

DEAR SIR:—Desiring to sever my connection as administrator (or executor) of the estate of A. B., I hereby tender my resignation as such administrator (or executor) and beg that the same may be accepted by you.

.....Sign.

If the resignation is tendered other than in the account filed the following might be used as a form of entry:

This day came A. B., administrator (or executor) of C. D., and filed herein his written resignation of said trust and asks that the same be accepted by the court; and the same appearing to be for the best interest of all concerned the said resignation is accepted; and said C. D. is ordered to file his account of his administration of said estate, within..... .....days in this court.[28]

[22] Estate of Huckstep, 5 Mo. App. 581; Townsend vs. Pell, 3 Dem. 367.

[23] Koger vs. Franklin, 79 Ala. 505.

[24] Carow vs. Morvatt, 2 E. M. Ch. 56.

[25] Morgan vs. Dodge, 44 N. H. 255.

[26] Creath vs. Brent, 3 Dana 130; Griffith vs. Frazier, 8 Cranch 9; Springs vs. Erwin, 6 Ired. L. 27.

[27] State vs. Johnson, 7 Blackf. 529.

[28] By accepting resignation the Court does not lose jurisdiction over the administrator to compel him to file an account.

Slagle vs. Entrekin, 44 O. S. 637.

The receipt of the resignation and appointment will be sufficient, although no journal entry be made Johnson vs. Schwenk, 99 O. S. 124, See § 227.

The authority of an administrator continues until terminated by one of the methods provided by statute. Meyer vs. Watt, 48 O. S. 545.

He is not liable for acts after his resignation has been accepted. McCullough vs. Moffitt, 23 O. C. C. 238; 13 O. C. C. (N.S.) 152; affirmed, 82 O. S. 433.

§ 213. Removal of executor for cause, etc.

The third method of extinguishing an administrator or executor's connection with the estate is by removal for cause, and this is provided for in the following provision of the General Code:

"The probate court may remove any executor or administrator, he having not less than five days' notice thereof, for habitual drunkenness, gross neglect of duty, incompetency, fraudulent conduct, removal from the state, or if there are unsettled claims or demands existing between him and the estate, which the court thinks may be the subject of controversy or litigation between him and the estate, or persons interested therein, or for any other cause which in its opinion renders it for the interest of the estate that such executor or administrator be removed." [R. S. § 6017; 102 v. 101.] [29]

§ 213a. **Proceedings after removal.** "The other executor or administrator, if any there be, may proceed to discharge the trust as if the executor or administrator so removed were dead. If there be no other executor or administrator the court may commit the administration of the estate not already administered to some other person or persons, in like manner as if the executor or administrator so removed were dead." [R. S. § 6017.] [29*]

§ 214. Who must file application, etc.

I have no doubt that the court may of its own motion remove an administrator or executor for cause, just as well as it may revoke letters of administration when they have been wrongfully issued, but the more usual practice is that an application should be filed in court to invoke its action in the premises; and while our statute does not provide that the application shall be made by a party in interest, yet the courts have frequently held that such an application must be filed by a party in interest, and that the court would not act where it did not appear that the person making the application had some interest in the matter.[30]

In this State it has been held that a prosecuting attorney has sufficient interest to file an application for removal if an administrator fails or refuses to file an inventory.[31]

[29] § 10629, G. C.

[29*] § 10630, G. C.

[30] See Woerner on Admin. 581.

[31] See *In re* Pickards, 5 N. P. 493; 7 Dec. 476.

This section does not require the court to remove an administrator merely because he moves to another state. It leaves the matter in the discretion of the judge. Seasongood v. Seasongood, 23 O. C. C. (N.S.) 369.

The jurisdiction of the Probate Court is exclusive. Munger vs. Jeffries, 7 N. P. 55; 10 Dec. 12.

A creditor who is entitled to the letters may move for the removal of an administrator if the appointment was made within the time he had priority over a stranger.[32] So one injured in the maladministration of the estate.[33] So may the widow,[34] or a legatee under a will when it has been revoked and an appeal taken,[35] or a legatee or his assignee,[36] or sureties conceiving themselves in danger from their principal's misconduct,[37] or any of the heirs of the estate, especially if solvent.[38]

Only next of kin may ask for the removal of an administrator on the ground that he is not the next of kin.[39] And if one next of kin yield his right to a stranger, he may not thereafter revoke his consent and ask for a removal.[40]

An administrator whose appointment is void because of a former appointment may not ask for the removal of such prior appointee on the ground that his appointment is voidable.[41]

An illegitimate son cannot ask to have his mother removed as administrator of his putative father's estate on the ground that she was never married to him, for he has no interest in the estate.[42]

The natural guardian of an infant legatee cannot apply for a removal,[43] nor may the creditor only of the administrator.[44]

§ 215. Application.

It has been a common practice in preparing an application for removal of the administrator, to simply set out the words of the statute without naming in detail the acts that are alleged

32 Ferris vs. Ferris, 89 Ill. 452.

33 Succession of Decuir, 23 La. Ann. 166.

34 Evans vs. Buchanan, 15 Ind. 438; Pace vs. Oppenheim, 12 Ind. 533.

35 Newhouse vs. Gale, 1 Redf. 217.

36 Yeaw vs. Searle, 2 R. I. 164; Susz vs. Forst, 4 Dem. 346.

37 De Lane's Case, 2 Brev. 167; Hardaway vs. Parham, 27 Miss. 103.

38 Reed vs. Crocker, 12 La. Ann. 445.

39 Edmundson vs. Roberts, 1 How. (Miss.) 322.

40 Cole vs. Dial, 12 Tex. 100.

41 Coltart vs. Allen, 40 Ala. 155.

42 Myatt v. Myatt, 44 Ill. 473.

43 Quin v. Hill, 6 Dem. 39.

44 Carroll vs. Hull, 21 La. Ann. 561.

See § 1514, Procedure for removal of gdn.; § 1563, Procedure for removal of assignee.

If the administrator is insolvent, the surety on his bond might secure his removal. Yakey vs. Strunk, 7 N. P. (N.S.) 177; 18 Dec. 734.

to constitute the cause for removal. In a very able opinion, Judge Fisher, of the Common Pleas Court, held that under § 10629-30 of the General Code, an application for the removal of an administrator or executor, must state the facts which constitute the alleged causes of removal. It is not sufficient to charge mismanagement, maladministration or misapplication of the funds in general terms; and that it was an error in the Probate Court to overrule a motion to make more definite and certain such a general charge.[45] The Court further held in this case, that the application must show that the person making the same has an interest in the estate, and also that the proceedings are adversary in their character. From this decision, which was affirmed by the Circuit Court, and which I have no doubt states the law correctly, it will be necessary to set out in detail in the application for removal, sufficient cause to make out a *prima facie* case.[46]

§ 216. Form of application.

(*Title.*)

Now comes the said A. B. and represents that he is an heir-at-law of the said decedent, C. D., and legatee under the will of the said C. D., and as such is interested in the administration of the estate (or if the party is interested in any other way, so state), and he further represents to the court that the said E. F., executor of the said C. D., has been guilty of the following misconduct in the management of said estate, to-wit:

First, That he has been guilty of gross neglect of duty in the settlement of said estate in the following way. (Here allege any of the matters which in a subsequent section are held to constitute gross neglect of duty.)

Second, That said executor is wholly and duly incompetent to settle said estate. (Here allege the manner which it is claimed will constitute the incompetency.)

Third, That said executor has been guilty of fraudulent conduct in the settlement of said estate. (Here allege the fact upon which it is claimed the fraudulent conduct rests.)

Fourth, That there are unsettled claims existing between said executor and the decedent, etc. (Here allege in what manner the existence of such a claim would be a good ground for his removal.)

Fifth, That he has been guilty of habitual drunkenness. (This allegation might be sufficient without further definiteness.)

Sixth, That said executor has removed from the State.

Seventh. (It might be further alleged whatever matter it is claimed will be sufficient to cause his removal.)

[45] Fox Exrs. vs. Keister, 6 N. P. 327; 8 Dec. 636; 9 Dec. 316.

[46] See § 254. Application in release of bondsman.

Wherefore the said A. B. prays that a notice may be issued to said E. F., executor of said C. D., requiring him to appear in this court and answer said charges as provided by law; and that he be removed from said trust.

.....Sign.

State of Ohio, ...*County, ss.*

A. B., being first duly sworn, says that the allegations of his above application are true, as he verily believes.

Sworn to and subscribed before me and in my presence this.....day of .....A. D. 190....

§ 217. Form of entry for hearing, etc.

This day came A. B. and filed herein his application for the removal of E. F., executor of the estate of said C. D.; and the same is set for hearing on the.....day of....., at.....o'clock ....M. And it is ordered that a notice of the said application and the causes therein alleged for the removal of said E. F. and the time of hearing same be issued, directed to (here insert name of person who is to serve the same), for the said E. F. to appear in this court at the time the said cause is set for hearing, and answer the same; and that said notice be served on said E. F. at least twenty days before the time of hearing thereof.

§ 218. Notice, etc.

Only the statute providing for the removal of an administrator or executor for cause, provides that notice should be given to the executor or administrator. But if an application or motion were filed to terminate an administrator or executor's authority, by reason that the letters were wrongfully issued, a proper practice would be to give the same notice as is required under § 10629-30, G. C. Of course, as a general rule, it may be said, that no administrator can be removed unless he has the notice required by statute.[47] It will be observed that this notice must be served on the administrator or executor at least five days before his removal. If the administrator had absconded and gone to parts unknown, so that no personal service could be made on him, or if he has gone beyond the jurisdiction of the court, then it would be well to give notice by publication. The first insertion being at least five days before the time of hearing.

[47] Woerner Admin. 575.

The constitution of a motion to remove an executor is not a summary and *ex parte* proceeding, but one in which the executor should be allowed to show that the charges are without merit. *In re* Breckinridge Est:, 7 C. C. (N.S.) 86; 27 O. C. C. 688.

See as to notice by publication, Netting vs. Strickland, 9 C. D. 844; 18 O. C. C. 136.

§ 219. Form of notice.

(*Title.*)

To.....

You are hereby commanded to notify E. F., administrator (or executor) of the estate of C. D., that on the.....day of..... an application was filed in this court for his removal from said trust, because of his alleged unlawful acts therein, which are as follows. (Here state and set out in detail the grounds upon which the removal is asked.) And said application is set for hearing on the.....day of:..... .....A. D. 190..., at.....o'clock, at which time it is ordered that said E. F. will appear in this court and answer respecting said charges. If said E. F. fails to appear the court will proceed to hear the same in his absence, and make such orders as the facts will justify.

Witness my hand and seal of this court, on this.....day of..... .....Sign.

Probate Judge.[48]

§ 220. Causes. Habitual drunkenness.

The drunkenness contemplated by this section should be such habitual indulgence on the part of the executor or administrator as would render him incapable of devoting the necessary time and the proper degree of attention to the administration of the estate.[49] But the proof that the executor or administrator has been seen intoxicated from time to time is not sufficient. Surrogate Tucker held the statute contemplated "habitual, continued, inveterate and irremediable habits of drunkenness, incapacitating him for the transaction of business." [50]

[48] This notice may be served by any party. In which case the party making the services should make an affidavit on the back of the original notice of the time and manner in which the notice was made. If the notice is served by the Sheriff, he will make the usual return. The original notice should be filed with the papers and made a part of the record of the case.

See § 1568, Removal of assignee.

[49] See Matter of Cady, 36 Hun 122; affirmed 103 N. Y. 678.

[50] Elmer vs. Kechele, 1 Redf. 472.

See Collins vs. Collins, 22 Dec. 345, where a number of cases are cited and quoted from as to what will constitute habitual drunkenness.

In Com. vs. McNamee, 112 Mass. 285, it is said: "The charge of being a common drunkard can be substantiated, without proving that the person accused of it has been constantly drunk during the time covered by the complaint, or even that his drunkenness was a matter of daily occurrence. The law nowhere undertakes to define how many instances of intoxication, in any given time, shall be deemed sufficient to fix upon a man the imputation of being a common drunkard. The use of the word 'common' imports frequency, and it has been held that to convict a man upon such a charge, it must be shown that he is an habitual drunkard." Evi-

§ 221. Gross neglect of duty.

Just what might be comprehended within the phrase "gross neglect of duty," and which would be sufficient to remove an administrator or executor, has not been passed upon by our courts. It no doubt is meant to include acts that are not included within the meaning of habitual drunkenness, incompetency, fraudulent conduct, etc. A similar phrase is used in the divorce laws as a cause for divorce, and there it has been held that gross neglect of duty is an omission or forbearance to perform those duties imposed by the marriage relation.[51] So it may be said that a gross neglect of duty of an executor or administrator in the execution of his trust would be an omission or forbearance to perform those duties which are imposed upon him by the law of administration. A failure to properly discharge his duties might be the result of various causes depending particularly upon each case; and what will constitute a failure sufficient to justify a removal must rest largely in the discretion of the Court. The first object that should always be kept in view in the administration of an estate, and in passing upon the relation of an administrator or executor thereto, is that the estate is administered to the best interest of all concerned. An adminis-

dence of habitual intoxication from the use of chloroform held not to sustain a complaint charging a person with being a "common drunkard." Com. vs. Whitney, 11 Cush. (Mass.) 477.

Ludwick vs. Com., 18 Pa. St. 172. Said the Court in this case: "To constitute an habitual drunkard, it is not necessary that a man should be always drunk. It is impossible to lay down any fixed rule as to when a man shall be deemed a habitual drunkard. It must depend upon the decision of the jury, under the direction of the Court. It may, however, be safely said, that to bring the man within the meaning of the act it is not necessary that he should always be drunk. Occasional acts of drunkenness do not make one an habitual drunkard. Nor is it necessary that he should be continually in an intoxicated state. A man may be an habitual drunkard, and yet be sober for days and weeks together. The only rule is, has he a fixed habit of drunkenness? Was he habituated to intemperance whenever the opportunity offered? We agree that a man who is intoxicated or drunk one-half his time is an habitual drunkard, and should be pronounced such."

See § 1563, Removal assignee; § 1539, Removal guardian.

[51] Schwartz vs. Schwartz, 7 N. P. 194; 6 Dec. 525.

trator ought not to be removed, and the Court will not remove him, for a trivial cause, but if the surrounding circumstances are such, no matter what may be the cause, that the estate will not be properly administered, such executor or administrator has lost his usefulness to the trust, and his connection therewith ought to be terminated. A court should bear in mind, however, that very often heirs or others interested in an estate are unjust and wrong in their criticisms of the administrator or executor.[52]

The New York statute provides that improvidence shall be a cause of removal, and it is said that the improvidence contemplated by this section is that want of care or foresight in the management of the property which does render, or would be likely to render, the estate and effects of the decedent unsafe and liable to be lost or diminished.[53]

§ 222. Incompetency.

Whatever would be a sufficient ground to prevent the appointment of an executor or administrator, if newly discovered or

[52] In speaking of this hostility, etc., the Court in the matter of Havemeyer, 3 App. Div. N. Y. 519, says: "But when this condition of hostility between those interested in an estate and its trustee exists, it becomes material to determine whether the feeling of hostility has been caused by an honest endeavor on the part of the trustee to carry out his trust and perform his duties, in opposing the wishes of the beneficiaries for an illegal and improper disposition of the trust funds, or whether it has been caused by an attempt of the trustee to manage the estate in a manner not authorized by law or by the will of the testator from whom he received his authority to act. If the latter appears, we think that the interests of those concerned in the estate require that the trustee should make way for one who will manage the estate according to the rules prescribed for the management of such estates and who will act in sympathy with the beneficiaries rather than in hostility to them."

[53] Matter of Cutting, 5 Dem. 456, 457, citing Coope vs. Lowerre, 1 Barb. Ch. 45; Goggshall vs. Green, 9 Hun 471; McMahon vs. Harrison, 6 N. Y. 443; Emerson vs. Bowers, 14 N. Y. 449; O'Brien vs. Neubert, 3 Dem. 156; Blank vs. Morrison, 4 Dem. 297; McGregor vs. McGregor, 1 Keyes, 133; Hayward vs. Place, 4 Dem. 487.

Affirmed in Supreme Court and Court of Appeals.

See § 1302, Causes for removal of trustee.

See 115, who may be appointed.

created, would be sufficient to remove him after the appointment is made. As this matter of incompetency has been gone into rather fully in the chapters relating to the appointment of administrators and executors, for further investigation as to who may be considered incompetent, reference thereto will be made.[54]

Incompetency may be used as synonymous to unfitness, which has been defined as implying no want of capacity or mental infirmity, but unfitness arising out of the situation of the person in connection with the estate of which he is administrator, by reason of being indebted to it, or having claims upon it, or in the interest he has under a will, or his situation as an heir at law.[55]

A specification of incompetency will not be supported by proof that an administrator could neither read nor write. The Court said: "This qualification would be very useful, but we cannot deem it absolutely essential. Such persons possess nevertheless very considerable business capacity." [56]

§ 223. Fraudulent conduct.

Fraudulent conduct means dishonest conduct. If there is one thing above another which a court will demand from a person acting in a fiduciary capacity, it is that of absolute honesty. If an administrator is shown to have been dishonest in any of his dealings in any matter concerning the welfare of the estate, the Court ought to have no hesitation in removing him. Just what conduct on the part of the administrator or executor would constitute fraudulent conduct is difficult to determine, for the manifold ways of committing fraud are as various and wide as the ingenuity of man. An act may be unlawful and not fraudulent; thus where an executor with the knowledge of all interested parties, bid in property at a sale of his own as such executor at a fair price, it would not be such fraudulent conduct so as to justify his removal.[57]

[54] See §§ 81, 115.

[55] Thayer vs. Homer, 11 Metc. 104.

[56] Gregg vs. Wilson, 24 Ind. 227.

[57] Fox vs. Keister, 6 N. P. 327; 9 Dec. 316.

See § 1302.

Likewise there might be many other acts done by the executor or administrator which are not strictly within the letter of the law, but which, if done honestly and openly, would not justify the court in ordering his removal.[58]

§ 224. Removal from the State.

Removal from the State is made a cause to justify the Court in removing an administrator or executor. The mere fact that the executor or administrator removes from the State will not be sufficient to compel the court to remove him. It is a matter largely in the discretion of the court, and if the interests of the estate will be best subserved by continuing the administrator or executor he will not be removed.[59] Generally it may be said that it is no excuse that he had gone to another State because the greater part of the decedent's estate was there situated and he could better administer it there.[60]

The fact of becoming a non-resident does not of itself vacate the office, for that requires the judgment of the court.[61]

If an administrator becomes a soldier by joining the regular army he disqualifies himself to act and may be removed.[62]

§ 225. Unsettled demands.

It is not every claim that an executor or administrator may have against an estate that will justify his removal, for § 6100 fully recognizes that such claim may be settled without a removal of the executor or administrator.[63]

There it is provided that the court must pass upon the claim of an executor or administrator and all interested persons made parties, and the same may be appealed to the Court of Common

[58] Woerner on Admin. 575.

[59] Cutler vs. Howard, 9 Wis. 309; Scott vs. Lawson, 10 La. Ann. 547.

[60] Ewing vs. Ewing, 38 Ind. 390.

[61] State vs. Rucker, 59 Mo. 17.

[62] Berry vs. Bellows, 30 Ark. 198; Hebert vs. Jackson, 28 La. Ann. 377.

As a general rule it may be said, that if an executor or administrator takes himself beyond the jurisdiction of the court making the appointment, that if the estate is such that it needs his care and attention to any extent, the Court should exercise its power of removal.

See § 1302.

[63] See § 631 *et seq.*

As to what will constitute sufficient ground to remove, see *In re* Breckinridge Est., 7 C. C. (N.S.) 86; 17 Cir. D. 688, column 687; 27 O. C. C. 688.

Pleas by any person who is aggrieved by the decision of the Probate Court. The law of this State further being, that if the executor or administrator owed the estate anything, that the same becomes assets in his hands for which he is liable on his bond. As it is never to be presumed that a law is made without purpose, we must conclude therefore that there can exist a condition of affairs over unsettled demands existing between the estate and the executor or administrator which will justify the court in ordering his removal. If there are such claims existing as will prevent a proper administration of the estate, the executor or administrator ought to be removed, but the mere fact of the existence of certain claims will not be sufficient.[65]

§ 226. Any other causes.

If sufficient cause for removal cannot be found to exist under the above mentioned causes, the court will certainly have power, where there is a wrongful or injurious administration of the estate, to remove the executor or administrator under the designation, or *any other cause which in the opinion of such court renders it not for the interest of the estate that such executor or administrator be removed.* The Masachusetts statute, from which State it is said we have received most of our probate law, had an almost similar omnibus clause, about which Justice Parker says: "The statute gives a very broad discretion to the judge, evidently intended not to define or limit the disabilities which should be the cause of removal, but to leave room for application of the power to all causes which may occur to render execution of the will or administration of an estate too perplex." [66]

As a cause for removal it has been held to be sufficient that

[65] *In re* Worthington, 5 N. P. 63; 5 Dec. 524.

"The Court," says Woerner, § 271, "will not remove an administrator regularly appointed, upon the suggestion of a party who was privy to the appointment, that the administrator is indebted to the estate, which is denied by the administrator; the proper remedy being to surcharge the administrator's account in Probate Court."

Fisher, J., in Fox, Extr., vs. Keister, 6 N. P. 327; 9 Dec. 316.

See § 1302.

[66] Winship vs. Bass, 12 Mass. 199.

The clause cited in *In re* Schonaker, 55 Bull. 78. In this case it is held that where a will is contested and broken, the duties of an administrator with the will annexed cease.

at time of instituting the proceeding there was and still continues to be acrimonious and hostile feeling between an executor and testator's widow, and also a legatee, which intercepts and prevents such managing and husbanding of the estate as prudence, sound policy and interest of the devisees and creditors require.[67]

A failure to keep proper accounts may be sufficient for a removal.[68]

A refusal to obey an order of court is sufficient to justify the removal of an administrator.[69]

He may be removed if he has committed waste, is wasting or squandering the estate,[70] or is neglecting or mismanaging it,[71] or make improper investments or mingles the trusts funds with his own if connected with other acts of neglect,[72] or converts the assets to his own use,[73] or is guilty of gross carelessness in its management,[74] or fails to redeem property on request made,[75] or gives unauthorized preferences (perhaps),[76] or has allowed a fraudulent claim,[77] or conveys assets of the estate to his sureties to indemnify them,[78] or fails to perform the duties of his trust.[79]

[67] Estate of Pike, 45 Wis. 391; 1 Prob. Rep. 332. In this case it is said that a quarrel between an executor and devisee or legatee is not in every case a cause for removal of an executor. The blame of such may rest entirely on the devisee or legatee and its existence may not endanger the interests of any one or interfere in the least with the proper execution of the trust. In such a case if the executor performs his duties it would or might be an abuse to remove him.

[68] *In re* Simon's Estate, 155 Pa. St. 215; S. C. 26 Atl. Rep. 424.

[69] Wright vs. McNatt, 49 Tex. 425. Such as filing an account or giving bond, etc. Evans vs. Buchanan, 15 Ind. 438.

[70] Newcomb vs. Williams, 9 Met. 525; Emerson vs. Bowers, 14 Barb. 658.

[71] Lucich vs. Medin, 3 Nev. 81; Travis vs. Insley, 28 La. Ann. 784; Fernbacher vs. Fernbacher, 4 Dem. 227; S. C. 17 Abb. N. C. 339; Gray vs. Gray, 39 N. J. Eq. 332.

[72] *In re* Simon's Estate, 155 Pa. St. 215; S. C. 26 Atl. Rep. 424.

[73] Gibson vs. Maxwell, 11 S. E. Rep. 615.

[74] Rogers vs. Morrison, 21 La. Ann. 455; Reynolds vs. Zink, 27 Gratt. 29.

[75] Glines vs. Weeks, 137 Mass. 547.

[76] Foltz vs. Prouse, 17 Ill. 487.

[77] Owens vs. Link, 48 Mo. App. 534.

[78] Fleet vs. Simmons, 3 Dem. 542.

[79] Marsh vs. People, 15 Ill. 284; Chew vs. Chew, 3 Grant Cas. 289; Wildridge vs. Patterson, 15 Mass. 148.

§ 227. Other statutory causes.

In addition to the matter specified in § 10629-30, G. C., there are a number of other statutory causes for the removal of an administrator or executor. Thus he may be removed if he fails to file an inventory,[80] or if he neglects and refuses to return a sale bill within the time required by law,[81] or if he neglects to file his account.[82]

Likewise if he is ordered to give a new bond and he fails to do so within the time required.[83] Also if he is required by court to give a bond of indemnity to his sureties and he fails to do so he may be removed.[84]

In all of these specified causes the party having failed to comply with the statutory provisions and the Court might, perhaps, after having given him the order to do a certain act, remove the executor or administrator without a further hearing; but the better practice would be to file an application for his removal the same as in any other case. In addition to these specified causes for removal, if the administrator refuses and neglects to perform any other order given by the court or required by statute, such as the giving of bond, etc., he may be removed.

§ 228. Hearing and entry.

On the day set for hearing, proof of service of notice should be filed in the case and the evidence should be heard in like manner as in any trial; and if the charges are not sustained a very short entry of dismissal will be sufficient. If sustained the following form may be used:

(Title.)

This day this cause came on to be heard upon the application of A. B., filed herein for the removal of E. F., executor of the estate of said C. D.; and it appearing to the court that said E. F. has had due and legal notice of this proceeding and the time of hearing thereon as required by law (and if such be the fact, state; and the said E. F. being now here in court), and the said cause came on for hearing and was submitted to the court upon the

80 See § 10669 G. C., § 306.
81 See § 10711 G. C., § 491.
82 See § 10825 G. C., § 709.
83 See § 10866 G. C., § 252.
84 See § 10867 G. C., § 253.

Application for removal and recovery of concealed assets may be joined in one action. Harris vs. Westervels, 15 C. C. 534; 8 C. D. 368.

said application and the testimony of divers witnesses; and was argued to the court by counsel, whereupon the court finds that the said E. F. has been guilty of (here insert the ground of removal alleged in the application, which the court finds to be true), and orders that the said E. F. be removed as executor of the estate of the said C. D., and that within.....days he file a full account of his administration of said estate, in this court as required by law, and the costs of this proceeding, $.....are taxed against....., and judgment for said sum, $....., the costs herein, is rendered against.....[85]

§ 229. Effect of order of removal.

The removal authorizes the administrator *de bonis non* to immediately take possession of all the effects of the deceased, and bring suit for that purpose.[86]

The removal of one administrator and the appointment of another to supersede him is a judicial proceeding of sufficient notoriety and all connected therewith are bound to take notice of it.[87]

Where an obligor is appointed administrator of the obligee the debt is not thereby extinguished, but is merely suspended and the debts become assets in the hands of the obligor as administrator.[88]

By accepting the resignation of an administrator pending the settlement of his accounts, the Probate Court does not thereby lose its jurisdiction over his person or the settlement of his accounts, and may proceed to hear and determine exceptions thereto, and ascertain the amount due from him to the estate, in like manner as if he had continued in the execution of his trust; and the amount so found due will, in the absence of fraud and collusion, be conclusive not only upon him but upon his sureties, in an action upon the administration bond, unless an appeal has been taken or the judgment has been reversed upon a proceeding in error.[89]

[85] See § 10624 G. C.

[86] See § 157; Admrs. of Pitcher vs. Reese, 6 O. 418 (176).

[87] Treasurer vs. McElvain, 5 O. 200.

[88] Bigelow vs. Bigelow, 4 O. 138.

[89] In a recent case it was held that the Probate Court has no jurisdiction to compel an administrator to file his account after he has been removed. If this is the law it ought not to be, and I doubt if it is. The removal is not complete until the account is filed.

Since the above was written the Supreme Court has expressly decided in accordance with the author's views, and that the court does not lose jurisdiction over him until his account is filed and settled, notwithstanding the fact that the court may have made an order of removal. *In re* Morrison, 68 O. S. 252.

In re Miller, 8 N. P. 385.

See James vs. West, 47 Bull., 857, where the practice of filing an account after removal was followed.

Where upon the settlement of the accounts of an administrator or executor, who has resigned or been removed, the amount due from him to the estate has been ascertained and determined by the Probate Court, it is not error in the court to order its payment to his successor in the administration of the estate.[90]

As to the effect of the resignation the statute provides as follows:

"The acceptance of such resignation, and the appointment of another administrator, shall not affect the liability of the former executor or administrator, or his sureties, previously incurred." [R. S. § 6016.][91]

§ 230. Acts after his removal, etc.

After the removal of an executor or administrator he has nothing to do except to turn over all property in his hands and file his final report. All other acts are invalid.[92]

If the executorship is terminated by death, his successor must within six months file an account. As a matter of course, having no control over the estate, the removed administrator or executor will not be liable for any act affecting the estate after his removal.[93]

If a suit be pending against him in his representative capacity he may plead his removal and his successor must be substituted.[94]

All sales made and all acts done in good faith by an executor or administrator previous to his removal are valid.[95]

The removal terminates the authority of the removed administrator, over the assets received as well as those not received.[96]

See *In re* Morrison's Est., 8 N. P. 385.

90 Slagle vs. Entrekin, 44 O. S. 637; Woerner 589.

91 § 10628 G. C.

92 Owens vs. Cowan, 7 B. Mon. 152; Stubblefield vs. McRaven, 5 Sm. & M. 130.

93 Marsh vs. People, 15 Ill. 284.

94 National Bank vs. Stanton, 116 Mass. 435.

95 § 6021 R. S., § 159, Sales of former executor, etc.

See § 160, Notice, bonds, etc.

See § 95, Power during contest.

96 Weaver vs. Reese, 6 O. 421.

If the court refuses to remove him and an appeal is taken, his authority continues until the appeal is heard. Melanpy vs. B. & L., 13 Dec. 192.

The resignation can take effect even though no other administrator is appointed. State vs. Moffitt, 13 C. C. (N.S.) 152, 159.

If the administrator is discharged the mere fact that he permits a suit against the estate to be continued will not be sufficient to hold him responsible. State vs. Moffitt, 33 O. C. C. 230; 13 O. C. C. (N.S.) 152; affirmed, 82 O. S. 433.

§ 231. Termination of authority by completion of trust.

The object and purpose of the appointment of an executor or administrator having been accomplished, as a matter of course, his authority terminates, but unless it is terminated by one of the modes provided by statute it continues until the estate is fully settled. Where an administrator files what purports to be his final account in Probate Court and the court having found upon the hearing of the account that the executor had well and faithfully discharged his duties and paid out to the proper person or persons all moneys in his possession as executor; and further ordered that the account be made final and that said executor be discharged from his trust, that he distribute among legatees and distributees of the estate of the decedent all of the uncollected assets of said estate. It was held that this was not such a finding as would prevent the administrator from proceeding to convert uncollected choses in action of said estate into money.[97]

The Court says: "The primary duty of the executor with respect to the choses in action is to collect them, and he is relieved of that duty only when he has otherwise disposed of them in one of the modes above mentioned. It is not shown by the record that the executor had disposed of the note sued on by him. He had not distributed to anyone entitled to its proceeds, nor had any distributee of the estate agreed to receive it, nor had he sold it, or filed it with the Probate Court for creditors or distributees. On the contrary, it appears that he still retained the note and his duty remained as long as he continued to be executor to collect the same by suit or otherwise, and account for the proceeds. In a settlement made when that is done, whatever he or the Probate Court may call it, is not his final settlement.[97*]

Discussing the order made in this case, the Court further says: "But we find no power conferred upon that court to discharge an executor or administrator from his trust upon the settlement of what is called a final account, thus extinguishing

[97] Weyer vs. Watt, 48 O. S. 546. [97*] Id. 550.

his authority as trustee. Unless therefore the order of the Probate Court operated as a removal of the plaintiff from his trust or as a resignation of it by him, his authority as executor continued notwithstanding the order." From this authority it may be said that the usual order made in the Probate Court upon the filing of what purports to be a final account in which it is generally stated that an account is approved and that there is balance in the hands of the executor of ———— dollars, which he is ordered to distribute according to law, etc., will not release such administrator or executor if there are still outstanding assets to be administered upon; and if such executor wishes to be released in such a case he should tender his resignation with the filing of his account, for in such a way can he only surrender his authority, unless removed for cause, before the trust is completely administered.[98]

§ 232. Appeal and error.

The question whether the decision of the Probate Court in the matter of removing an administrator is subject to review by a higher court in the nature of an appeal or proceedings in error has been of sufficient uncertainty to reach the Supreme Court. *In re* estate of Samuel Stell,[99] it was held that an appeal will not lie to the Court of Common Pleas from the order of the Probate Court removing an administrator.

The same question came before the court again in the case of

[98] An administrator is not discharged from his trust until full administration is accomplished, and therefore an administrator was not discharged by filing in the Probate Court a written statement under oath that no assets had ever come into his hands as administrator; and that no claim of any kind had ever been presented to him, excepting such as had been fully paid by the widow, and that having received no funds as administrator and having paid out nothing, he filed the statement under oath as his final account as administrator and for the discharge of his trust.

McClaskey vs. Barr (Ohio), 79 Fed. 408; Fewlass vs. Keeshan (Ohio), 88 Fed. 573.

See Hicks vs. Stone, 11 Bull. 67.

See § 798, Order of discharge.

[99] 15 O. S. 484.

Statute as amended specifically allows appeal. See § 39. 95 v. 416–

§ 11043 G. C.

When an appeal has been taken from a motion to remove an administrator, this does not affect the right of the administrator to act, and he can collect a judgment pending the appeal. Melanpy vs. B. & L., 13 Dec. 192.

Ebersole vs. Schiller,[100] when the court again held that there is no right of appeal to the Court of Common Pleas from the Probate Court, reviewing the removal of an administrator. Whether or not the proceedings in error would lie has been a matter of some doubt.[100*]

In the case of Fox vs. Kiester,[101] it was held that the order of the Probate Court in removing an executor or administrator is an order affecting a substantial right made in a special proceeding and may be reviewed on error on application to the Court of Common Pleas.

This decision was affirmed by the Circuit Court.[102]

But in quite a recent decision in the Supreme Court [103] it was held that an order of the Probate Court removing an executor is not a subject to be reviewed on petition in error in the Court of Common Pleas.

The Court expresses itself very briefly, but it says: "A conclusion reached in the Common Pleas and Circuit Courts that an order of the Probate Court, removing an executor, is not subject to review on petition in error, is justified by the section (6017) of the statute as well as by the views which this court has heretofore expressed upon the general subject." [104]

[100] 50 O. S. 701; Perrine vs. Printz, Dayton 65.

[100*] The law as amended (1902), 95 v. 392, § 12241 G. C., § 52, provides that error may be prosecuted.

[101] 6 N. P. 216; 8 Dec. 636.

[102] Id. 332.

[103] Monger vs. Jeffries, 43 Bull. 217; 62 O. S. 149; Martin vs. Dershem, 46 Bull. 172.

[104] Now changed by statute. See § 52.

Citing *in re* Still, 15 O. S. 484; Brigle vs. Starbuck, 34 O. S. 280; Ebersole vs. Shiller, 50 O. S. 701.

See § 1575, Removal of assignee.

Although the refusal of the Probate Court to consider the application of the next of kin or of a creditor for letters of administration, may be reviewed in the Common Pleas Court, that court will not disturb a finding of the Probate Court to the effect that the next of kin is "evidently unsuitable," or that the applying creditor is incompetent, within the meaning of § 6005, R. S., unless it appears that the Probate Court abused its discretion. McCallip vs. Sharp, 13 Dec. 450.

The statute, § 6407 R. S. (§ 11206 G. C.), giving right to appeal to Common Pleas Court, does not conflict with § 524 R. S. (§ 10492 G. C.), giving Probate Courts original exclusive jurisdiction to grant and revoke letters testamentary. *In re* Sells' Est., 5 N. P. (N.S.) 629; 19 Dec. 567.

The Circuit Court, however, cannot review the decision of the Court of Common Pleas. Smith vs. Bracy, 32 O. C. C. 383.

CHAPTER XV.

BONDS, EXECUTION, FORM, ETC.

§ 233 Requirement of bonds.
§ 234 To whom made payable.
§ 235 Good signed in blank.
§ 236 Sufficient condition.
§ 237 Execution, form etc.
§ 238 Approval and custody.
§ 239 Liability of judge in accepting bond, etc.
§ 240 Amount of penalty.
§ 241 Sureties — Qualification and number.
§ 242 Examination of sureties.

§ 233. Requirement of bonds.

In a work of this character it will not be proper to go into the historical origin of the law requiring the giving of bonds. Suffice to say that the legislatures have always been solicitous in making provision for the safety of the beneficiaries of trust estates; and that our statutes contemplate that whenever a trustee is appointed other than that of an executor or trustee under a will dispensing with bond, that a bond be given, indeed until such bond is given, no appointment ought to be made; and some courts have held that an administrator or executor where the bond is not dispensed with could perform no legal acts in relation to the administration of his trust, until a bond was given.[1]

But such, it seems, is not the law of Ohio, for in several instances it was held that the giving of a bond is not a jurisdictional requirement, and that the failure to give such bond does not of itself render the appointment void.[2]

And in another case it was held that the omission of an administrator to give bond with the requisite number of sureties upon it, will not affect his right to recover in an action where

[1] Woerner on Admin. 546.

[2] Mitchel vs. Albright, 20 Bull. 101. This case was followed by Judge Pugh in the case of Martin et al. vs. Falconer, 23 Bull. 333.

letters have been issued by the Probate Court upon the bond as given and which remains unrevoked.[3]

In this case it is also said that such an appointment is voidable and not void, and therefore cannot be collaterally impeached.[4]

These cases cited seem to follow the decisions of the New York court, and that if advantage is to be taken of a defective bond in any way it must be in a direct proceeding in the court that made the appointment.[5]

§ 234. To whom made payable.

The general practice is that all trustees' bonds are made payable to the State of Ohio, the State being held to be a trustee for all parties interested in the administration of the estate. Where the statute makes provision to that effect, bonds should be made payable to the person for whose benefit they are specially given. But the courts would not be strict about this matter, and if an executor's bond should be made payable to one of the interested parties or to any person, it would be held that such person was a trustee for whoever might be interested, and for any person for whose benefit it was intended that the bond was given.[6]

[3] Slagle vs. Entrekin, 44 O. S. 637.

[4] Sch. Exrs. 142; Bigelow vs. Comegys, 5 O. S. 256.

[5] Bloom vs. Burdick, 1 Hill 130; 37 Am. Dec. 299.

See §§ 1333, 1337, 1343, 1554.

[6] A bond made payable to the "Governor" instead of the State is not void. Sikes vs. Truitt, 4 Jones Eq. 361; Johnson vs. Fugnay, 1 Dana 514; Farley vs. McConnell, 7 Lans. 428.

If made to the "county," instead of "people." Bay vs. Brock, 44 Mich. 45.

Or "people of the State" instead of State, Teris vs. Randell, 6 Cal. 632.

But where the testator was described as James, when it should have been Joseph, the sureties were not held. McGooney vs. State, 20 O. 93.

Likewise where made to the Supreme Court instead of District Court. Myers vs. Parker, 6 O. S. 502.

But where the bond by mistake was made to an administrator *de bonis non*, instead to an administrator *de bonis non* with the will annexed, the surety was held. Newberger vs. Finney, 17 C. C. 215; 9 C. D. 720.

§ 235. **Good signed in blank.** "All official bonds, and bonds of executors, administrators, guardians and trustees, bonds required or authorized to be taken by or before a court, judge, public board or officer, judicial or ministerial, bonds of indemnity, and all other bonds conditioned to become void upon the performance by the parties thereto, or any of them, of the stipulations therein contained, shall bind and render liable thereon, both principals and sureties therein, whether at the time of the signing thereof by such obligors, or any of them, the amounts of such bonds be filled in or left in blank, if such amounts be filled in before, or at the time of the approval or acceptance of such bonds, and such filling in may be done in the absence of any or all of the obligors, and without any express authority for that purpose from them or any of them." [R. S. § 6.][7]

Before the passage of the above section of the General Code no blank could be filled in.[8]

It will be observed that the above statute only provides that the amounts of such bonds may be filled in after they have been signed in blank. It has been held, however, that the omission of the names of sureties or obligors in the body of the bond does not affect its validity or their obligation.[9] But if a bond were written without any obligee it is very questionable if it could be enforced, although in a proper case it might be reformed; then, after reformation, be enforced.[10]

Omissions may be supplied by construing the decree of appointment and bond together.[11]

A blank bond executed by the principal and sureties has been held sufficient to sustain the qualification and appointment until the vacation of the letters.[12] But a judgment at law upon such a bo ·d has been refused.[13]

[7] § 5 G. C.

[8] State vs. Boring, 15 O. 507; Famulener vs. Anderson, 15 O. S. 473.

[9] McLain vs. Simington, 37 O. S. 660; Partridge vs. Jones, 38 O. S. 375; Bld. Assn. vs. Cummings, 45 O. S. 64.

Some of these bonds were on specialties, etc.

In a recent case it was held that the sureties were liable even though they were misled as to who was the principal in the bond, where they signed it in blank. Sourada vs. David, 15 N. P. 257.

As to signature obtained by fraud, see Sourada vs. David, 15 N. P. (N.S.) 257.

[10] State vs. Watson, 2 Cleve. 314; Abrams v. Kounts, 4 O. 214.

See Gardner vs. Woodyear, 1 O. 170; State vs. Slough, 12 C. C. 105; 5 C. D. 697.

[11] State vs. Price, 15 Mo. 375.

[12] Spencer vs. Cahoon, 4 Dev. L. 225.

[13] Cowling vs. Justice, 6 Rand. 349.

It is valid, although omitting to state in terms the conditions on which the obligation might be enforced, or which would render the bond void.[14]

The omission of the penalty does not render the bond void, for the law construes it with reference to the amount the penalty should have been.[15]

The omission of the name of the decedent does not render it void, for the papers on file may be referred to to supply the omission.[16]

Such immaterial blanks in a bond as date or name of the obligor may be filled in at any time. The bond is valid without them.[17]

§ 236. **Sufficient condition.** "A bond payable to the state of Ohio, or other payee as may be directed by law, reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond." [R. S. § 7.][18]

The provisions of § 6, G. C., would make valid a bond of an executor or administrator if it failed to set out in detail all the conditions mentioned in the section requiring bond, etc. A bond with the will annexed, conditioned that the administrator will properly discharge his duties as administrator, is not for that reason void.[19]

The bond is valid, although the sureties are not named in the body of the bond.[20]

The bond is effective, although its conditions are not strictly in accordance with the requirements of the statute, but provide

[14] Rose vs. Winn, 51 Tex. 545; Newton vs. Cox, 76 Mo. 352.

[15] State vs. Britton, 102 Ind. 214; Soldini vs. Hyams, 15 La. Ann. 551; Mason vs. Fuller, 12 La. Ann. 68; Shalter's Appeal, 43 Pa. St. 83.

[16] State vs. Price, 15 Mo. 375.

[17] Famulemer vs. Anderson, 15 O. S. 473.

[18] § 6 G. C.

[19] Owen vs. State, 25 Ind. 371.

[20] Joyer vs. Cooper, 2 Bailey L. 199; Stone vs. Wilson, 4 McCord 203.

Covers all the duties required of the official during his term, whether imposed by statute before or after, etc. Dawson vs. State, 38 O. S. 1.

in different and more general terms, for the faithful execution of the trust.[21]

Where the will is annexed a condition to administer according to the will, instead of according to the law, does not render the bond void.[22]

If it has more conditions than the statutes require, such additional conditions will be regarded as surplusage.[23]

The bond is valid although only one surety sign where two are required.[24]

Private arrangement between the principal and sureties in what manner the bond should be filled out and used will not avoid it as to third persons who relied upon it as actually presented and approved.[25]

A surety who signed the bond conditionally must retract before the bond is approved and the court and innocent parties have placed reliance upon it.[26]

When the name of a person is signed to an administrator's bond without his knowledge, and afterwards, and before its approval by the court, he is informed thereof, and does not object, it is too late to demand relief from liability after the administrator has committed waste.[27]

The bond of an executor, given to secure the faithful discharge of his duties as executor, cannot be construed as conditioned for the faithful discharge of his duties as trustee of a trust created by the will.[28]

[21] Probate Court vs. Strong, 27 Vt. 202; Lanier vs. Irvine, 21 Minn. 447; Judge of Probate vs. Claggett, 36 N. H. 381; Pettingill vs. Pettingill, 60 Me. 411; Casoni vs. Jerome, 58 N. Y. 315; Holbrook, vs. Bentley, 32 Conn. 502; Newton vs. Cox, 76 Mo. 352; McFadden vs. Hewett, 78 Me. 24.

[22] Hall vs. Cushing, 9 Pick. 395; Hartzell vs. Com., 42 Pa. St. 453.

[23] Woods vs. State, 10 Mo. 698; Grant vs. Brotherton, 7 Mo. 458; Ordinary vs. Cooley, 30 N. J. L. 179.

[24] Slagle vs. Entrekin, 44 O. S. 637; Steele vs. Tutwiler, 68 Ala. 107.

[25] Franklin vs. De Priest, 13 Gratt. 257; Brown vs. Davenport, 76 Ga. 799; Field vs. Van Cott, 5 Daly 308; Cohea vs. State, 34 Miss. 179.

[26] Canal, etc., Co. vs. Brown, 4 La. Ann. 545.

[27] State vs. Hill, 50 Ark. 458; S. C., 8 S. W. Rep. 401.

[28] Hinds vs. Hinds, 85 Ind. 312; Coggeshall vs. State, 112 Ind. 561. See Foster vs. Wise, 46 O. S. 27; Kaufman's Estate, Goebel, 98.

An official bond conditioned to discharge the duties of an officer "according to law" embraces the duties required by laws enforced during the term of the officer, whether enacted before or after the execution of the bond.[29]

§ 237. Execution, form, etc.

These provisions of §§ 5 and 6, G. C., were no doubt engrafted in our statutes from the fact that the persons whose duty it was to act on such bonds were public officials; not having a direct interest in the matter, minor details might very easily be overlooked, and then our Supreme Court had given a very strict construction to that class of bonds, especially when considering the same in relation to the sureties thereon. In the case of State vs. Medary,[30] it is said: "The bond speaks for itself, and the law is that it shall so speak, and that the liability of sureties is limited to the exact letter of the bond. The sureties stand upon the words of the bond, and if the words will not make them liable nothing can. There is no construction, no equity, against sureties. If the bond cannot have effect according to its exact words the law does not authorize the court to give it effect in some other way in order that it may prevail." [31]

This strict construction seems to have been given to a bond because it was a specialty under seal. Whether the abolishment of seals would make any difference might be a question, but there is enough uncertainty about the matter that Probate Judges and their deputies should exercise great care in this matter of taking bonds; more than I know they generally do. Some Probate Judges require that the bonds be signed in open court. This is a very good rule, but difficult to put into prac-

[29] Dawson vs. State, 38 O. S. 1.

[30] 17 O. 554.

[31] Judge Longworth, in Partridge vs. Jones (38 O. S. 375), quoted with approbation the following: "If ever there was a time when courts listened to trivial and verbal inaccuracies in contracts when the real meaning and intention of the parties was plain, that time has gone by; and the only object of the court is, that when the meaning and intention of the party are plain no grammatical inaccuracy and want of the appropriate words shall render the instrument unavailing."

tice; when done elsewhere there is always danger of forgery or misrepresentation.

§ 238. Approval and custody.

It is provided by § 11, G. C., that every officer on receiving an official bond which by law is required to be filed or deposited with him, shall immediately on receiving such bond record the same in a book to be kept by him for that purpose; and § 522, G. C., says that each judge shall have the care and custody of all files, papers, books and records belonging to his office; and by § 10611, G. C., it is provided that the bonds shall be filed in the court taking the same and the bonds shall be such as the court shall approve. The following is a general statute relating to the same:

"All bonds required or authorized by law to be given in the probate court, on being accepted and approved by the probate judge, shall be filed in his office." [R. S. § 6401.][32]

In reference to the approval and custody of such bonds I know of no Ohio decisions relating thereto. Courts elsewhere have held that the bond is valid, although no formal approval is entered thereon or of record.[33]

Merely finding the bond on file in the clerk's office will raise a strong presumption that it was approved.[34]

It cannot be taken from the clerk's office. A certified copy of it may be given in evidence.[35]

If it and its record is destroyed it may be restored.[36]

In an action on a bond it is not necessary to first show its ap-

[32] § 11200 G. C.

[33] State vs. Chrisman, 2 Ind. 126; James vs. Dixon, 21 Mo. 538; Henry vs. State, 9 Mo. 778; State vs. Farmer, 54 Mo. 439; Brown vs. Wheatherby, 71 Mo. 152; Cameron vs. Cameron, 15 Wis. 1; Ford vs. Adams, 43 Ga. 340.

[34] McClure vs. Colclough, 5 Ala. 65. See United States vs. Dandridge, 12 Wheat 64; Apthrop vs. North, 14 Mass. 107.

[35] Miller vs. Gee, 4 Ala. 359.

[36] Tanner vs. Mills, 50 Ala. 356.

proval before introducing it in evidence; that fact may be shown afterwards.[37]

§ 239. Liability of judge in accepting bond, etc.

The matter of the extent of the liability of a Probate Judge in accepting a bond that proves deficient in some manner is perhaps of more interest to the Probate Judge in the nature of information, as to a proper discharge of his duties, than in the enforcement of such liability, if there be one; for as yet there is no reported case in our State in which it was sought to hold the Probate Judge responsible. Whether he is responsible or not, or, if responsible, under what conditions, is a mooted question. If the act of accepting a bond is a judicial act, the weight of authority is that he could never be held responsible. If the act is a ministerial one, which seems to be the prevailing opinion, he would be responsible in the exercise of ordinary care. Yet it has been held that even if it were a ministerial act, he would only be responsible for acting wilfully or maliciously.[38]

In another case it was held that it must be shown that he acted wilfully, corruptly or maliciously.[39]

The line of demarcation between judicial acts and ministerial acts is exceedingly fine, and the courts are not in harmony. In Michigan [40] it is held that the approval of the form and security of a bond is a judicial act, for which, if the body or person whose duty it is to prove the same, acts wrongfully, there is no redress.

In Iowa [41] it is held that the approval of a bond is simply the ascertainment of two facts, the amount which the person acting as surety was worth and the amount of the penalty. The ascertainment of neither fact involved the determination of a question of law or fact upon valid evidence. In the Court's opinion it was not a judicial determination. Elsewhere it is

[37] Allen vs. State, 61 Ind. 268. See Myers vs. State, 47 Ind. 293.

[38] McTerre vs. Lebow, 85 Tenn. 121.

[39] Tompkins vs. Sands, 8 Wend. 462; 24 Am. Dec. 46.

[40] Bay Co. vs. Brock, 44 Mich. 45.

[41] Hubbard vs. Switzer, 47 Iowa 681.

said the approval or rejection of the bond is essentially a ministerial act, though coupled with discretion.[42]

The better doctrine it seems would be that the Probate Judge ought to exercise ordinary care and especially should he be held liable for gross negligence.[43]

In some States the judge is held liable if he takes a defective guardian's bond, this construction depending largely upon the peculiar wording of the statute.[44]

In a case not reported it was held [45] that a Probate Judge is not liable for accepting a forged bond.

§ 240. Amount of penalty.

There is nowhere, as far as I have been able to discover, any statutory provision fixing the amount of penalties in administrators' or executors' bonds. The general practice is to make it double the value of the property which is to be administered. Care should be taken that sureties on the bond are possessed of property sufficient to equal double that of property to be secured, excluding what might be exempted to them under the homestead or other exemption laws of our State.[46]

The acceptance of an insolvent surety will not affect the validity of the appointment, nor the validity of the administrator's acts.[47] Nor will the fact that the bond is insufficient in amount.[48]

[42] Adamson vs. LaFayette, 41 Mo. 226.

[43] See Murfree on Official Bonds, §§ 50, 51, etc.; Mechem on Public Offices, §§ 619, 635, 643, 657, 686.

The following are definitions of ministerial and judicial acts, from the Century Dictionary:

Ministerial acts are "Those acts, offices and powers that are to be performed or exercised uniformly on a given state of facts in a prescribed manner, in obedience to law or the mandate of legal authority, without dependence on the exercise of judgment as to the propriety of so doing."

Judicial act — is an act of any public officer involving the exercise of his judgment or discretion on a question affecting the right of any party.

[44] Woerner on Gdns. 119.

[45] Ingersoll vs. Smith, 36 Bull. 302.

[46] Woerner on Admin. 555; § 6891 G. C.

[47] Slagle vs. Entrekin, 44 Ohio St. 637; Herriman vs. Janney, 31 La. Ann. 276.

[48] Mumford vs. Hall, 25 Minn. 347.

In determining the amount of the estate, only property in this State will be considered.[49]

Sureties who are legatees with no property except such as is derived from the will are not sufficient.[50]

The acceptance of non-freehold sureties does not vitiate the bond,[51] nor a sale of real estate.[52]

They need not be freeholders of the county where the bond is given,[53] but should be.

A bond which divides up the penalty among the sureties is not absolutely void, but is not favored.[54]

And the same is true of several bonds in lieu of a single bond.[55]

Trust companies may become sureties or act as administrators without giving bond.[56]

A husband may be surety for his wife.[57]

§ 241. Sureties. Qualification and number.

It is provided by statute that " sureties must be residents of this State and worth in the aggregate double the sum to be secured beyond the amount of their debts, and have property liable to execution in this State equal to the sum to be secured." [58]

The provisions of this section are directory and if not fully complied with would not vitiate the bond, and if a non-resident or an insolvent should attach his signature to the bond he would be held. Of course any interested person might make an application to require an additional or new bond. Where a rule of court forbids attorneys going on such bonds and an attorney violated the rule, it was held that the bond was valid and the attorney could not escape his legal responsibilities thereon.[59]

[49] Lewis vs. Grognard, 17 N. J. Eq. 425.

[50] Ellis vs. Witty, 63 Miss. 117.

[51] Hicks vs. Chouteau, 12 Mo. 341.

[52] Johnson vs. Clark, 18 Kan. 157.

[53] Barksdale v. Cobb, 16 Ga. 13.

[54] Baldwin vs. Standish, 7 Cush. 207.

[55] People vs. Lott, 27 Ill. 215.

[56] See §§ 9571, 9572 and 9573 G. C., and chapter 13a, § 207m and 710-162 G. C.

In settlement of an account the judge may allow for premium paid on the bond not above one-half per cent. per annum on the amount of the bond, unless it is double the liability of the administrator, then it is one-fourth per cent. per annum.

[57] *In re* Grove, 6 Dem. 369.

[58] § 6891 G. C.

[59] Wallace vs. Scoles, 6 O. 428 (181).

It is also provided by another section of the General Code [60] that sureties shall be inhabitants of this State. As it has been remarked before in this work, good practice demands that sureties be residents of the county in which the bond is given, for when a person is taken who is a non-resident of the county, it is difficult for the court to ascertain his financial standing; and not only that, if anything should occur that suit is required to be brought upon the bond, the person desiring to bring such suit might be compelled to go a considerable distance in a strange county to enforce a surety's liability. This might result to great inconvenience to the persons interested, and the court ought always in every way in its power protect the beneficiaries of a trust estate. In other sections [61] it is provided that there shall be at least two sureties on the bond, but if a bond were taken with but one surety thereon the bond would be a valid one.[62]

It has been recently provided [63] that corporations known as surety companies may become sureties on administrators', executors' or trustees' bonds.[64] Before such a corporation can be taken as surety, it must comply with the laws of the State to the satisfaction of the Commissioner of Insurance. The usual way in such cases is for the company desiring to do business in a certain Probate Court to file in that court a certificate from the Commissioner of Insurance to the effect that the company has complied with the laws of our State. This being done it would be well for the court to place upon record an entry which may be in the following form:

In the matter of.....Company.

This day came.....Company, by its representative .....and filed herein a certificate of a commissioner of insurance in the State of Ohio, showing that said company had complied with the laws of the State of Ohio; and upon examination, the said certificate appearing to be regular and in conformity to law, it is

[60] § 10611 G. C., § 86.

[61] § 10611 G. C., § 83; § 10618 G. C., § 124.

[62] Slagle vs. Entrekin, 44 O. S. 637.

[63] §§ 9510-11 G. C., §§ 9568-69-70 G. C.

[64] *In re* Bank, 4 Dec. 228; 3 N. P. 286; § 9571 G. C.

It is unconstitutional to compel an administrator or executor to give only as surety on his bond a surety company, and an act of the Legislature with such a requirement is void. State vs. Robins, 71 O. S. 273.

hereby ordered that said.....be accepted as surety on the bond of any executor, administrator, trustee or guardian hereafter appointed by this court.

§ 242. Examination of sureties.

Our statute provides that a "court or officer authorized by law to prove the surety may require such person to testify orally or in writing touching his sufficiency; but this shall not in itself exonerate the officer in action for taking an insufficient surety." [65] If the examination is taken orally, the ordinary oath should be administered to the party before proceeding with the examination. The Court should fully satisfy itself that the party has the requisite qualification before accepting him as surety. Very often the inconvenience attaching to the surety appearing in court and qualifying results in the substitution of some other method, generally by affidavit. The affidavit may be in the following form.

State of Ohio,

.....*County, ss.*

A. B., one of the sureties on the bond of C. D., as administrator (or executor) of the estate of E. F., deceased, being duly sworn, says that he is a resident of.....in the County of..... Ohio. That he is worth beyond the amount of his debts, at least..... .....Dollars; and that he has property liable to execution in this State equal to the sum of the bond upon which he has attached his name as surety.

.....Sign.

Sworn and subscribed before me this.....day of.....

[65] § 10218 G. C.

CHAPTER XVI.

NEW BONDS—SURETIES, ETC.

§ 243 Application for release of surety, etc.
§ 243-1 Application by executor, etc.
§ 243a Removal on failure to give new bond.
§ 243b Costs, etc.
§ 244 Application and cause.
§ 245 Form of application.
§ 246 Entry ordering notice, etc.
§ 247 Notice, form of notice, hearing, etc.
§ 248 When order takes effect.
§ 249 When new bond may be required by interested party.
§ 250 Liability of prior sureties.
§ 251 Liability of sureties on new bonds.
§ 252 If bond not given may be removed from trust.
§ 253 When executor or administrator to give bond of indemnity to surety.
§ 254 Application, procedure, etc.
§ 255 Sufficient cause for making order.
§ 256 Form of indemnity bond.
§ 257 Construction placed upon such bond.
§ 258 Additional bonds.
§ 259 General liabilities of sureties.
§ 259a Reduction of bond.

§ 243. Application for release of surety, etc.

The fact that the surety assumes his obligation on the bond without any consideration moving to him from the obligor, has induced the body making power of our State to enact statutes giving a vigilant surety full and ample opportunity to protect himself. He may require that the administrator or executor indemnify him by another bond, or if there is any cause, demand a new bond. The statute providing for release, is as follows:

"A surety of an executor or administrator, or the executor or administrator of a surety, at any time may make application to the proper probate court to be released from the bond of such executor or administrator, by filing his written request therefor with the judge of such court, and giving at least five days' notice, in writing, to such executor or administrator. If, upon the hearing, the court is of opinion that there is good reason therefor, it shall release such surety. The death of a surety always shall be good cause." [R. S. § 6204.][1]

§ 243-1. Application by executor, etc. § 10861-1. An executor or administrator, at any time may make application to the proper probate court for the release of his sureties, by filing his written request therefor with the judge of such court, and giving at least five days' notice, in writing, to such sureties.

[1] § 10861 G. C. See § 1257, under foreign will; § 1343, additional bonds; § 1563, removal of assignee; § 1554, assignee's bond.

If, upon hearing, the court is of opinion that there is good reason to release said sureties it shall order said executor or administrator to file an account, as provided by law, and said sureties shall be released upon said executor or administrator filing a new bond and its approval by the court. [107 v. 401.]

§ 243a. Removal on failure to give new bond. § 10862. If such executor or administrator fails to give new bond, as by such court directed, he must be removed and his letters superseded. Such original surety or sureties shall not be released until the executor or administrator so gives bond, but the original surety or sureties shall be liable for said executor or administrator's acts only from the time of executing the original bond to the filing and approval by the court of the new bond. [107 v. 401.][1*]

§ 243b. Costs. "The costs of such proceeding shall be paid by the surety applying to be released, unless it appears to the court that the administrator or executor is insolvent, incompetent, or is wasting the assets of the estate." [R. S. § 6204.][1†]

§ 244. Application and cause.

It will be observed that the statute does not designate what shall constitute a good cause for the release of a surety. I may say that as a general practice the application will be granted for the mere asking, although the court may refuse to do so unless it appears that the administrator or executor has changed in his financial condition since his appointment, or that he is wasting or mismanaging the estate.

This statute is remedial and should be construed favorably towards the surety.[2] It applies to any bond given by an administrator, of whatever kind.[3] While some of the courts have held that when an application for release is made, no reason need be assigned, such decisions have been generally made under a statute which gives the surety an absolute right of release and does not leave it with the discretion of the court. Under our statute, it being left to the discretion of the court, the application ought to contain a reason for the desired release.

1* § 10862 G. C. This statute gives the surety ample protection. Souhrada vs. David, 15 N. P. (N.S.) 257.

1† § 10863 G. C.

2 Kendrick vs. Wilkinson, 18 Ind. 206; Sifford vs. Morrison, 63 Md. 14; DeLane's Case, 2 Brev. 167; McKay vs. Donald, 8 Rich. 331; Lewis vs. Watson, 3 Redf. 43; Johnson vs. Fugunay, 1 Dana 514; Harrison vs. Turbeville, 2 Humph. 242; Jones vs. Ritter, 52 Ala. 280; People vs. Curry, 59 Ill. 35; Allen vs. Sanders, 34 N. J. Eq. 203.

3 Kendrick v. Wilkinson, 18 Ind. 206.

§ 245. Form of application.

(Title, etc.)

The undersigned A. B., surety on the administration bond of C. D., as executor (or administrator) of the estate of E. F., deceased, hereby makes an application under the provisions of section No. 6204 *et seq.* of R. S., to be released from the bond of said C. D.; and alleges that the said C. D. is (here insert the cause assigned for removal).

Wherefore said A. B. prays that the said C. D. may be ordered to appear in court to answer said application; and that A. B. may be released as surety on said bond; and that said C. D. as executor (or administrator) be directed to file a new bond, and that said A. B. be released from all further liabilities thereon.[4]

.....Sign.

§ 246. Entry ordering notice, etc.

Upon the filing of an application of a surety to be released, a Court should make an entry ordering that the cause be set for hearing on a certain day, and that notice be issued to said administrator or executor. The entry may be in the following form:

(Title.)

This day came A. B. and filed herein his application to be released as surety upon the bond of C. D., executor (or administrator) of E. F. Wherefore it is ordered that said cause be set for hearing on the..... day of....., at.....o'clock...M. It is ordered that a notice of the said application and the causes therein alleged for the release of the said A. B., surety on the bond of said C. D., and the time set for hearing the same, be issued to (here insert the name who is to serve the same) for the said C. D. to appear in this court at the time the said cause is set for hearing and answer the same; and that said notice be served on said C. D. at least five days before the time of hearing.

§ 247. Notice, form of notice, hearing, etc.

As to notice and form of notice, what was given under former chapters on resignation and removal will be applicable here; and the form of notice provided there can very easily be adopted for the form required here.[4*] And for form of entry, what has been heretofore said in a previous chapter will also be applicable here.[5] The following may serve as a form of entry:

[4] This application should be verified.

[4*] § 218.

[5] § 228.

(*Title.*)

This day this cause came on to be heard upon the application of A. B. filed herein; requesting that the said A. B. may be released as surety upon the bond of C. D.; and it appearing to the court that the said C. D. has had due and legal notice of this proceeding and the time of hearing thereon as required by law; and the said cause came on to be further heard and was submitted to the court upon the said application and testimony. Whereupon the court finds that the said C. D. (here state cause for removal) and orders that the said C. D. give a new bond as executor (or administrator) of the estate of E. F., within.....days, and that upon the giving of said new bond A. B. be released from all further liabilities as surety of the said C. D. And the costs of this proceeding.....[4]..... Dollars, are taxed against....., and judgment for said sum.....Dollars costs herein is rendered against.....

It is further ordered that said A. B. file an account of his said trust herein within.....days.

The law does not require that an account be filed, but in order to show what amount the sureties on the new and old bonds might be respectively responsible for, it would be well to order an account.[5*]

§ 248. When order takes effect.

So far as the administrator or executor is concerned, the order takes effect from its date of entry. But so far as it concerns the releasing of the surety, it only takes effect when a new valid bond has been filed, and received the approval of the Probate Judge; and if a bond should be filed that was illegal or void, the sureties would not be discharged, although it might have received the approval of the Court. The case of Howenstine v. Sweet,[6] is an interesting one on this question. Here the administrator had been ordered to file a new bond within the time required by the order of the Court. He presented a bond which appeared regular and proper and the

[5*] The statute further provides, that unless the administrator or executor is insolvent or incompetent or is wasting the assets, the cost of the proceeding should be paid by the surety. This provision is no doubt for the purpose of preventing a capricious application for removal.

If the release was granted without good cause the statute would require the cost to be paid by the applicant. See § 273.

[6] 13 C. C. 239; 7 C. D. 498.

same was approved by the Probate Judge. Afterwards it was discovered that the new bond was a forgery, and it was held that the sureties on the original bond had not been released.

To the same effect was Stevens v. Allman,[7] when a justice of the peace attempted to make a new official bond, by having other securities, attach their names to the original bond. The Court held that this did not release the sureties.

§ 249. When new bond may be required by interested party.

A new bond may be required on the application of an interested party as well as upon the application of a surety to be released. The statute relating thereto is as follows:

"When the sureties on a bond of an executor or administrator are insufficient, on the petition of a person interested and after notice to the principal in the bond, the court may require a new bond to be given with two or more sufficient sureties." [R. S. § 6205.][8]

The method of procedure adopted under the provisions of § 10861-3, G. C., § 240, would be very applicable to the proceeding instituted under this section by an interested party. It does not require that any specified length of notice be given, but it would be well to follow the five days' notice required in the previous section.

§ 250. Liability of prior sureties. "When a new bond is required as above provided, the sureties in the prior bond shall nevertheless be liable for all breaches of the condition committed before the new bond is approved by the court." [R. S. § 6206.][9]

The wording of this section is not quite similar to the latter part of 10862 G. C. (§ 243a), but I apprehend the meaning is the same. Considerable contention has arisen about whether or not the giving of a new security will relieve the old one from his liability. In reference to a guardian's bond it was held, that

[7] 19 O. S. 485.
[8] § 10864 G. C.
[9] § 10865 G. C.

where a guardian of the person and property of a minor, having received after giving bond, money belonging to his ward, embezzled the same, a subsequent discharge of the surety in such bond and the acceptance by the Probate Court of the bond with other surety in lieu of the first bond, will not exonerate such surety in the first bond with respect to the money so embezzled.[10]

In another case it was held that when successive bonds with different sets of sureties have been given by an executor and the *devastavit* occurred before the execution and approval of any of the bonds, the liabilities of the sureties in the subsequent bonds is secondary to that of the sureties on the bond subsisting and in force at the time the estate was wasted; and if the former had made good the loss, such sureties may recover against the latter the full amount paid by them on account thereon.[11] In this case the Court say "this last section (6206) expressly provides that the sureties in the prior bond shall be liable for all breaches of its condition which occurred before the approval of the new bond. The new bond is not given for the benefit of the sureties in the old one, but for the benefit of the estate." [12]

§ 251. Liability of sureties on new bond.

Whether or not the sureties on the new bond were liable for acts of an administrator or executor which occurred before the giving of such new bond is always one of some difficulty. This matter was passed upon in our Supreme Court in Foster v. Wise.[12*] In this case it was found that prior to the time that a new bond had been given, the executor had collected all the assets and converted them to his own use. The sureties on the new bond claimed that they were only liable for such assets as were converted by the executor after the execution of the bond of which they were sureties. The Court

10 Eichelberger vs. Gross, 42 O. S. 549.

11 Corrigan vs. Foster, 51 O. S. 225.

12 See §§ 1353, 1424, 1554.

The right of contribution among sureties is founded in contract, etc. Oldham vs. Brown, 28 O. S. 41; Russell vs. Failer, 1 O. S. 327.

12* 46 O. S. 20.

Sureties on the second bond of a testamentary trustee are liable for default on the part of the trustee in not accounting for funds which were misappropriated before the execution of the bond, where the account was filed and the judgment finding the amount due was tendered after the execution of the second bond. Smith vs. Worley, 12 O. App. 367.

See 18 Cyc. 1251.

refused to accept this view, saying "the fact that prior to executing the bond the administrator had converted the assets to his own use, in no way affected the obligation to account for all that had been received by him belonging to the estate. It was to secure this obligation that the bond was required to be given." In a subsequent decision upon the facts of the same case,[13] it was held that while such sureties were responsible, yet if they are required to meet a loss they could sue the sureties of the former bond. It therefore results that where a defalcation has occurred during the existence of the prior bond, and a new bond is given, that the new bond becomes just so much additional surety for such defalcation.[14]

§ 252. If bond not given, may be removed from trust. "In the cases specified in the next two preceding sections, if the principal does not give such new bond within the time ordered by the court, he shall be removed from his trust and some other person may be appointed in his stead, as the circumstances of the case require." [R. S. § 6207.][15]

§ 253. When executor or administrator to give bond of indemnity to surety. "If an executor or administrator wastes or unfaithfully administers the estate, on the application of a surety in the administration bond, the court granting the letters may order such executor or administrator to render an account, and to execute to such surety a bond of indemnity, with sureties approved by it. Upon neglect or refusal to execute such bond within the time ordered, the court may remove him, and revoke his letters testamentary, or of administration, and appoint another administrator in his place." [R. S. § 6208.][16]

[13] 51 O. S. 226. See Woerner on Admin. 551.

[14] See § 1424.

[15] § 10866 G. C.

[16] § 10867 G. C.

This section gives to sureties a method other than that provided by § 6204 R. S. to protect themselves against the wrongful acts of an administrator upon whose bond they are surety.

A bond given under this section binds the obligors for any loss sustained by obligees on account of liability for executor existing at the time of its execution and thereafter paid by the obligees. Buffington vs. Bronson, 61 O. S. 231. See § 1554, Assignees.

See §§ 249, 250.

§ 254. Application, procedure, etc.

The applications, notices, entries, etc., which have been heretofore provided in this work for a release of surety on an executor or administrator's bond can easily be adopted for a proceeding under § 10867 G. C.[17]

§ 255. Sufficient cause for making order.

It is provided that if the executor or administrator shall waste or unfaithfully administer the estate, the Court may make the order. In the subsequent section, it is provided what constitutes unfaithful administration, which is as follows:

"If an executor or administrator unreasonably delays to raise money, by collecting debts and effects of the deceased, or by selling the real estate, if necessary, and he can obtain an order therefor, or neglects to pay what is in his hands; and if, because of such delay or neglect, the estate be taken in execution by a creditor, it shall be unfaithful administration in such executor or administrator, and he shall be liable on his administration bond for all resulting damages." [R. S. § 6209.][18]

§ 256. Form of indemnity bond.

Know all Men by these Presents.

That we, C. E. B., as principal, and J. M. S. and E. M. are held and firmly bound unto J. P. B. and J. R., in the sum of.....dollars, for the payment of which well and truly to be made, we do hereby bind ourselves, our heirs, executors and administrators.

Witness our hands and seals this.....day of..... 190....

The condition of this obligation is such that, whereas the above named J. P. B. and J. R. are sureties for the said C. E. B., in a certain bond as executor of the estate of M. L.

Now, therefore, if the said C. E. B. shall save and keep the said J. P. B. and J. R. harmless from all loss or damage by reason of being sureties on the said bond of C. E. B. and such executor of the estate, then this obligation to be void, otherwise to be and remain in full force and virtue in law.

E. M.
J. M. S.
C. E. B.

[17] § 215 *et seq.*

[18] § 10868 G. C.

§ 257. Construction placed upon such bond.

An indemnity bond executed in pursuance of § 10857 of the G. C., conditioned that the obligors shall save and keep the obligees harmless from all loss or damage by reason of their being sureties on the bond of an executor, is not limited in its obligation to such loss or damage as should arise from the failure of the executor to pay over money of the estate which came to his hands after its execution, but binds the obligors for any loss or damage sustained by the obligees on account of liability for the executor existing at the time of its execution and thereafter paid by the obligees.[19]

§ 258. Additional bonds.

Several sections of the G. C. provide for the giving of additional bonds,[20] and in addition to these statutory provisions I have no doubt the Court may of its own motion require additional bonds to be given at any time when it is believed by the Court that the bond already given is insufficient. There is quite a distinction between a new bond and an additional bond: A new bond relieves the original surety from all wrongful acts of the administrator or executor which occurred after the new bond has been approved by the Court. Where an additional bond is given, the liability of the surety on the original bond continues. As to all acts of the administrator or executor after the giving of the additional bond the two sets of sureties are equally responsible. As to such acts, they occupy the relation of co-sureties for the administrator, and are liable for contribution to equalize the burden incident to the situation.[21]

It has been held where an administrator on his appointment gives the bond required by statute for the faithful administration of his trust as a whole, and afterward in a proceeding instituted by him to sell real estate of the deceased to pay debts, gives another bond as required by statute for the faithful dis-

[19] Buffington vs. Bronson, 61 O. S. 231.

[20] §§ 10633, 10789, 10790 G. C.

[21] Daum vs. Kenast, 18 C. C. 1; 9 C. D. 867.

charge of his duties under such proceeding, such new bond does not take the place of the former general administration bond, but the sureties upon the administration bond are jointly liable with the sureties on the bond under the proceeding to sell real estate for the faithful discharge of his duties, in such proceeding in accounting for the proceeds of the sale, and an action can be obtained against all such co-sureties jointly.[22]

Of course the sureties on the additional bond would not be liable for a *devastavit* that occurred prior to the giving of the bond, unless the conditions of the bond were such as to make them liable, the same as if a new bond were given. That is, if the condition was merely that the administrator would faithfully administer his trust. But I apprehend that if an additional bond were given to cover certain assets that the surety on such bond could not be held liable for a waste of other assets, and that if an additional bond were given conditioned on the faithful performance of certain acts, the surety on such bond would not be liable for other wrongful acts of the administrator even though they were committed after the giving of such bond. As to such acts sureties on the original bond would alone be responsible.[23]

§ 259. General liabilities of sureties.

The fact that the signature of one of the sureties was forged has been held not to constitute a defense to the surety who signed, believing it to be genuine.[24] The contract of suretyship is always strictly construed, and the liability is limited to the official acts of the principal.[25] Acts that do not lie within the line of official duty and authority, not under color of office, the officer may incur personal but not official responsibility, and for these acts the sureties are in no way responsible.[26] Some difficulty has been experienced in determining the liability for acts done merely under the color of the office. Acts done *virtute officii,* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him, for these

[22] Id., Sterritt vs. Lingu, 4 N. P. 366; Id., 6 Dec. 481.

[23] See Sch. Exrs. 148; Woerner on Admin. 546, 548. See § 875, Real estate; § 1353, Liability of surety, etc.

[24] Stern vs. People, 102 Ill. 540; Sewell vs. Breathett Lodge, 150 S. W. Rep. 677.

[25] Lucht vs. Behrens, 28 O. S. 240; Curtis vs. Bank, 39 O. S. 579; Hall vs. Williamson, 9 O. S. 17; Myers vs.

the surety is liable. But for acts done *colore officii* which are of such a nature that his office gives him no authority to do, then the surety in many States is held to be not responsible.[27]

However, in Ohio,[28] as well as in the great majority of the States, sureties have been held liable for acts done under either case.[29] The rule is that a surety is bound by a judgment against his principal,[30] unless there was fraud or collusion between the administrator and those who seek to enforce the payment.[31] In some States a surety may appeal from such a judgment, though not a party to the record.[32] The surety is not discharged by the death of his principal.[33]

The death of an administrator of an unsettled estate does not start the running of the statute of limitations in favor of the sureties on his administration bond, since the liability of the deceased administrator is not fixed until the decree of the court approving the final account submitted by his administrator, and the statute does not begin to run until the rendition of such decree.[34]

An administrator was also guardian of certain minor distributees, who before the settling of the administration account, attained their majority. In such case the liability to the distributees was not, by virtue of the vesting in one person, the capacity of both debtor and creditor, transferred from the administration to the guardian's bond, as at the time payment could have been demanded, the guardian's right to receive funds

Parker, 6 O. S. 502; McGovern vs. State, 2 O. S. 93; State vs. Conover, 4 Dutch. (N. J.) 224; People vs. Lucas, 93 N. Y. 585; Clark vs. Lamb, 76 Ala. 406; State vs. Davis, 88 Mo. 585; Gerber vs. Ackley, 37 Wis. 43.

[26] McKee vs. Griffin, 66 Ala. 211.

[27] Carey vs. State, 34 Ind. 105; Brown vs. Mosely, 11 S. & M. (Miss.) 354; McElhany vs. Gilleland, 30 Ala. 183; State vs. Conover, 4 Dutch. (N. J.) 224; State vs. Long, 8 Ired. (N. C.) 415; Gerber vs. Ackley, 32 Wis. 233.

[28] State vs. Jennings, 4 O. S. 418; Hubbard vs. Elden, 43 O. S. 380.

[29] Van Pelt vs. Littler, 14 Cal. 194; Charles vs. Haskin, 11 Iowa 329; Horan vs. People, 10 Ill. App. 21; Turner vs. Sisson, 137 Mass. 191; State vs. Moore, 19 Mo. 369; Turner vs. Killian, 12 Neb. 580; Cummings vs. Brown, 43 N. Y. 514; People vs. Lucas, 93 N. Y. 585; Carmack C. Com., 5 Binn. (Pa.) 184; Holliman vs. Carroll, 27 Tex. 23; Sangster vs. Com., 17 Gratt (Va.) 124.

[30] Goodwin vs. Wilson, 1 Blackf. 344; Governor vs. Shelby, 2 Blackf. 26; Salyer vs. State, 5 Ind. 202; Speer vs. Pichmond, 3 Mo. App. 572; People vs. Stacy, 11 Ill. App. 506; Martin vs. Tally, 72 Ala. 23; McClellan vs. Downey, 63 Cal. 520; Morrison vs. Lavell, 81 Va. 519; Slagle vs. Entrekin, 44 O. S. 637. See Nicholson vs. Carr, 3 Blackf. 104.

[31] Wolff vs. Shaeffer, 4 Mo. App. 367; S. C., 74 Mo. 154; Scofield vs. Churchill, 72 N. Y. 565.

[32] McCartney vs. Garneau, 4 Mo. App. 566; People vs. Stacy, 11 Ill. App. 506; Buch's Appeal, 102 Pa. St. 502.

[33] State vs. Houston, 4 Blackf. 291.

[34] Williams vs. State, 10 So. Rep. 52; S. C., 68 Miss. 680.

had ceased.[35] In the absence of fraud, etc., the surety is bound by the finding of the Probate Judge.[36]

§ 259a. Reduction of bond. Sometimes an estate can not be settled in full during the first year and it becomes necessary to continue the bond for a longer time, and very often but a comparatively small amount of the original assets remain for distribution. Where a private individual is the surety this does not become a material matter provided the bondsman is willing to remain on the bond; but if a surety company is bondsman, it is material to have the costs reduced by having the bond reduced. In such cases an application should be filed in the Probate Court setting forth the reasons for such reduction, and an entry permitting the same. The following may serve as general forms:

FORM.

"*In re* Estate of ..... } Application to Reduce Bond.

Now comes ....., administrator of estate of ....., and represents to the court that he has filed his first account in said estate and has made disposition of assets amounting to $....., and still has on hand assets of said estate of the par value of $....., his liability being protected by the surety company of ....., and he says it would be to the interest of said estate to reduce the original bond from $..... to $..... to cover his liability for remaining assets in his possession."

.....
Administrator.

Sworn to and subscribed before me and in my presence this ..... day of ....., 192..."

FORM.

"*In re* Estate of ..... } Entry to Reduce Bond.

This matter came on for hearing upon application of the administrator of the estate of ..... for reduction of his bond from $..... to $....., and upon evidence, no good reason appears why said bond should not be reduced; and it appearing to the court that it would be to the best interests of said estate to reduce said bond, it is therefore ordered that said bond be reduced from $..... to $....., and the liability of the surety on said bond of said administrator be reduced accordingly."

[35] Burnside vs. Robertson, 6 S. E. Rep. 843; S. C., 30 S. C. 459.

Such bond is strictly construed and when an administrator received money from an insurance policy which belonged to such persons as the insured might designate, the bondsmen were not liable. Murphey vs. Dorsey, 23 C. C. 157.

[36] Gardner vs. Eshbrock, 34 Bull. 287.

A surety upon a judgment for $2,300 can not be liable for a judgment of $2,346. Hall vs. Williamson, 9 O. S. 17.

But where by mistake an administrator *de bonis non*, instead of an administrator *de bonis non* with the will annexed, the surety on the bond was held. Newberger vs. Finney, 17 C. C. 215; 9 C. D. 720.

The surety is estopped to deny a legal appointment of an executor, where the bond recites such fact. Hoffman vs. Fleming, 47 Bull. 430.

Where an administrator gave a general bond, and afterwards gave an additional bond to sell real estate, both bonds are equally liable for failure of administrator to pay inheritance tax. Hunt v. Bonding Co., 58 Bull. 249.

CHAPTER XVII.

SUIT ON BONDS.

§ 260 Procedure — Remedy, etc.
§ 261 Jurisdiction.
§ 262 Suit by creditor on liquidated demands.
§ 263 Kind and nature of creditor's claim.
§ 264 When suit could be brought by creditor.
§ 265 Suit by legatee or distributee on liquidated demand.
§ 266 When right accrues to legatee, etc.
§ 267 At what time action may be brought.
§ 268 Suit on unliquidated demand.
§ 269 When Probate Court may authorize suit to be brought.
§ 270 Application for leave, etc.
§ 271 Form of application.
§ 272 Entry ordering hearing and notice, etc.
§ 273 Notice, etc.
§ 274 Hearing, etc.
§ 275 Form of entry granting leave to bring suit.
§ 276 Defense in suit on administration bond for not filing account — Costs.
§ 277 In suit on bond, claim allowed to be *prima facie* evidence only of its justice. How such claim contested.
§ 278 Suit by succeeding administrator or executor on bond.
§ 279 Time within which suit may be brought.

§ 260. Procedure. Remedy, etc.

In the two preceding chapters we have treated of the manner in which bonds should be given, their forms and liabilities thereon. It now remains to speak of the manner in which the rights sought to be protected by such bonds may be enforced. The giving of a bond by an administrator or executor never releases him from a personal liability for any *devastavit* of the estate; and therefor it has been very properly held that the remedy on a bond is a cumulative one.[1] As a matter of course no liability would exist on a bond given by an administrator or executor unless he had been guilty of such conduct as would have made him personally liable. But such personal

[1] Thomas vs. Chamberlain, 39 O. S. 119.

liability of the administrator or executor must have been such an one as resulted from a wrongful exercise of his rightful authority as such official, it must be an act which was within his authority. Thus if an administrator gives a note in settlement of some claim against the estate and thereafter refuses to pay the note, this would not be such misconduct on his part as would authorize a suit on the bond as the giving of notes was beyond his power.[2]

The bonds given by an administrator or executor being statutory it may be said that the remedy thereon is also statutory, and the action in order to exist must come within the provisions of the statute. Several distinctions are made by the various sections as to the manner in which an action on the bond can be brought. By §§ 10869 G. C. (§ 262) and 10870 G. C. (§ 265), the action can only be brought when the demand has in some manner been passed upon, or is what is called a liquidated demand. It can be brought by a creditor, legatee, or distributee, and is brought for the benefit of the person who institutes the action. The other action provided for is on unliquidated demand; and is brought by any person interested; but for the benefit of all who may be interested in the estate. In the latter case the action can only be instituted after leave is granted by the Probate Court. These distinctions will be discussed further in the following sections of this chapter.[3]

[2] Curtis vs. Bank, 39 O. S. 579. See Flickinger vs. Sauni, 40 O. S. 591, where it was held that the executor was personally liable, but not on his bond.

[3] As it is not within the province of this work to go into the detail of the practice and jurisdiction of courts other than the Probate Court, and as all actions on bonds are brought in such other courts, we must content ourselves with reference to standard works treating on these subjects. See Kinkead's Pl., § 354; Whittakers Forms, 134.

See § 612, Limitation of action against Admin.; § 762, Distribution of assets; § 784, Sureties and liabilities.

Suit should be brought against all the obligors. It is error to render a several judgment against one or more, leaving the action to proceed against the others. Voss vs. Loomis, 1 C. C. 20; 1 C. D. 12. Citing 23 O. S. 243; 27 O. S. 674.

In an action on the bond where the bond recites the appointment of an administrator, and the bond is approved by the Probate Court, sure-

§ 261. Jurisdiction.

Some confusion formerly arose as to the court in which the suit on an administrator's bond should be brought. Before the adoption of the present constitution the Court of Common Pleas had probate jurisdiction and the statute provided that a suit on such bond should be brought in the court in which it was filed. It was claimed therefore that such action must be brought in the Probate Court as that was the court in which the bond was filed. But this was denied.[4] It has also been held that a justice of the peace has no jurisdiction in a suit on an administrator's bond.[5] The codifiers out of several former sections, evolved the following as our present statute:

"An action on the bond may be brought in the common pleas or superior court of the county in which it was given, for the particular relief only to which the plaintiff is entitled, or be framed, in the petition or any cross-petition filed in the case, with a view to a settlement of all matters for which the principal in the bond is accountable. Heirs, devisees, legatees, widow, or next of kin, or others, who may be liable on account of assets coming into their hands, or otherwise are proper parties to be made defendants. When the action is framed for that purpose and the necessary parties are before the court, it may adjust and settle the estate in whole or part, rendering all judgments required, and awarding costs as it deems proper." [R. S. § 6215.][6]

This section, it will be observed, leaves no open question as to the court having jurisdiction. Likewise it makes ample provision for settling all demands that may exist between the parties. The action must be brought in the county in which the bond is filed.[7]

ties on the bond are estopped to deny the due appointment. Hoffman vs. Fleming, 47 Bull. 430, Sup. Ct.

[4] Dawson vs. Dawson, 25 O. S. 443; Reed vs. Reed, 10 C. C. 44; 6 C. D. 19.

[5] Hackworth vs. Robinson, 31 O. S. 655.

[6] § 10874 G. C.

[7] Hackworth vs. Robinson, 31 O. S. 656. See § 784, Sureties may be made parties, etc.

§ 262. Suit by creditor on liquidated demands.

The various sections provide for suits by persons in various capacities. If the demand is an unliquidated one, unless the suit be by an administrator *de bonis non*,[8] leave of the Probate Court must first be obtained. The following is the section providing for suit by a creditor on a liquidated demand.

"After a creditor is entitled by law to payment of his debt by the executors or administrators, and the amount of the claim either has been admitted to be just, allowed by them, ascertained by judgment or award against them, or by an order of distribution, the bond they gave for the discharge of their trust, may be put in suit by such creditor, if upon demand made by him, they neglect to pay his claim." [R. S. § 6210.][9]

§ 263. Kind and nature of creditor's claim.

It will be observed that the claim or demand must be one that has been admitted or allowed by the executor, or if it has not been allowed by the executor, that it has been ascertained by a suit thereon as provided for in the section referring to rejected claims, or it must be the amount found by an award of arbitration, or it must be an amount which the Probate Court has ordered to be distributed. The only instance in which the probate Court can order a certain amount distributed to a creditor is, when the estate is declared insolvent, then the Court ascertains the amount due to each creditor; and no doubt that is the requirement here alluded to, when it permits a creditor to sue on an order of distribution.[10]

[8] See § 628, Executions against; § 157, Proceeding against former admin.

[9] § 10869 G. C.

[10] See State vs. Cutting, 2 O. S. 1; Cadwallader vs. Longley, 1 D. 497.

When a claim is not disputed or rejected, upon its presentation, it is a sufficient allowance to allow a suit to be brought for the money, *pro rata* the amount or the entire amount, as the assets may prove, etc. Smock vs. Bouse, 12 C. C. 46; 5 C. D. 293.

The remedy on the bond is cumulative. Thomas vs. Chamberlain, 39 O. S. 112.

Action must aver a demand. Woodson vs. State, 17 O. 161.

§ 264. When suit could be brought by creditor.

Before suit can be brought, there must be a demand made, but there need not be obtained a leave of Probate Court.[11] Likewise it must be shown that the administrator has received assets applicable to the payment of such claims. The provisions of § 10740 G. C., § 611, excepting the executor or administrator from suit of creditor for twelve months from date of bond, or further time allowed by Court, has no application to suits upon the administration bond; and where the debt of a creditor has been allowed and the executor or administrator has funds in his hands applicable to its payment, if the estate is solvent the creditor is entitled by law to its payment within twelve months from the date of administration bond. If not paid he may after the expiration of that time, upon demand, bring suit upon the bond and recover notwithstanding further time is given to collect the remaining assets of the estate.[12]

§ 265. Suit by legatee or distributee on liquidated demand. "Such suit also may be brought by a legatee, after he is entitled to the payment of his legacy, and by the widow, or other distributee, to recover her share of the personal estate, after an order of the court, ascertaining the amount due to her, if the executor or administrator neglects to pay it when demanded." [R. S. § 6211.][13]

§ 266. When right accrues to legatee, etc.

The same rule applies to a legatee, widow or distributee under the provisions of § 10870 G. C. (§ 265) as applies to a creditor under § 10869 G. C. (§ 262).[14] It will be observed that there

[11] State vs. Cutting, 2 O. S. 1.

[12] Greer vs. State, 2 O. S. 575.

In this case a query was made whether or not a suit could be sustained after one year, and before the expiration of eighteen months. The probabilities are that the suit could not be maintained until the expiration of eighteen months. See Hammerle vs. Kramer, 12 O. S. 252.

See present statute.

[13] § 10870 G. C.

Where an action was brought by a distributee against a living surety, who had received a distribution from the estate of a cosurety, it was held that the living surety could plead this set-off. Fisher vs. Cassidy, 49 O. S. 421.

In an action brought under this section there must be a demand made before there is a right to sue, and the amount must be fixed by a court of competent jurisdiction, before such right exists. Henry vs. Doyle, 82 O. S. 113.

See § 761 *et seq.*

[14] State vs. Cutting, 2 O. S. 1.

are three persons under § 10870 G. C. that may bring an action. First is a legatee, after he shall be entitled to the payment of his legacy. The question here might arise whether a legatee could bring suit on the bond without an order of the Probate Court directing the executor to pay such a claim. If the legacy is a general one, that is, one the amount to which the legatee is entitled, would depend upon what remains for distribution, I have no doubt that the legatee must pursue the same course as a distributee. But if the legacy is a specific one and the amount of the same is not and cannot be disputed by the executor, the right would accrue under the same conditions as a creditor's claim. A very interesting decision upon the right of the legatee to enforce payment of his legacy, is that of Isherwood's Estate.[15] Here the legacy was a specific one and an application was filed in the Probate Court of Lucas County to have an order made on the executors to pay the legacy. It was admitted that the estate was ample to pay all debts and the Court held that it had authority to order the executor to pay such legacy, and also had power where it was shown that ample and sufficient assets remained, to pay all possible debts, to order payment to be made without giving an indemnity bond. The second person provided for is the widow. From the reading of this section one would be inclined to believe that the only right conferred on the widow, was to recover on the bond when some order had been made by the Probate Court, ascertaining her distributive share of the personal estate; and such was the view taken by Judge White in Dawson vs. Dawson.[16]

No doubt she has such a remedy, but has she the right to recover on the bond, when the administrator or executor refuses to pay the allowance made to her for her year's maintenance? This matter is not free from doubt, but when the inventory is returned and approved by the Court and no exceptions have been taken thereto, the amount coming to the widow has been fixed and ascertained; and there is no other order of the Court needed in the ascertainment of such amount. The reasons therefore for holding that the widow might recover on such a claim,

[15] 7 N. P. 332, 5 Dec. 143.
[16] 25 O. S. 449. Such legacy is payable in one year, etc.

are very strong. For, after the amount coming to her is fixed, she certainly has as good a right as a creditor whose claim has been allowed, or a legatee whose claim is specific. No doubt she could have an order of the Probate Court, directing the administrator or executor to pay the same on showing that he could do so without any personal liability. The third class entitled to sue under the provisions of 10870 G. C., are distributees after an order of Court has been had, ascertaining the amount that is due them. The action would not lie where no further proceedings were had than the filing of an account and a general order of distribution made thereon; for it should not be forgotten that the only order that a Probate Court can make in passing upon an account, is an order to distribute according to law.[17]

In order to ascertain what is due to each distributee, or where the legacy is a general one—indefinite in amount, or to a widow in relation to her share of the personal estate, a suit would need to have been first brought in a Probate Court or other court; and a finding made in such case determining the exact amount coming to each person. The action brought by a creditor, a legatee, a widow, or distributee under the provisions of secs. 10870 and 10869 G. C. is for the benefit of the persons instituting the action.[18]

§ 267. At what time action may be brought.

After the Probate Court or other court under the provisions of §10848-49 (§761) has ascertained the amount coming to a distributee the action may be maintained. But if such suit is brought within eighteen months from the time that the administrator has given notice of his appointment, such distributee must first give an indemnity bond to protect such administrator from liability for all further claims against said estate.[19] A specific leg-

[17] Bank vs. Beebe, 62 O. S. 41.

[18] In an action on the bond the sureties, in the absence of fraud, etc., are bound by the finding made by the Probate Judge as to the amount, etc. Gardner vs. Ashbrook, 34 Bull. 287.

[19] Dawson vs. Dawson, 25 O. S. 443.

acy does not become due until one year after the time letters have been granted and no action could be had thereon, until eighteen months from such apppointment. Whether or not the Court might in any case permit such an action without an indemnity bond may be questioned. But if the case heretofore referred to,[20] is to be followed there may be cases when the action might exist without such a bond having been given. The general statute of limitations applies and no action could be maintained if more than ten years had elapsed since the action accrued.[21]

§ 268. Suit on unliquidated demand.

If an administrator or executor has committed a *devastavit,* any person interested although the demand may be unliquidated, may bring an action on the bond.[22] The action in such a case may be brought in the name of the person who institutes the action. It might be brought in the name of the State, and such would be the better practice.[23] But whatever is recovered, will be for the benefit of all interested in the estate.[24] Thus it would seem that where a person's claim is fixed and specific, the action should not be brought under the provisions of secs. 10868 (§ 255), 10871 (§ 269), but rather under secs. 10869-10870, G. C. Before an action can be brought on an unliquidated demand, leave of the Probate Court in which the appointment was made, must be procured. The object and purpose of such leave is to guard the executor and his sureties against groundless prosecution and mere technical breaches without substantial injury.[25]

§ 269. When Probate Court may authorize suit to be brought.

Secs. 10869 and 10871 (§§ 265 and 269), having provided for the recovery against the obligors of a bond, where the claim

[20] Isherwood's Estate, 7 N. P. 333; 5 Dec. 143.

[21] See § 11226 G. C.; § 20.

[22] Under former law it was held that an action for devastavit could not be maintained. Stewart vs. Treasurer, 4 O. 98; Treasurer vs. Kemp, 5 O. 240.

[23] Mighton vs. Dawson, 38 O. S. 650.

[24] Dawson vs. Dawson, 25 O. S. 443; Greer vs. State, 2 O. S. 574. See Woodson vs. State, 17 O. 161, for decision under former statute requiring a demand before suit could be brought.

[25] State vs. Cutting, 2 O. S. 8.

has been liquidated, it remains to provide a remedy to an interested person who may be injured by a *devastavit* of the administrator or executor, but whose claim has not been reduced to a settled demand. In order to save the bondsman from, possibly, a needless litigation, it is provided that before such suit can be filed, the court having jurisdiction over an administrator or executor must give leave to file the same. The statute relating thereto is as follows:

"When, on the representation of a person interested in the estate of a deceased testator or intestate, it appears to the probate court that the executor or administrator has failed to perform his duty, in any other particular than is specified in the next two preceding sections, the court may authorize any creditor, next of kin, legatee, or other person aggrieved by such maladministration, to bring a suit on the bond." [R. S. § 6212.][26]

§ 270. Application for leave, etc.

While the statute does not indicate that the application should be in writing and a finding made thereon of record, yet no doubt such would be the proper practice. And in another State under a very similar statute it is said that the petition should state clearly all the facts necessary for the consideration of the Court, or properly to be notified to an adverse party, upon the petition. The citation ought to be issued to the administrator and his sureties, and that a petitioner ought to see that the citation is served in the manner required by its terms.[27]

It is further said that the petitioner must be prepared at the time fixed for hearing, to show that the administrator has so failed to perform his duties and to render proper, a suit on his bond. And the order can only be made by a decree in writing.[28] It may be doubted whether it is absolutely essential that a notice be issued to either the administrator or the sureties on the bond. But it would be wise to do so.

[26] § 10871 G. C.

[27] Smith Probate Law, 398; Richardson vs. Oakman, 15 Gray. 57; Bennett vs. Woodman, 116 Mass. 518.

[28] Fay vs. Rodgers, 2 Gray. 175.

§ 271. Form of application.

(*Title.*)

Now comes A. B. and represents to the court that on the.....day of .....the said C. D. was appointed and is still acting as administrator (or executor) of the estate of E. F. He further represents that he is an interested person in the administration of said estate in this, to-wit:

(Here set out in detail the interest that the party filing the application claims to have.) Said A. B. further represents that the said C. D. has committed a *devastavit* in the administration of the said estate in the following manner, to-wit:

(Here insert the manner in full which it is claimed an injury is being committed.)

Wherefore said A. B. prays that the court may issue a citation for said C. D. to appear in this court on the day to be named, and state a cause why the said A. B. should not be granted leave to commence a suit on the bond of the said C. D.), and that upon the hearing of said cause he may be granted leave to bring such suit.

.....Sign.[29]

§ 272. Entry ordering hearing and notice, etc.

While as before herein indicated it may not be necessary that notice be issued to the administrator and his bondsman, it would be well to do so; and the entry may be in the following form:

This day came A. B. and filed herein his application for leave of court to bring suit on the bond of C. D., filed herein as executor (or administrator) of the estate of E. F. Wherefore it is ordered that said matter be set for hearing on the.....day of....., at.....o'clock, and that a notice thereof be issued and directed to (here insert name of person who is to serve the same), notifying the said C. D., G. H. and I. K. of the matter set forth in said application and the time of hearing same.

§ 273. Notice, etc.

The form of notice given under other chapters of this work, commanding the administrator or executor to appear before court, may be used in this instance.[30] And what has been there said about the service of said notice and the proof of service is applicable here.

[29] This application ought to be sworn to as petitions are usually verified.

[30] § 247.

§ 274. Hearing, etc.

As to what might constitute such a *devastavit* as would justify the Court in giving leave to sue, etc., will depend upon the particulars of each case. It is provided in a previous section,[31] "that if an executor or administrator shall unreasonably delay to raise money, by collecting the debts and effects of the deceased, or by selling the real estate if necessary, and he can obtain an order therefore, or shall neglect to pay what he has in his hands; and if, in consequence of such delay or neglect, the estate of the deceased shall be taken in execution by any other of his creditors, it shall be deemed unfaithful administration, and such executor or administrator shall be liable on his administration bond, and all damages occasioned thereby." In addition to the provisions of this section there might be a great many other instances in which the Court would be justified in granting leave. Thus if the administrator had failed to file an inventory or even if he filed an account and the account did not correctly state the assets, leave could be granted. But leave ought not to be granted if there is no immediate danger of the applicant or the estate suffering an injury. The administrator and perhaps his bondsman ought to have an opportunity to arrange the difficulty without litigation if possible. The leave ought never to be granted unless a good cause is shown. It ought not to be had for the mere asking. The Court ought to go into the fact that the person filing the application has some interest at stake, as well as a finding that there has been a *prima facie devastavit.*

§ 275. Form of entry granting leave to bring suit.

(*Title.*)

This day this cause came on to be heard upon the application heretofore filed in this court by A. B. for leave from this court to bring suit on the bond of C. D. as executor (or administrator) of the estate of E. F., and it appearing to the Court that said C. D. had due and legal notice of the said application and the time for hearing thereon. The same came on to be heard upon the said application and testimony.

Whereupon the Court finds good cause has been shown for granting to the said A. B. the leave of this court to bring a suit on the said bond of the said

[31] § 10868 G. C., § 255.

C. D. and his sureties thereon. Wherefore it is ordered that leave be granted.

§ 276. Defense in suit on administration bond for not filing account—costs. "In actions on a bond of an administrator or executor, for its breach by not filing his final account at the time required by law, or by order of the court, the defendant may aver and give in evidence any facts tending to show that the breach did not occur because of neglect or unreasonable delay of the administrator or executor to settle the estate or file the account. If the defendant makes good his defense, he shall recover of the plaintiff his costs. In no case brought for such breach shall the plaintiff recover more costs than damages." [R. S. § 6213.][32]

§ 277. In suit on bond, claim allowed to be prima facie evidence only of its justice. How such claim contested. "When suit is brought upon the administration bond, by a creditor whose claim has been allowed or admitted by the executor or administrator, such allowance or admission shall be prima facie evidence only of the validity and justice of such claim. The executor, administrator or other defendants in the suit upon the administration bond, may contest it, and by the verdict of a jury, if either party requires it, the court may determine the amount or justice of the claim. If neither party demands a jury, the court by reference to a master or otherwise, shall decide upon the claim." [R. S. § 6216.][33]

§ 278. Suit by succeeding administrator or executor on bond.

We have thus far considered in this chapter sections of the General Code conferring power upon a creditor, legatee, widow, distributee or any person who might be interested, to bring suit on the bond. This would include every one in his individual capacity, but not that in an official relation. This is provided for in the following section:

"When the powers of an executor or administrator cease by death, removal, resignation, or otherwise, a succeeding administrator, or co-executor, or co-administrator, may maintain an action on his bond against any of the obligors thereof, or their

[32] § 10872 G. C. See Dawson vs. Dawson, 25 O. S. 443; Hackworth vs. Robinson, 31 O. S. 655.

[33] § 10875 G. C.

legal representatives, for any breach of its conditions." [R. S. § 6214.][34]

It will be observed that the provisions of the above section are very much similar to those of sec. 10634 G. C., which have been sufficiently commented on, in the chapter relating to administrator *de bonis non*.[34*]

§ 279. Time within which suit must be brought.

The time within which a suit on an administrator's bond can be brought to reach the funds omitted from what purports to be a final account of an executor or administrator, is ten years from the time the cause of action accrues, and the action accrues and the statute begins to run on the date when the administrator's final account is heard and passed upon.[35]

Interest may be recovered on an administrator's bond from the time the demand is made on the sureties.[36]

[34] § 10873 G. C.

[34*] § 158.

[35] Gilbert vs. Marsh, 4 N. P. 338; 7 Dec. 230.

[36] Webb vs. Roettinger, 12 C. C. 730; 4 C. D. 270; Aff., 37 B. 56.

CHAPTER XVIII.

INVENTORY.

§ 280 Definition — Importance of.
§ 281 Within what time to make inventory.
§ 282 When may be omitted.
§ 283 Proceedure where statement is filed in lieu of the appraisement — Form, etc.
§ 284 Appraiser, how appointed.
§ 285 If appraisers fail to act Justice may appoint.
§ 286 Form of appointment of appraisers by Justice.
§ 287 Inventory to be made and by whom.
§ 288 How and when notice to be given.
§ 289 Service and form of notice.
§ 290 Appraisers' oath; by whom administered.
§ 291 Form of oath, etc.
§ 292 In whose presence and in what manner the articles shall be appraised.
§ 293 Detailed statement required.
§ 294 Value to be given articles.
§ 295 How bonds and other securities to be inventoried and appraised.
§ 296 How other debts shall be inventoried and appraised.
§ 297 How inventory of money and bank bills to be stated.
§ 298 What it shall include.
§ 299 When real estate should be included.
§ 300 Signing of inventory; retention of copy and return of original.
§ 300a Monthly statement of probate court to county auditor.
§ 300b Taxes and penalty.
§ 300c Beginning of each succeeding tax year.
§ 300d Compensation of probate judge.
§ 300e No allowance of tax inquisitors.
§ 301 Appraisers' fees.
§ 302 Inventory to be sworn to by the executor or administrator. Form of oath, etc.
§ 303 Compulsory return of inventory.
§ 304 Application for citation, etc.
§ 305 Entry and writ of citation.
§ 306 Removal for failure, etc., and granting of new letters.
§ 307 Excuse for failure to return an inventory.
§ 308 Entry, form, etc.
§ 309 Effect of such revocation.
§ 310 Prosecution of former bond by administrator *de bonis non*.
§ 311 New assets after return of first inventory.
§ 312 Exceptions to inventory and proceedings thereon. Appeal to common pleas.
§ 312a Appeal on exceptions to inventory.
§ 313 Form of exceptions, etc.
§ 314 Form of entry ordering notice.
§ 315 Notice, etc.
§ 316 Hearing and order.
§ 317 Appeal.
§ 318 Effect of inventory as evidence.

§ 280. Definition. Importance of.

An inventory is defined to be a list, schedule or enumeration in writing, containing article by article the goods, chattels, rights

and credits, and in some cases the lands and tenements of a person or persons.[1] The word "inventory" in this chapter includes appraisement. [R. S. § 6023.][2]

The taking of a proper inventory is one of the most important duties devolving upon an administrator or executor in the discharge of his trust. It is important to him because it shows, or should show, just exactly what property is to be administered, and the probable value of it. In a controversy with an heir or creditor, it is invaluable to him as showing these facts, and thus prevent him from being charged for that which may never have come into his possession. To the heir, creditor or other interested person in the estate it is alike invaluable, for if there is no inventory, or if the inventory be an improper one, no information is given to the heir or creditor as to what the administrator ought to be properly charged with. It also follows that great care should be exercised in having all the assets of the estate enumerated, and likewise a value fixed thereon. The statutes seem to cover the matter fully as to the time within which it should be made and returned, penalty for not returning, etc. Our statute provides an additional reason for the filing of an inventory when in certain cases it requires the payment of an inheritance tax.[3]

A number of matters, such as proceedings where the person was supposed to have embezzled assets belonging to the estate, widow's allowance, the inheritance tax and what constitutes assets will be made the subjects of separate chapters.[3*]

§ 281. Within what time to make inventory. "Within thirty days after his appointment, every executor and administrator, and administrator *de bonis non* shall make and return upon oath, into court, a true inventory of the goods, chattels,

[1] 11 Am. & Eng. Ency. of Law, 812. Our inventory law was originally taken from New York.

[2] § 10637 G. C.; § 593.

An appraisal is an essential part of an inventory. Sprankle v. Odell, 22 C. C. (N.S.) 480.

[3] The great object of this important requirement of the law, requiring an inventory, is to enable the Probate Judge and the parties in interest to know what property belongs to the estate. Without it they could not understandingly call the executor to an account. Moore vs. Holmes, 32 Conn. 553; Woerner on Admin. 660.

[3*] See §§ 1593, 319, 342.

moneys, rights and credits of the deceased, by law to be administered, and which have come to his possession or knowledge; except that if their probable value be less than five hundred dollars, the court may direct it to be omitted. If his predecessors have so done, an administrator *de bonis non* shall not be required to return and file an inventory, unless, in the opinion of the probate court, it is necessary." [R. S. § 6023; 102 v. 201.][4]

§ 282. When may be omitted.

As the statutes now stand an inventory can only be omitted, first, where the probable value of the property to be administered is less than $500 in value; second, where an administrator *de bonis non* is appointed and the former administrator filed an inventory, if the estate was such that he ought to have filed one; third, if the executor is a residuary legatee, unless it is made to appear to the Court that an inventory should be made and that the estate is $500 in value, it may be omitted.[5]

As a general rule it may be said that in every case where there are minors having an interest or where the estate exceeds $500 an inventory should be required. A practice not strictly in accordance with law has been followed in some courts, that where the estate consists entirely of notes, stocks, moneys or such articles that have a value which can be readily ascertained from a mathematical calculation, that a written statement of the executor or administrator under oath, giving a description of the kind and value of such articles, is accepted in lieu of the ordinary appraisement. This gives to the Court and all persons in interest with less annoyance and cost to the estate, the same information as an inventory and appraisement. Where there is a widow or there is other personal property, it cannot be used. It is said that time alone constitutes no bar against the requirement of an inventory where the statute fails explicitly to sanction the omission. But if a long period has elapsed, such as forty years, a presumption might arise either that the estate had been fully

4 § 10638 G. C.

5 §§ 10608-9 G. C., § 57; § 10638 G. C. § 281.

An appraisement is part of the inventory, Sprankle vs. Odell, 22 O. C. C. (N.S.) 480.

It is clearly the duty of the court to require an appraisal. *In re* Pickards, 5 N. P. 493; 7 Dec. 476.

settled or that there were no assets available; and time in connection with other circumstances may operate much sooner to dispense with the filing of an inventory.[6]

It is likewise provided by statute [7] that if a testator shall express a wish that there be no appraisement of his household goods and furniture, that the Court may omit the same upon an application of any party in interest. Under the law as it now stands it seems to be the imperative duty of the Probate Court to require an inventory in every instance where the value of the estate is $500. Unless possibly under § 10608-9, G. C., where the executor is residuary legatee, there the Court seems to have a discretion. But taken in connection with the provisions of the law applying to the inheritance tax and other provisions requiring the Probate Judge to make monthly statements to the auditor, it seems that even in the case of a residuary legatee an inventory ought to be required.

And it will be the duty of a Probate Judge to enforce the filing of an inventory in all such cases.[8]

In the case of an administrator *de bonis non,* where an inventory has been once returned, the provisions of the inheritance tax have been satisfied and therefore the giving of a new inventory may very properly vest in the discretion of the Probate Court.

§283. Procedure where statement is filed in lieu of the appraisement. Forms, etc.

If no inventory or appraisement is to be filed, as a usual matter it goes by default, and no order is made in reference thereto. If, however, it is desired to omit a regular appraisement and substitute a statement, it may be done in the following manner: [9]

[6] Sch. on Exrs. 231. See *In re* Rierdon, 5 N. P. 516; 5 Dec. 606.

[7] §§ 10697-8 G. C., § 470.

[8] *In re* Estate of Pickards, 5 N. P. 493; 7 Dec. 476. If he fails, he may be liable on his bond.

[9] I wish to state that the filing of such a statement is not exactly in conformity to law, but experience has demonstrated that many times there are reasons why an appraisement by appraisers ought to be omitted, if it can be done with no injury to anyone. Sometimes the family are very much averse to having three men go through all their family affairs. If a full statement is filed by an administrator it seems that the law is reasonably complied with and no one is injured.

(*Title, etc.*)

Now comes A. B., executor (or administrator) of the estate of C. D., and represents to the court that (here insert whatever the reason may be for asking that a regular appraisement be dispensed with). He further represents that he herewith presents a full and complete exhibit of all the personal property of said decedent with the value thereon as near as he could ascertain the same; and he asks that the same may be accepted by the court in lieu of an inventory and appraisement of said personal property and that such inventory and appraisement be dispensed with. (Here insert a full itemized account of every article of property, bonds, or notes of the decedent, with its fair value.)

State of Ohio,

.....County, ss.

Personally appeared before me, A. B., executor (or administrator) of the estate of C. D., who being duly sworn says that the foregoing statement of the personal property of the said C. D. is in all respects just and true; that it contains a true and correct account of all the personal estate and property of the deceased, which has come to the knowledge of the said A. B., particularly all money, bank bills, or other circular mediums belonging to the deceased, and all just claims of the deceased against said A. B. or other persons, according to the best of his knowledge.

.....Sign.

Sworn to and subscribed before me this....day of.....

.....

Upon the filing of such a statement, if the Court thinks proper, it may accept the same. The acceptance of such a statement, being somewhat irregular, would not preclude the ordering of a regular appraisement at some future time.[10]

FORM OF ENTRY.

(*Title.*)

This day came A. B., executor (or administrator) of the estate of C. D., and filed in this court his detailed statement of all the personal property of the deceased under oath; and asks the Court that the same may be accepted in lieu of a regular appraisement of the said personal estate, and that no further appraisement of said estate be required; and it appearing to the Court that said statement is a reasonable and fair exhibit of all the personal property of the deceased. The same is accepted in lieu of a regular appraisement, unless the same shall be required by future order of the Court; and it is further ordered that said statement be filed and recorded in the book of inventories.

[10] As to the forms and procedure to be used in compelling the making of an inventory. § 303.

§ 284. Appraiser, how appointed.

The question whether or not an inventory shall be filed, ought to be determined at the time the letters are issued, if that be possible, for it is a usual practice to designate the names of the appraisers in the entry making the appointment; and also designate them in the letters of appointment. The statute in relation thereto is as follows:

"The estate and effects comprised in the inventory, unless an appraisement thereof has been dispensed with by an order of the court, shall be appraised by three suitable disinterested persons, appointed by the court, and sworn to a faithful discharge of their trust. If part of such estate or effects be in any other county, any disinterested justice of such county may appoint the appraisers of the estate and effects therein." [R. S. § 6028.][11]

The question sometimes arises under this section whether they should be freeholders or not. If the appraisement is only to include personal property, unquestionably they need not be freeholders. If it is also expected to appraise real estate, it being a requirement of the law to have real estate appraised by three disinterested freeholders of the vicinity, it might be well in such cases to appoint men as appraisers who are qualified under the statute to appraise real estate, although an appraisement of real estate with the personal property by a non-freeholder would probably not be void. The Court, in appointing the appraisers, takes the suggestions of the administrator or executor. But care should be taken to ascertain that the persons appointed are satisfactory to the heirs and widow, as well as to the executor or administrator, for they are all interested parties. Another question that sometimes arises in practice is, whether the appraisers can act for personal property situated in another county. I am of the opinion that they can, and that it is not the purpose of the statute to exclude the appraisers appointed by the Court making the appointment of the administrators, from appraising personal assets of the estate whenever they are found. The pro-

[11] § 10644 G. C.

The appraisers need not be residents of the county of the administrator's appointment: the only requirement being that they be "three suitable disinterested persons."

See § 860. In appraisement of real estate, they must be "of the vicinity" and "freeholders." See § 857.

vision that a justice of the peace may appoint appraisers for property in another county is one of convenience, and not necessarily followed. Of course, if there is real estate to be sold, then a different rule might apply.[12]

§ 285. If appraisers fail to act justice may appoint.

The general practice is for the administrator to notify the persons appointed appraisers, of their appointment and the day and place where they are expected to act.

If the administrator ascertains in time to communicate with the Court that some one of the appraisers will be unable to attend, he should notify the Court and permit the judge to substitute another. If such is greatly inconvenient a justice may appoint under the following provisions of our statute:

"If by neglect, sickness, or other cause, appraisers fail to attend to the performance of their duty, any justice of the peace in the county in which the property to be appraised is situated, may appoint others to supply the place of such delinquents." [R. S. § 6029.][13]

§ 286. Form of appointment of appraisers by justice. "When a justice appoints appraisers he shall make a certificate of the appointment which shall be returned by the executor or administrator with the inventory, and which in substance shall be as follows:

To ....., of ..... county:

You are hereby appointed to appraise, on oath, the estate and effects of ....., late of ..... county, deceased. Given under my hand this ..... day of .....

.....

[R. S. § 6030.][14] Justice of the peace."

§ 287. Inventory to be made and by whom. "After giving the notice required in the next following section, the executor or administrator, with the aid of the appraisers, if an appraise-

[12] See § 1595, Assignment.

[13] § 10645 G. C.

[14] § 10646 G. C. A justice of the peace is entitled to a fee of 40 cents for making the appointment. § 1746 G. C.

ment is made, shall make the inventory herein directed." [R. S. § 6031.][15]

The law contemplates that an administrator will be expeditious in the settlement of the estate. It requires a sale to be made within three months; likewise requires the inventory to be filed within 30 days. And, in addition to these matters, there may be notes to collect, legal rights to be enforced, the claims of the widow and children to be protected, that require an inventory to be made at the earliest possible convenience, so that no rights will suffer. In order that the various articles in the sale bill and inventory will correspond in number and position, it may be an advantage to have the inventory made a few days before the sale.

§ 288. How and when notice to be given.

Before an appraisement can be had, a notice provided for in the following section must be made:

"Not less than five days previous thereto, a written notice, stating the time and place of making such inventory, must be served on the widow, legatees, and next of kin residing in the county where the property may be, by the executor or administrator, and also be posted in two of the most public places in the township where the decedent last dwelt, and, in every such notice, the time and place at which such appraisement will be made, shall be specified." [R. S. § 6032.][16]

§ 289. Service and form of notice.

It is absolutely essential to a valid appraisement that notice be given as required in the above section. It must be given to the widow, legatees and next of kin who reside in the county, and it must be put up in two public places in the township. The statute says in the most public places. It may be a matter of some difficulty to determine what are the two most public places. However, it would seem that the spirit of the law would be complied with if the notice be posted in such places that it would

[15] § 10647 G. C. [16] § 10648 G. C.

likely notify creditors and other interested persons of the time and place of the inventory. Where there is a doubt on this subject it would be well to put up more notices than the law requires. A usual practice is to put up one notice at or near the residence of the deceased. This notice should be put up or served by the administrator. It would be legal if served by anyone else. An affidavit as to the manner of service and place where the notices were put up should be filed in court. The usual practice is to have it made on the inventory. The form of notice may be as follows:

NOTICE OF APPRAISEMENT.

Estate of....., deceased.

Notice is hereby given that an inventory and apraisement of the estate and property of....., late of.....county, deceased, will be taken at....., late residence in..... township, on the.....day of....., A. D. 190.., commencing at .....o'clock....M., and continuing from day to day until completed.

Dated this.....day of.....190...

.....Administrator, — Executor.

FORM OF AFFIDAVIT OF SERVICE.

(*Title.*)

A. B., administrator of the estate of C. D., deceased, being duly sworn says that copies of the annexed notice were posted up as follows: (Here mention where they were posted.) In the township of the late residence of the deceased; and that on the.....day of....., the same were served by (here mention manner of service), to....., the widow, ..., the next of kin of the deceased.

.....Sign.

Sworn to and subscribed before me this.....day of.....

§ 290. Appraisers' oath; by whom administered. "Before proceeding to the execution of their duty, the appraisers must take and subscribe an oath, to be inserted in or annexed to the inventory, before an officer authorized to administer oaths, that they will truly, honestly and impartially appraise the estate and property exhibited to them, and perform the other duties required by law in the premises according to the best of their knowledge and ability. In the absence of such officer, the administrator or executor may administer the oath." [R. S. § 6033.][17]

[17] § 10649 G. C.

§ 291. Form of oath, etc.

Any person authorized by law to administer oaths or the administrator or executor, may administer the oath. The following may be used as a form in which the oath can be administered:

You and each of you do solemnly swear that you will truly, honestly and impartially appraise all the estate of said A. B., deceased, which may be exhibited to you; and that you will perform the other duties required of you by law as appraisers of the said estate, according to the best of your knowledge and ability. This you do as you shall answer unto God.

This oath is very often given in the form of an affidavit attached to the inventory as follows:

State of Ohio,

.....County, ss.

E. F., G. H. and I. J., appraisers of the personal estate of C. D., deceased, being sworn say that they will truly, honestly and impartially appraise the estate and property of the said deceased which may be exhibited to them and perform the other duties required of them by law in the premises as appraisers, according to the best of their knowledge and ability.

.....Sign.

Sworn to and subscribed before me this.....day of.....[18]

§ 292. In whose presence and in what manner the articles shall be appraised. "In the presence of such of the next of kin, legatees, or creditors of the testator or intestate, as attend, and the widow if there be one, the appraisers shall proceed to estimate and appraise the property and estate. Each article or item must be set down separately, with its value in dollars and cents, distinctly in figures, opposite to the articles or items, respectively." [R. S. § 6034.][19]

§ 293. Detailed statement required.

The statute is plain in reference to the persons who are entitled to be present, and further says that they shall appraise the property and estate. This does not mean real estate unless specially ordered. As to what will constitute assets to be appraised

[18] This applies to real estate as well as personalty. See § 10798 G. C.

See § 1595, Assignments.

[19] § 10650 G. C.

will be found treated of in a subsequent chapter, § 363 *et seq.* Each item shall be set down separately with the value, in dollars and cents, distinctly in figures opposite. Very great difficulty is sometimes experienced by a failure to properly comply with the law. A distinguished author says:[20] "It may be assumed as the experience of courts and judges that a large proportion of the litigation arising in the settlement of estates is due to inattention and inaccuracy in making inventories and keeping the accounts, under the mischievous delusion that honesty and good faith are sufficient to accomplish the ends of administration. But this is not only a question of policy addressing itself to the judgment of parties managing the estate; it is a legal obligation. The statute in nearly every State requires not only a full and true inventory, etc., but also directs that each article of property shall be separately appraised and its value noted. It is the duty of the Court to which an inventory is returned to reject it if not made in compliance with law, and require a new one which shall be in due form."

When the statute says that it shall be made out in detail it does not mean or allow that articles shall be grouped together and appraised as a whole, but it means just what it says. Thus in one case where items were put down as "Cash, bonds, notes, etc., $13,993.06," "Household goods and kitchen furniture, $298," "Horses, cows and swine, $268," it was held that this did not, strictly speaking, constitute an inventory.[21]

[20] Woerner on Admin. 668.

[21] Vanmeter vs. Jones, 3 N. J. 520. "The whole difficulty," says the Ordinary, in delivering the opinion of the prerogative court, "has grown out of the defective character of the inventory, and exhibits in a striking point of view the impropriety of suffering such inventories to be filed. They do not answer to the design of the law. They fail to furnish to parties interested the very information which they were designed to supply. They often lead, as in this case, to useless litigation, imperil the rights of parties, impose upon courts the painful duty of groping for the truth in the dark, or of deciding by uncertain and unreliable tests of truth. The court below was misled entirely by the defects and virtual misrepresentations of the inventory and this court was saved from falling into the same error mainly by exhibits offered on the part of the exceptant. In this case, it is true, the loss of the mistake would have fallen where it justly belonged, on the head of the party guilty of the negligence that occa-

The inventory of an administrator of a deceased partner should only refer to his interest in the partnership as of a certain character, and where located, without undertaking to give the items of property belonging to such partnership, since the administrator cannot have control of it until the partnership affairs are settled.[22]

§ 294. Value to be given articles.

The three subsequent sections[23] specifically provide how bonds, mortgages, notes and securities for the payment of money shall be appraised, and how moneys in bank or on hand shall be set down. The above section applies more particularly to tangible personal property. It is very important that a fair value be returned in the appraisement, for such value is *prima facie* evidence as to its value against the administrator, although it is not conclusive. It is one means of ascertaining the value of an article to consider its cost. But this should not govern its value alone. As a general rule, it may be said that the appraisers are to fix a value on the property which in their judgment it will bring at a public sale. This might sometimes be an inequitable value, but it is the best rule probably that can be formed.[24]

The whole matter is left to the judgment of the appraisers, and they should not consider the fact that the widow may take it at its appraised value, but should give to each article that value which they believe it will bring when put upon the market. It is said that an administrator is not obliged to have articles inventoried that are in another State, or those that are due from

sioned it. But it falls, it is to be feared, too often upon unsuspecting heirs and confiding relatives, who are made the victims of the carelessness or fraud which covers up the real truth under the shelter of general and unintelligible inventories. I feel it my duty to protest earnestly against the practice, not only from the embarrassment it has occasioned in this particular case, but because I regard it as a fruitful source of litigation, and as opening a wide door to fraud and injustice. Justice requires that in all cases the requirements of the statute should be strictly complied with." (p. 518 *et seq.*)

[22] Loomis vs. Armstrong, 29 N. W. Rep. 867; S. C., 63 Mich. 355; § 416, Partnership assets.

[23] §§ 6035, 6036, 6037 R. S.

[24] See Woerner on Admin. 670.

[23] §§ 10651, 10652, 10653 G. C.

[24] See Woerner on Admin. 670.

parties in another State.[25] But no harm would result in having them included. Where any article is in litigation, or its title questioned, or where any bond, note or judgment is doubtful, it should be so designated in the inventory.

§ 295. How bonds and other securities to be inventoried and appraised. "The inventory must contain a particular statement of all bonds, mortgages, notes, and other securities for the payment of money, belonging to the deceased, known to such executor or administrator, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, can be collected on each claim." [R. S. § 6035.][26]

§ 296. How other debts shall be inventoried and appraised. "The inventory also must contain a statement of all debts and accounts belonging to the deceased, known to such executor or administrator, specifying the name of the debtor, the date, the balance or thing due, and the value or sum which can be collected thereon, in the judgment of the appraisers." [R. S. § 6036.][27]

§ 297. How inventory of money and bank bills to be stated. "The inventory also must contain an account of all moneys, whether in specie or bank bills, or other circulating medium, belonging to the deceased, which have come to the hands of the executor or administrator. If none has come to his hands, the fact must be so stated in the inventory." [R. S. § 6037.][28]

The form furnished by Probate Judges will show in just what manner bonds, notes and moneys should be stated in the inventory.

§ 298. What it shall include.

The inventory shall include an appraisement of all the personal property belonging to the testator (some articles are not

[25] See § 298, What it shall include; Redf. Surr. Prac. 334.

[26] § 10651 G. C.

[27] § 10652 G. C.

[28] § 10653 G. C.

to be deemed as assets),[29] whether such property is in his possession or in the possession of another.[30]

But property belonging to another, and clearly distinguishable from the mass of the property of the estate, need not be inventoried.[31]

He must inventory his own indebtedness to the estate,[32] and all property within his knowledge, whether in this or another State.[33]

It is not his duty, however, to inventory property fraudulently conveyed.[34]

It is his duty to inventory all property of the estate in another's possession.[35] Property claimed by another, but found among the assets of the estate, must be inventoried unless it clearly appear that such property does not belong to the deceased.[36]

He cannot be compelled by Court, however, to include property belonging to another, though in his possession as administrator.[37]

A leasehold estate for less than life is a chattel real, is personal property, and should be included in the inventory.[38]

Where testator had executed an oil lease of his lands in con-

[29] See § 10654 G. C., under chapter on widow's allowance, § 320. As to what will constitute assets, see subsequent chapter. § 363.

[30] Vanmeter vs. Jones, 3 N. J. Eq. 520; Pursel vs. Pursel, 14 N. J. Eq. 514; McNeel's Estate, 68 Pa. St. 412; Bourne vs. Stevenson, 58 Me. 499.

[31] Trecothick vs. Austin, 4 Mason 16; Farrelly vs. Ladd, 10 Allen 127; Prescott vs. Ward, 10 Allen 203.

[32] § 390; Weems vs. Bryan, 21 Ala. 302; Gregory vs. State, 119 Ind. 503; Kealhofer vs. Emmert (Md.), 29 Atl. Rep. 68.

[33] This is not a universal rule; Woerner on Admin. 665. Butler's Estate, 38 N. Y. 397; Sherman vs. Page, 85 N. Y. 123.

[34] Gardner vs. Gardner, 17 R. I. 751; S. C., 24 Atl. Rep. 785; Snodgrass vs. Andrews, 30 Miss. 472.

[35] Turner vs. Ellis, 24 Miss. 173; Williams vs. Morehouse, 9 Conn. 470. See Hignutt vs. Cranor, 62 Md. 216; Silverbrandt vs. Widmayer, 2 Dem. 263. See Appeal of Weiss, 133 Pa. St. 84; S. C., 19 Atl. Rep. 311.

[36] Bourne vs. Stevenson, 58 Me. 504; Waterhouse vs. Bourke, 14 La. Ann. 358; Mulford vs. Mulford, 40 N. J. Eq. 163; Washburn vs. Hale, 10 Pick. 429; Speakman's Appeal, 71 Pa. St. 25; Gold's Case, Kirby 100; Robbins vs. Robbins (Ky.) 1 S. W. Rep. 152.

[37] Snodgrass vs. Andrews, 30 Miss. 472.

[38] § 942; McCarty vs. Burnet, 84 Ind. 23.

sideration of a royalty of part of the oil, the oil produced after his death, and accruing as such royalty, is not of the *corpus,* but a part of the income of the estate.[39]

Animals *ferœ naturœ* which are confined or in the immediate possession of man, such as tame pigeons, deer, rabbits, pheasants, partridges, or animals kept in a room or cage, or fish in a box, tank or net.[40] And doves in a dove house [41] belong to the administrator; while animals *ferœ naturœ* in a park, not tame or reclaimed from their wild state, fish in a pond, and the like, go to the heir if the decedent left them upon his own freehold estate; but if he left them on leased premises, being less than a freehold estate, then to the administrator.[42]

§ 299. When real estate should be included.

There are advantages and disadvantages attached to the appraisement of real estate with the personal property. It is an advantage that it saves expense and trouble. It is a disadvantage that the appraisers are not selected for that purpose; and that the proceedings in the action to sell real estate do not contain this jurisdictional fact of a proper appraisement other than by mere reference. If there is a widow who is entitled to dower, the appraisement made with the personal property should never be made to answer the appraisement contemplated by a proceedings to sell real estate. In very many cases, however, it will do no harm where there is a probability that the real estate will have to be sold, to include an appraisement of it with the personal property. The section of our statute providing for such appraisement is as follows:

"If, at the time of granting letters testamentary or letters of administration, the court deems fit, it may order the executor or administrator also to include in the inventory an appraisement of all the real estate of the deceased." [R. S. § 6025.][43]

[39] *In re* Woodburn's Estate, 138 Pa. St. 606; S. C., 27 W. N. C. 305; 21 Atl. Rep. 16.

[40] Buster vs. Newkirk, 20 Johns. 75; Pierson vs. Post, 3 Caine 175.

[41] Com. vs. Chace, 9 Pick. 15.

[42] Ferguson vs. Miller, 1 Cow. 243. See § 294.

[43] § 10641 G. C.

§ 300. Signing and filing inventory. "Upon the completion of the inventory it shall be signed by the appraisers at the end thereof and said appraisers shall certify that the foregoing inventory is a true and correct appraisement of the property exhibited to them and it shall not be necessary for the appraisers to sign each schedule thereof. A copy of the inventory shall be retained by the executor or administrator, who shall return the original to the probate court." [R. S. § 6044; 107 v. 548.][44]

§ 300a. Monthly statement of probate court to county auditor. "At the end of each month the court shall deliver to the county auditor, a statement showing as to each inventory the aggregate value of each class of property other than real, as shown by the inventories filed during that month, for his use and the use of the proper board of equalization in the performance of their respective duties in relation to returns for taxation of personal property, moneys, rights and credits, and the equalization and correction thereof." [R. S. § 6044.][44*]

§ 300b. Taxes and penalty. "Taxes or penalty lawfully placed on a duplicate or added by the county auditor or board of equalization because of a failure to make a true return, or of making a false return for taxation, shall be a debt of the decedent, to have the same priority and be paid as other taxes, and collectable out of the property of the estate either before or after distribution, by any means provided by law for collecting other taxes. No distribution, or payment of inferior debts or claims shall defeat such collection; but no such tax or penalty can be added before notice to the executor or administrator, and an opportunity is given him to be heard. All taxes omitted by the deceased must be charged on the tax lists and duplicate in his name." [R. S. § 6044.][44**]

§ 300c. Beginning of each succeeding tax year. "In all additions to the personal tax lists and duplicate made by a county auditor, each succeeding tax year shall be considered as beginning at the time of the completion of the annual settlement with the county treasurer, of the duplicate for the previous year." [R. S. § 6044.][44†]

§ 300d. Compensation of probate judge. "The probate judge shall be entitled to the same compensation as for other like services, to be taxed as a part of the costs of administering such estate." [R. S. § 6044.] [44‡]

[44] § 10660 G. C.
[44*] § 10661 G. C.
[44**] § 10662 G. C.
[44†] § 10663 G. C.
[44‡] § 10664 G. C.

§ 300e. No allowance of tax inquisitors. "No percentage, nor part of any increased tax on the property of such estate, covered by such inventory, for the years which it is required to be listed in the name of the executor or administrator, shall be allowed or paid to a person under a contract for securing for taxation, or putting on the tax list or duplicate property improperly or otherwise omitted, or not listed or returned for taxation." [R. S. § 6044.][44‡]

§ 301. Appraisers' fees. "Each appraiser shall be paid two dollars per day, or such amount as the probate judge may allow for his services." [R. S. § 6045.][45]

Experience has demonstrated in many instances this amount to be an inadequate compensation. If the appraisement is only a few moments' work you may get competent men to attend to it. But if it is a day's work, difficulty will be experienced in getting any person to perform the duties, unless he does it as a matter of accommodation; and this should not be, for the statute expressly provides that the appraiser should be a disinterested person; that is, one who is entirely free from any influence from either the heir, widow, legatee or administrator. The difficulty in leaving the matter entirely to the discretion of the Court is that very often appraisers will ask a larger sum than the estate ought to be taxed with. If the administrator cannot procure competent men for the amount allowed by statute he ought to procure the consent of the heirs to pay them an additional sum or else give them such a sum as he thinks just, and assume the responsibility that it may ultimately be allowed to him in his account.[46]

§ 302. Inventory to be sworn to by the executor or administrator. Form of oath, etc. "Before such inventory is received by the probate court, the executor or administrator shall take and subscribe an oath or affirmation before the judge, his deputy, or other officer authorized to administer oaths, stating that the inventory is in all respects just and true; that it contains a true statement of all the estate and property of the deceased which has come to his knowledge, and particularly of all money, bank bills, or other circulating medium belonging to the deceased, and of all just claims of the deceased against such

44‡ §§ 10664, 10665 G. C.
44 See § 663, Taxes.
45 § 10666 G. C.
46 See § 1595, Assignments. Former statute allowed $1.

executor or administrator, or other persons, according to the best of his knowledge. Such oath must be endorsed upon or annexed to the inventory." [R. S. § 6046.][47]

§ 303. Compulsory return of inventory. "If an executor or administrator neglects or refuses to return such inventory within thirty days after his appointment, the probate court shall issue an order requiring him, at an early day therein named to return an inventory according to law." [R. S. § 6047; 102 v. 201.][48]

§ 304. Application for citation, etc.

The order provided for in this statute (10668, G. C.), is not an order to compel an inventory to be taken, but it is to compel an inventory to be returned after it has been ordered that one be made. While it may be said that it is the duty of the Court to enforce returns of an inventory without motion, yet it is perhaps the general practice that such things are done upon the application of some one. And the statutes of some States[49] specifically provide that a creditor or party in interest may file such an application; and therein has been held that the application must show that the applicant is a creditor or otherwise interested in the estate.[50]

[47] § 10667 G. C.

The same form of oath may be used as is given in a previous section of this chapter in the filing of a statement in lieu of an account. § 283. The form of a general inventory is always provided by the Probate Court upon an application; and as it is of considerable length in its entirety, it will be omitted from this volume. These forms are usually gotten up in such a manner that if a fair degree of intelligence be exercised on the part of the appraisers and the administrator, no mistake need be made in properly filling them out. They ought to be filled out in ink, transcribed from rough notes taken by the appraisers in the performance of their duties. Where the estate is of any size or the articles exceed a few in number, no attempt should be made to fill out the inventory as the work progresses. But first the work should be done, rough notes taken, then transcribed to the paper which is to be filed as an inventory in the Probate Court. It is very trying on the patience of the probate judges to accept the inventories that are sometimes presented to him, in the discharge of his duties. A copy must be retained by the administrator.

[48] § 10668 G. C. See § 283, Statement for inventory; § 491, Sale bill; § 741, Account; § 1597, Assignment.

[49] N. Y. § 2716 Civil Code.

[50] Redf. Sur. Prac. 396.

Query: Is right ever barred. Gilbert vs. Marsh, 4 N. P. 338; 7 Dec. 230.

But even there it is within the power of the Court to compel a return of its own motion.[51]

The application may be in the following form:

(*Title.*)

The undersigned respectfully represents that....., late of said county, died on or about the.....day of....., leaving an estate to be administered, worth about.....dollars. That on or about the.....day of.....was appointed administrator (or executor) of the estate of the said....., deceased; and has neglected and failed to return an inventory of said estate, as required by law. Your petitioner further represents that he is interested in the said estate (here state the manner in which the person claims an interest in the estate), and prays that a citation may be issued, requiring said .....to appear before said court on the.....day of..... at .....o'clock. Then and there to show cause, if any he may have, why he should not return an inventory of said estate.

....Sign.

§ 305. Entry and writ of citation.

The order granting the writ will be made without any other evidence of the failure to return the inventory than that which the application and the records of the court show. The entry may be in the following form:

On this day came A. B. and filed herein his application for a writ of citation against C. D., administrator (or executor) of the estate of E. F., alleging that the said C. D. has failed and neglected to return his inventory as required by law.

Wherefore it is ordered that a writ of citation be issued requiring said A. B. to return said inventory to this court on.....day of....., or show cause before this court on that day why the same has not been done; and if he fails to do so he will be removed from his said trust.

FORM OF WRIT OF CITATION.

(*Title.*)

State of Ohio,

.....County, Probate Court, ss.

To F. R., sheriff: You are commanded to cite and give notice to A. B. to appear before the Probate Court at the court house in the city of ....., of said county and show cause why he should not return an inventory; and that if he fails to return the inventory or to show cause

[51] Thompson vs. Thompson, 21 Barb. 107.

for not so doing, he may be removed from his said trust as provided by law and of this writ make due return.

Witness my hand and seal of said court, this.....day of.....

.....Sign.

Probate Judge.

§ 306. Removal for failure, etc., and granting of new letters. "After personal service of such order by an officer or person authorized to make the service, if such executor or administrator, by the day appointed, does not return such inventory under oath or fails to obtain further time from the court to return it, or if such order can not be served personally by reason of his absconding or concealing himself, the court may remove him and new letters shall be granted, as provided by law. [R. S. § 6049.][52]

§ 307. Excuse for failure to return an inventory.

After an inventory has been once ordered under the provisions of our law, which seem to contemplate the filing of an inventory in the administration of every estate, it could only be a want of assets that would give a sufficient excuse. It is not the mere filing of a paper purporting to be an inventory that will satisfy the law, and therefore the writ might issue to compel the filing of a *proper inventory*. It might also be issued where there were new assets which came into the hands of the administrator or executor after a former inventory had been filed.[53] Since one of the reasons for filing an inventory is to ascertain what the assets of the deceased were, for the purpose of taxation, the fact that the estate has been settled by agreement and all the debts paid would not be a sufficient excuse; and it is no excuse for a failure to make and return an inventory that the assets have no present existence, that is, have been disposed of by the representative.[54]

Nor is it an answer to the application to compel the return of an inventory that the administrator has assets largely in excess of the debts of the testator, and that he offers to give security

[52] § 10669 G. C.

[53] See § 10683 G. C., § 311.

[54] Silverbrandt vs. Widmayer, 2 Dem. 263.

for the payment of all debts, or that it would be troublesome and expensive to make an inventory, or to allege that the petitioner is actuated by curiosity and a design to abuse the process of the court.[55]

It is very doubtful if it were shown that the applicant was not an interested party that it would be a sufficient excuse to dispense with the order.[56]

§ 308. Entry, form, etc.

If before the time set for the administrator or executor to file the inventory or show cause why he should not be removed, the administrator appears and files an inventory, one that is satisfactory to the Court, a very short entry of dismissal is sufficient. If, however, he fails to make a proper return, then the entry may be in the following form:

(*Title.*)

This day this matter came on to be further heard upon the application of A. B., requiring C. D. to make return of an inventory in the matter of the administration of the estate of E. F., as required by law; and it appearing to the court that said C. D. has had due and legal notice of the order heretofore made (here if the administrator has absconded or conceals himself so that the order could not be served, so state in the entry), it further appearing to the court that said administrator (or executor) has failed to return said inventory. It is hereby ordered that he be removed as administrator of said estate; and that whithin..... days from this date he file in this court an account of his trust; and that the costs of these proceedings, amounting to.....dollars, be taxed against said C. D., and judgment be rendered therefor.

§ 309. Effect of such revocation. "Such letters shall supersede all former letters testamentary or of administration, deprive the former executor or administrator of all power, authority, or control, over the estate of the deceased, and entitle the person appointed, to take, demand, and receive his goods and effects wherever they are found." [R. S. § 6050.][57]

§ 310. Prosecution of former bond by administrator de bonis non. "In every case of revocation, the bond given by the

[55] Forsyth vs. Burr, 37 Barb. 540.
[56] See Redf. Sur. Prac. 398.
[57] § 10670 G. C.

former executor or administrator, must be prosecuted, and a recovery had thereon, to the full extent of any injury sustained by the estate of the deceased, by his acts or omissions, and to the full value of all the property of the deceased, received and not duly administered by him." [R. S. § 6051.][58]

§ 311. New assets after return of first inventory.

It very often happens that after an inventory has been taken it will be ascertained that some articles have been overlooked. This is the rule. It is hardly to be expected that you will get every article. If in such cases they are of considerable amount the inventory should be amended by either again calling together the original appraisers and notifying the persons entitled to be present, or the administrator may assume the risk, if any there be, and return the articles in his possession in his account. If new assets come into the possession of an administrator or executor after he has filed his inventory, a new inventory may be made. The same rules will apply to the new inventory as to the original. It is provided for in the following section of the General Code:

"Whenever personal property, or assets of any kind, not mentioned in any inventory that has been made, come to the knowledge or possession of an executor or administrator, he must cause them to be appraised in manner aforesaid, and an inventory to be returned, within two months after discovery thereof. The making of such inventory and return may be enforced in the same manner as in the case of the first inventory." [R. S. § 6061.][59]

§ 312. Exceptions to inventory and proceedings thereon. Appeal to Common Pleas. "Within six months after the return of an inventory a person interested in the estate may file exceptions to it. Thereupon, the court shall set a day for their

[58] § 10671 G. C.

As to comment applicable to the above section, see chapters on Administrator *de bonis non*, § 151; Removal and resignation, § 208; Bonds, § 260. Also for proceedings by attachment, see chapter on Special Administrator, § 128 *et seq.*

[59] § 10683 G. C.

hearing, and cause written notice of such filing and of the time for the hearing to be given to the executor or administrator, not less than five days before that time. For good cause the hearing may be continued for such time as the court deems reasonable. At the hearing the executor or administrator, and any witness may be examined under oath. The court must enter its finding on the journal and tax the costs as may be equitable." [R. S. § 6024; 102 v. 201.][60]

§ 312a. Appeal on exceptions to inventory. "When a person interested in an estate which is in the course of administration, files exceptions to an inventory thereof, in the probate court, either party may appeal from its finding, order, or judgment or hearing thereof, to the court of common pleas." [R. S. § 6024.][60*]

§ 313. Form of exceptions, etc.

The above section of the General Code seems to contain the entire proceedings for exceptions to an inventory. First, it provides that any interested person may file it; second, that it may be done within six months after the return of the inventory, and that a day shall be set for hearing when a trial may be had; costs taxed as may be equitable and that an appeal may be taken by an aggrieved party. The following may be used as a form for exceptions:

(*Title.*)

Now comes A. B., one of the creditors of said estate of (or here insert other capacity), and files an exception to the inventory of the estate of C. D. filed in this court on the.....day of.....by E. F., executor (or administrator). In this to-wit: (Here set out in detail whatever the fault may be to the inventory, whether it be the omission of the assets or the improper statement of one.)

Wherefore the said A. B. prays that a hearing may be had thereon and the court make such an order as the facts and the law require.

§ 314. Form of entry ordering notice.

The above exceptions having been filed, the statute directs that notice thereof be given to the administrator, which may be provided for by the following entry:

[60] § 10639, G. C.

[60*] § 10640, G. C.

A creditor of an heir at law, or distributee of a decedent, whose estate is being administered upon, is not an interested person within the meaning of the statute. *In re* Sturgis, 6 N. P. (N.S.) 331; 18 Dec. 344.

And the question may be raised where the matter has been appealed, in the Court of Common Pleas. *Id.*

The question as to an allowance of a widow may be raised on exceptions. *In re* Est. of Scott, 19 Dec. 577.

The Court of Common Pleas can not dismiss an appeal from an order overruling exceptions to an appraisement on the ground that the executor filed exceptions to his own inventory. Sprankle vs. Odell, 22 O. C. C. (N.S.) 480; affirmed, 78 O. S. 404.

(*Title.*)

This day came A. B. and filed in this court his exceptions to the inventory herein filed by C. D. as administrator (or executor) of the estate of E. F.

Wherefore it is ordered that notice thereof be given to the said C. D. as required by law and that the hearing of said exceptions is set for the..... day of....., at.....o'clock.

And that said notice be served or delivered to said executor (or administrator) by.....not less than 5 days before said day of hearing.

§ 315. Notice, etc.

The notice may be served by anyone. If served by a private individual it should contain an affidavit of its manner of service. If by a sheriff, the usual return; it may be in the following form:

(*Title.*)

To.....(here insert person to make the service): You are hereby commanded to notify C. D. that on the.....day of..... A. B. filed in this court exceptions to his inventory of the personal property of the estate of E. F. Exceptions thereto are as follows: (Here state the exceptions to the inventory). And you further take notice that the court has fixed the.....day of....., at.....o'clock, as the time for hearing said exceptions.

§ 316. Hearing and order.

The Court will order subpœnas issued on application of any interested party for witnesses to appear and testify in the matter of such exceptions on the day set for hearing, and the ordinary course of a trial will be pursued; whatever the finding may be, it should be entered upon the journal. The following may be used as a form of entry:

This day this matter came on to be heard on the exception of A. B. to the inventory of C. D., administrator (or executor) of the estate of E. F., and was submitted to the court by testimony of witnesses. The said C. D., administrator, being present (or if the administrator is not present, say that the court furher finds that the said C. D. has had due and legal notice of said hearing). Whereupon the court finds (here state whatever the finding may be) and the court orders (here state what orders may be made as to the costs and if the administrator desires to appeal and add to the entry), and thereupon said administrator gives notice of appeal.

§ 317. Appeal.

The law specifically provides that from any judgment, order or decision of the Probate Court, on the hearing of such exceptions, an appeal may be taken to the Court of Common Pleas.[61] I presume the matter could also be taken up on error, but on this question I have no distinct authority other than the general provision of our statute, which provides for error. Upon an order made to direct the return of the inventory the statute makes no provision. Therefore there would be no right of appeal, neither is there any right of appeal when the administrator is removed for failure to make a return of the inventory, and it may be questionable if there is a remedy by proceedings in error.[62]

§ 318. Effect of inventory as evidence.

The inventory is *prima facie* evidence both as to extent and value of the personal property left by the decedent, and casts the burden upon one seeking to impeach it to show that articles were deemed of greater value than the appraised value was.[63]

The administrator is *prima facie* liable for the amount of money at which the articles have been inventoried.[64]

If it is shown that assets were disposed of for more than the inventory price, the administrator of course is liable for that amount. Where assets are taken by the administrator at the inventory price, and it is shown that they are of greater value than the price, he must answer for the same.[65]

It is only where a widow occupies the position of administrator or executor that an administrator, etc., could rightfully take the property at its appraised value. The unexplained omission of an administrator to make any claim of set-off or defense to a

61 §§ 10639-40 G. C., § 312.
No provision is made for the manner in which an appeal may be perfected and therefore as to bond, transcript the general provisions. See §§ 41 to 60.
See *In re* Estate of Scott, 19 Dec. 577.

62 See § 39, § 52, Monger vs. Jeffries, 62 O. S. 155. There is no right of appeal from the Common Pleas Court to the Court of Appeals. *In re* Christman Est., 13 O. App. (1920).

63 Matter of Rodgers, 153 N. Y. 316.

64 Ames vs. Downing, 1 Bradf. 321.

65 Zilkin vs. Carhart, 3 Bradf. 376.

demand against himself in the inventory, is evidence against the validity of such a defense.[66]

And where an executor, in preparing the inventory of an estate, includes therein a promissory note given by him to the testator, which note was then out-lawed, this was held a sufficient acknowledgment in writing to remove the bar of the statute of limitation.[67]

Where a bank deposit is inventoried as cash, but the money is not collected before the bank fails, the administrator is not absolutely concluded, but the inventory may be shown to be incorrect upon a final accounting.[68]

Where upon the subsequent accounting it appears that certain items have realized much less than their inventory value, the executor or administrator, in order to avail himself of the rule that he should sustain no loss or decrease without his fault in part of the estate, but shall be allowed for such property or loss without his fault upon the settlement of his account, must show affirmatively the facts in regard to the alleged depreciation or loss.[69]

[66] Lloyd vs. Lloyd, 1 Redf. 399.

[67] Ross vs. Ross, 6 Hun 80; Matter of Daggett, 22 N. Y. Supp. 911.

[68] Sheerin vs. Public Admin., 2 Redf. 421.

[69] Underhill vs. Newburger, 4 Redf. 499. See Redf. Surr. Prac. 406; Jess. Surr. Prac. 898.

CHAPTER XIX.

WIDOWS' AND CHILDREN'S ALLOWANCE.

§ 319 Introductory.
§ 320 What shall not be deemed assets, etc.
§ 320a Assets not to be administered on in certain cases.
§ 321 Comments.—Wearing apparel, etc.
§ 322 Disposition of such property.
§ 323 Right to, under § 10654, G. C.
§ 324 Year's allowance.
§ 325 Money to be set-off if necessary.
§ 326 Persons entitled to, etc.
§ 327 Right barred by will or contract.
§ 328 Nature of the claim.
§ 329 When appraisers fail to make allowance.
§ 330 Apportionment between widow and children.
§ 331 Amount of, etc.
§ 332 When and to whom payable.
§ 333 Allowance may be increased or diminished by the Court.
§ 334 Petition for, etc.
§ 335 Who may file petition.
§ 336 Form of petition for increase or decrease allowance.
§ 337 Form of entry, etc.
§ 338 Notice, etc.
§ 339 Entry on hearing to increase or decrease.
§ 340 Error and appeal, etc.
§ 341 Widow's and widower's quarantine.

§ 319. Introductory.

When a man dies with an existing marriage relation between himself and his wife, or leaving children, the law gives to such surviving wife and children certain rights in his property. Since the statute has placed man and woman on an equality in reference to their property rights, it is questionable whether the law ought not to be the same in reference to the rights of a surviving husband and children in the property of a deceased wife as it is in reference to a surviving wife and children in the property of a deceased husband. But it is not so in this State,[1] ex-

[1] Hance, Gdn., vs. Chappell, 20 C. C. 214; 11 C. D. 139. Reversed where mother was a widow and held that her children were entitled to allowance out of her estate. Matter of Estate of Hinton, 45 Bull. 423.

Same doctrine approved, 3 C. C. (N.S.) 608: *In re* Glenn, 23 O. C. C. 397; 13 Cir. D. 398; columns 171, 732.

See chapter 41, § 14, as to Homestead rights. See § 903 *et seq.* Descent and Distribution.

The widow's allowance is exempt from inheritance tax to the extent of $3000.00. See chapter 106.

cept as to the dower interest,[2] and the distributive share of the personal property.[3]

Upon these two the law has been amended so as to place them on an equality. The various ways in which a widow is interested in the property of the deceased husband may be said to be the following: First, the interest of the wife in the husband's real estate; second, the interest in his personal property on distribution; third, the property which is ordered to be set aside to her and the children, and which are not to be deemed assets of the estate; fourth, an allowance made to support the widow and the children for one year; fifth, what is known as the widow's quarantine. The first of the above mentioned will be more properly considered when we deal in the sale of real estate (§ 943 *et seq.* Dower). Or when the subject of election under will is considered (§ 1214, *et seq.*). The second will be considered when treating of the distribution to be made by an administrator or executor. The other three will be considered in this chapter.[4]

§ 320. What shall not be deemed assets, etc.

There is certain specified property which, according to the statute, is not to be deemed assets of the estate. The only au-

[2] §§ 8666-7 G. C., § 944.

[3] § 8592 G. C., § 938.

[4] These provisions, like the kindred subject of the homestead exemption laws, are of purely American origin. They owe their existence to a humane and benevolent consideration for the distress and helplessness of widows and orphans newly bereft of their protector and supporter, and to a wise public policy, recognizing the true relation of the State to the family as its organic, constituent element. "The protection of the family," says Thompson in his valuable works on Homesteads and Exemptions, "from dependence and want is the expressed object of nearly all the homestead and exemption laws; the immunities enacted by these statutes are extended to this association of persons, or to the head thereof, for the benefit of all its members." "The relation of husband and wife, parent and child, is the unit of civilization, and the State has thought to encourage that relation by protecting it from absolute want, arising from the vicissitudes of life." Woerner on Admin. 160.

See § 661, Payment of; § 939, Distribution of personal property; § 944, Of what estate endowed; § 1026, Property under will.

thority and control which the administrator may have over such property is that he may have access to it in order that the appraisers may view the same and set it apart to the use of the wife and children. The section relating thereto is as follows:

§ 320a. Assets not to be administered on in certain cases. "When a person dies leaving a widow, or minor child, or children, under the age of fifteen years, the following property shall not be deemed assets or administered as such, but must be included and stated in the inventory of the estate, and signed by the appraisers, without appraising it:

1. One family sewing machine, to be retained by the widow absolutely as her own property, and all stoves set up and kept in use by the family;

2. The family bible, family pictures, and school books used by or in the family of the deceased, and books, not exceeding one hundred dollars in value, which were kept and used as part of the family library before his death;

3. One cow, or if there be no cow, household goods, to be selected by the widow, or if there be no widow, by the guardian or next friend of such minor child or children, not exceeding forty dollars in value, or if there be no household goods such as the widow or guardian or next friend desires to select, then forty dollars in money; all sheep to the number of twelve, their valuation not to be greater than seventy-five dollars, and the wool shorn from them;

4. All the wearing apparel and ornaments of the family and of the deceased, all the beds, bedsteads, and bedding, cooking utensils, and table-ware necessary for the use of the family, one clock, and any other articles of personal property not to exceed one hundred dollars in value, which the widow, or if there be no widow, the guardian or next friend of such minor child or children, may select, to be valued by the appraisers." [R. S. § 6038.][5]

§ 321. Comments. Wearing apparel, etc.

It may be observed that several conditions are requisite in order that property may be set off. First, there must be a widow, or if there be no widow, there must be a minor child or children under the age of fifteen years. The widow here means, as elsewhere, the surviving consort of a deceased husband who sustained a family relation with her husband, or if she did not, it was not the result of any fault of her own.[6]

[5] § 10654 G. C

[6] *In re* Estate of Roth, 6 N. P. 498.

Children, as a matter of course, means legitimate children, and would include adopted children as well as those of his own blood; but not his step-children. It seems from the wording of the first division of the section relating to the property that should be set off, that it becomes the property of the widow absolutely. Under the second division it is a general practice where the estate is not large to set all such property apart to the use of the widow or children, for generally it takes a large number of such articles to exceed $100 in value; and if there are no creditors whose interests may be affected, even if the amount is above $100, it may be proper to give it to the widow and children at once. Under the third division, if there is a cow it should be set off. Or if there is no cow, household goods may be selected, not exceeding $40 in value. If there is neither cow nor household goods, then $40 is to be allowed in money, and in addition twelve sheep, etc. Under the fourth division the articles therein mentioned not to exceed $100 in value.

A watch, watch chain, key and seals, a finger ring usually worn by the deceased during his life, a sword and sword belt of an officer in the United States army or navy, worn according to military rules and regulations, cannot be regarded as "wearing apparel"; but it is otherwise as to such officer's epaulets, which are a part of his coat; and a bosom pin, which is attached to his shirt.[7] So jewelry and rings may be wearing apparel.[8]

To entitle the widow to the possession of articles enumerated (*e. g.*, sheep and swine), the deceased husband must have had, or his personal representative must have, such an ownership

[7] Sawyer vs. Sawyer, 28 Vt. 249.

In the case of Becket vs. Wishon, 5 N. P. 155, the above case is cited and reviewed, and the Court arrives at the conclusion that a watch and chain of reasonable value, habitually worn by a person, is wearing apparel.

The term "wearing apparel" includes that which is worn for comfort and convenience. It may be cheap or expensive, according to mode of life and business, and the social, business and professional requirements of the wearer. But mere luxuries are not within the meaning of the term. A gold watch may be included, but not a diamond ring. *In re* Henry, 14 Fed. Dec. 353 (1905).

See in a recent case where a conductor's watch was held not to be included within the term "wearing apparel" nor "ornament." *In re* Est. of A. G. Post, 8 O. L. R. 492; 55 Bull. 382.

[8] Frazier vs. Barnum, 19 N. J. Eq. 316; Becket vs. Wishon, 5 N. P. 155.

and possession of them at the time of the making of the inventory, as will permit of their delivery to the widow. When he had but half interest therein, they cannot be delivered to her, nor can any allowance be made therefor.[9]

§ 322. **Disposition of such property.** "Such articles, except the wearing apparel of the deceased, shall remain in the possession of the widow, if there be one, during the time she lives with and provides for such minor child or children, when she ceases to do so, she must be allowed to retain as her own her wearing apparel, ornaments, and one bed, bedstead, and the bedding for it. The other articles so exempted, and not consumed, shall then belong to such minor child or children. If there be a widow, and no minor child or children, then such articles shall belong to the widow." [R. S. § 6039.][10]

§ 323. Right to under § 10654 G. C. (§ 320).

Immediately upon the death of the husband and father the goods enumerated in this section vest in the widow and children,[11] and they may sell them.[12] They pass to her administrator as against her husband's heirs, other than his children, or administrator.[13] This allowance is made regardless of the fact that the deceased has left a will,[14] unless the will made special provision as to the rights of the widow or the property. The administrator can not sell them, even under an order of court; and if he do will be liable.[15] A widow who has been divorced is not entitled to any of the property specified under this statute,[16] nor one who has deserted her husband for years.[17]

[9] Baucus vs. Stover, 24 Hun. 109. An engagement ring, a brooch, finger rings and earrings are wearing apparel. *In re* Hannah Levy, 47 Bull. 186.

[10] § 10655 G. C.

[11] Hastings vs. Meyer, 21 Mo. 519; Kellogg vs. Graves, 5 Ind. 509.

[12] McFarland vs. Paze, 24 Mo. 156.

[13] Cummings vs. Cummings, 51 Mo. 261; Estate of Moore, 57 Cal. 446.

[14] Nelson vs. Wilson, 61 Ind. 255.

[15] Carter vs. Hinkle, 13 Ala. 529; Graves vs. Graves, 10 B. Mon. 31; Morris vs. Morris, 9 Heisk. 814.

[16] Dobson vs. Butler, 17 Mo. 87; Hettrick vs. Hettrick, 55 Pa. St. 290.

[17] Tozer vs. Tozer, 2 Amer. L. Reg. (O. S.) 510; *In re* Roth, 6 N. P. 496; 9 Dec. 429; see §§ 226, 227, Removal of Admin.

See *In re* McMillan, 8 C. C. (N.S.) 294; 28 O. C. C. 645, as to widow living separate from her husband, holding widow is entitled to same.

§ 324. Year's allowance. "The appraisers also must set off and allow to the widow, and children under the age of fifteen years, if any there be, or if there be no widow, then to such children, sufficient provisions or other property to support them for twelve months from the decedent's death. If the widow or such children, since then, and previous to such allowance, have consumed any part of the estate for their support, the appraisers shall take that into consideration in determining the amount of the allowance." [R. S. § 6040.][18]

§ 325. Money to be set-off if necessary. "When there is not sufficient personal property, or property of a suitable kind, to set off to the widow or children, as provided in the next preceding section, the appraisers must certify what sum or further sum, in money, is necessary for the support of such widow or children." [R. S. § 6041.][19]

§ 326. Persons entitled to, etc.

The same persons are entitled to what is known in law as a widow's year's allowance, as are entitled to the property directed to be set apart under § 10654, G. C.[20] As a general rule it may be said that so long as an absolute divorce has not been procured, the wife is entitled to the allowance. Thus where a wife living separate and apart from her husband brought an action for alimony and obtained a decree requiring the husband to pay her a definite sum semi-annually during her life, it was held that this would not deprive her of the right to have set aside to her a year's allowance, provided there were assets belonging to the estate.[21]

In another case where a husband had deserted his wife in

[18] § 10656 G. C.

The question whether the person is in fact the widow can be raised by exceptions to the inventory and the judgment of the Probate Court can be appealed from to the Common Pleas Court under § 6024 R. S. *In re* Est. of Scott, 19 Dec. 577.

"The appraisers shall not include in the inventory the provisions, property, or money set off and allowed by them to the widow or children, but these must be stated in a separate schedule and returned, with the inventory, to the court, by the executor, or administrator." [38 v. 146, § 47; S. & C. 575.] § 6042 R. S.; § 10658 G. C.; 107 v. 547.

[19] § 10557 G. C.

[20] Children under 15 years of age are entitled to allowance out of mother's estate. *In re* Hinton, (Sup. Ct.); 45 Bull. 423; 64 O. S. 485; *In re* Glenn, 23 C. C. 397.

When the widow has consumed property of a greater value than the allowance made to her, she will be presumed to have been paid. Est. of McDermott, 13 Dec. 390.

It can be allowed out of a mother's estate. Hinton, *In re*, 64 O. S. 485.

[21] Lockwood vs. Krum, 34 O. S. 1.

Germany and afterwards came to the United States and without being divorced from the wife in Germany married in the United States, and for a period of more than 20 years lived with his American wife who remained in entire ignorance of the wife in Germany, the wife in Germany making no effort to locate her husband until after she discovered his death. In this case it was held that the right of the widow to the year's allowance rests upon the existence of the family relation; that the establishment of the mere fact that the marriage relation once existed and was never legally severed will not be sufficient to establish the widow's claim to the year's allowance. The claimant must show that the marriage relation existed at the time of the decedent's death, or if it did not, that it was against her wish and without her fault.[22]

In another case it was held, that where a husband abandoned his wife and she thereafter committed adultery, that she would not be barred of either her dower right, or her year's allowance, and that if the administrator, knowing the fact that the marriage relation with the deceased was not dissolved, paid the allowance to the supposed widow, that such action on the part of the administrator was fraudulent and the real widow might recover.[23] The courts of other States are not in accord as to the right where the marriage had never been legally dissolved. Thus in Iowa it was held that where the wife and husband lived apart for seven years, he boarding with others and neither contributing, or being asked to contribute, to her support, that she was not entitled to an allowance,[24] while under somewhat similar circumstances a New York court declined to follow the construction given by the Iowa court.[25]

However, it seems that the true rule is, that, if the wife deserts the husband without any fault of his; although a legal separation has not been had, that she is not entitled to the allowance.[26] Whether or not a non-resident widow and chil-

[22] *In re Roth*, 6 N. P. 498; 9 Dec. 429.

[23] Gwinner vs. Gwinner, Dayton, 155, 156, 157.

The mere fact that they live apart will not bar right of widow in husband's estate. *In re* McMillen, 8 C. C. (N.S.) 294; 28 O. C. C. 645.

Agreement of separation will not bar right. Knese vs. Hake, 16 Dec. 466; 3 O. L. R. 610.

[24] Linton vs. Crossby, 56 Iowa 386.

[25] Matter of Shedd, 6 Hun 367; 133 N. Y. 601.

[26] Tozer vs. Tozer, 2 Am. L. Reg. 510.

dren are entitled to have set apart to them property as provided in the sections of the G. C. referred to in this chapter, is a question upon which the courts of various States are not in accord. It has never come directly before our courts.[26*] In a recent case in Tennessee in which all of the decisions were reviewed, it was held that a non-resident widow was not entitled to receive such property.[27] It seems that the decision of the Tennessee court is followed by the majority of cases.[28]

Likewise it has been held that the children of a non-resident are not entitled to the allowance, where there is no widow, although the deceased had been living in the State some time prior to his death, but had expressed the intention of returning to his home in another State, as the provisions of the statute were intended for residents.[29] Our Circuit Court, however, has held in a case where a deceased died leaving a divorced wife and one son in Germany, and a second wife and children in this country, that the child in Germany was entitled to have an allowance made to him out of the estate of his father.[30] The widow must be a resident at the time of the decedent's death. It will not be sufficient if she has changed her residence to the State of the decedent's death at the time the appraisement is made.[31] Some of the courts make a distinction where the husband died a resident of another State and where he died resident in this State.[32] Generally, however, they hold that regardless of the fact where the husband died,

[26*] See recent case, McCalla vs. McCalla, 46 Bull. 230.

[27] Grayham vs. Stull, 21 L. R. A. 241. Case is fully annotated by giving reference to decisions and also gives statutory provisions of various States.

[28] The cases holding in accord with the Tennessee court are, Talmadge vs. Talmadge, 66 Ala 199; Auerbach vs. Pritcher, 58 Ala. 451. Person *ex parte*, 76 Ala. 521; Shannon vs. White. 109 Mass. 146; Richardson vs. Lewis, 21 Mo. App. 531; Medley vs. Dunlap, 90 N. C. 527; Spiers App. 26 Pa. 233; Odiornes App. 80 Pa. 504. Courts holding contrary, Kapp vs. Admin., 2 Bradf. 258; Mitchell vs. Word, 64 Ga. 208; Shaffer vs. Richardson, 27 Ind. 122; *In re* Gill's Estate, 79 Iowa 296.

[29] Veil vs. Koch, 27 Ill. 129.

[30] Banse vs. Muhne, 13 C. C. 501; 7 C. D. 224. The author doubts the soundness of this decision.

[31] Medley vs. Dunlap, 90 N. C. 527.

[32] Succession of Christie, 20 La Ann. 383.

if the widow is a non-resident she is entitled to the allowance. Especially would this be true where the making of such allowance would inflict injury upon the rights of residents of our State.[33] If the claimant was never married to the deceased, she is not entitled to the allowance, though he treated her as his wife and they intended to marry.[34] A wife left her husband because her children by a former marriage did not get along well with him, and it was agreed that in future the husband and wife should not "bother" each other. He subsequently had a woman of bad reputation keep house for him, to which the wife made no objection. It was held that the wife was not entitled on his death to the $300 exemption.[35] Her remarriage before claiming her allowance does not bar her claim.[36]

§ 327. Right barred by will or contract.

A good deal of controversy has arisen over the question whether or not a widow may bar her right to the statutory year's allowance by contract or by election to take under the will of her deceased husband. So far as it concerns the right to the allowance, if there be children living, it is settled, I think, beyond question. In such cases no contract ante-nuptial or post-nuptial, or election under the will, can bar the right. But it seems to be the rule now in Ohio, that where there are no children, the widow can by ante-nuptial contract or post-nuptial contract or election under will bar the right.[37]

[33] Since the text was written the Supreme Court has decided that it can not be allowed to a widow, in an ancillary administration. McCalla vs. McCalla, 46 Bull. 280.

She may waive her allowance, as where she administers the estate and does not claim it. Est. of John McDermott, 13 Dec. 390.

She need not make a demand, but is probably barred if she does not do so within six years from the time the estate is administered upon. Esther vs. Darby, 17 Dec. 780; 5 O. L. R. 102.

She may also be estopped by her conduct. 49 Bull. 85. Waived, etc. *In re* Patterson, 58 Bull. 305; 11 O. L. W. 373.

The following was held did not constitute a waiver of the widow who was also executrix: "That no claim is made for expenses or compensation on account of said trust, by affiant, other than the amount found due her by her last account and her year's allowance, which she is content to leave in the farm."

However, if the widow makes distribution without paying herself, it may be held to be a waiver.

[34] Appeal of Grimm, 131 Pa. St. 199; S. C., 25; W. N. Cas. 180; 18 Atl. Rep. § 1061; State vs. Lichtenberg (Wash.), 29 Pac. Rep. 999.

[35] *In re* Ross' Estate (Pa. Orph. Ct.), 6 Kulp. 521.

[36] *In re* Diller's Application, 5 N. P. 255; 6 Dec. 182; Bacon vs. Perkins (Mich.), 58 N. W. Rep. 835; *In re* Ross' Estate, 6 Kulp. 521, held that the widow was entitled to statutory allowance although her late husband had left her on account of her bad character, and nothing but divorce would deprive her of the statutory year's allowance. The Court decides this case without reference to any authority. See § 323, Right under § 10624 G. C.

[37] Perhaps the most recent case on this subject is that of Broadstone vs. Baldwin, reported in the 5th N. P. 39; 8 Dec. 236. This was under an antenuptial contract wherein it was provided that the widow should

However, a widow will not be barred even if there be no children, unless the will or contract indicates beyond question, that it was the intention to bar such a right; and if a will merely contained provisions for her, expressed to be in lieu of dower and all other claims on the estate of the decedent, this would not bar her right.[38] This case (Collier vs. Collier) might be broad enough to hold that there could be no provisions made in the will to bar her year's allowance. However, it has been held, although by an inferior court, that if the will fairly construed showed it to have been the intention of the testator in making a bequest to a wife that the same should be in lieu of the statutory allowance, that it would be a bar.[39]

No ante-nuptial contract making provision for a wife in case of her survivorship, and expressed to be in bar and full satisfaction of all such part or share of the personal estate of her husband which she may claim or be entitled to by law, will operate as a bar in equity to her claim under the statute, unless it appears that the provisions of the contract in favor of the wife have been fairly performed.[40] Under cases where it is not shown that the post or ante-nuptial agreement was fair, reasonable or just under all the circumstances of the case, but merely that an agreed price had been paid, it was held that it was not a bar.[41] It may be said then that the rule in Ohio is that where a fair contract is made, either post-nuptial or ante-nuptial, and which is carried into execution, which if fairly construed show an intention to exclude the statutory year's allowance, and there be no children, it will be held to bar the right; or if the provision made in a will for the widow be such that if a fair construction be given to the intention of

release all her interest in her husband's property, and also agreed never to set up any claim for dower for herself in any real estate, or for, or to any distributive share of his personal property, or for a year's allowance to her support as widow. In quite an extended opinion, in which Judge Smith reviews a great number of cases, he holds that such a contract is not opposed to any rule of public policy; and that it is good bar to her year's allowance. This case was affirmed by the Supreme Court without report.

[38] Collier vs. Collier, 3 O. S. 369.

[39] *In re* Estate of Witner, 7 N. P. 143.

[40] Phillips vs. Phillips, 14 O. S. 308.

[41] Garetson vs. Garetson, 4 C. C. 336; Affirmed, 29 Bull. 220; See Spangler vs. Dukes, 39 O. S. 642; Woerner on Admin. 174.

the testator, it is meant to exclude the statutory year's allowance, and if the widow elects to take under the will and there be no children, it will bar her right. If there be children, however, as hereinbefore stated, no act of the widow will bar the right.[42]

§ 328. Nature of the claim.

After the decease of the husband, the claim for year's allowance becomes a debt of the estate; such an one as may authorize, if there be not sufficient personal property to meet the same, the executor to sell real estate.[43] But it is not such a debt that will prevent the husband while living from disposing of his property. Therefore no right would exist to set aside a conveyance if fraudulently made, even if such conveyance had been made to defeat such allowance.[44] If, however, a fraudulent conveyance of property was made with the intent to defraud creditors and it was set aside, such property would then become assets of the estate, and the widow's allowance would be a debt to be paid therefrom.[45]

When the allowance is once made it becomes a vested right, and if the widow dies her executor may collect the same.[46] In some States it has been held that the right vests at the husband's death.[47] It is further held by our Supreme Court that the right vests whether the allowance has been set off by the appraisers or not; and that if the widow died before the appraisers act, it will still be their duty to make the allowance and that her executor can collect the same.[48] It has been made a query whether or not the amount allowed could be increased or diminished in case the widow died after its allowance, and

42 See § 323, Right under § 6038; § 1026, wills; also § 947.

In a recent case it was held that a widow can not by any act of her own excuse the appraisers from setting off her year's allowance. Neely vs. Neely, 1 N. P. (N.S.) 97; 48 Bull. 929.

It seems to me this is too broad. The facts in the case need to be examined. It accords with the text in that there was an unmarried daughter, but not a *minor*. But it seems to me the decision could be justified on an entirely different ground. The right to have the real estate of deceased sold to pay debts, was superior to any mortgage the widow could place thereon; and her year's allowance, being a debt of the deceased, it was superior to the mortgage, and therefore she did not waive her right to a year's allowance by giving a mortgage on the real estate. See 49 Bull. 85.

Unless it be fair and the husband has revealed the extent of his property to his wife, an ante nuptial contract will not bar her right, etc. Stotler vs. Stotler, 27 Dec. 303.

43 Allen vs. Allen, 18 O. S. 235; Dorah vs. Dorah, 4 O. S. 293.

44 Lockwood vs. Krum, 34 O. S. I.

45 Allen vs. Allen, 18 O. S. 235.

46 Dorah vs. Dorah, 4 O. S. 292.

47 See Kellog vs. Gregg, 5 Ind. 509; And case cited in Woerner on Admin. 177.

48 Bane vs. Wick, 14 O. S. 514; Dorah vs. Dorah, 4 O. S. 297.

before payment, or whether the court would be confined to that allowed by appraisers. Our courts would probably hold that the death of the widow would make no difference in the allowance to be made, and that if she died the Court would have the same right to review the same as if she were living and make the same order, as if she were alive, and that her death would not alone be sufficient cause to increase or decrease the amount allowed by the appraisers.[49]

§ 329. When appraisers fail to make allowance.

The widow and minor children are not required to make a demand. It is the duty of the appraisers to make this allowance without demand.[50] It may be said that the mere lapse of time would not bar such right and that the right to have an allowance made where the same was omitted by the appraisers exists as long as there are assets of the estate to be administered. In one case it was held that a delay of two years would not be fatal to the right.[51] If one set of appraisers do not make the allowance, the Court may appoint another set.[52] The property is to be set off out of the personal estate of the deceased, but if there is not sufficient personal property to set it off in kind, then it is allowed in money; and if the assets in the hands of the administrator derived from the personal property be not sufficient to pay the allowance, real estate may be used and applied for that purpose.[53]

[49] The year's support after the same is allowed to a widow may be barred within the two years provided for in § 6113. *In re* Glenn, 23 C. C. 397.

[50] *In re* Estate of Rierdon, 5 N. P. 516; S. C. 5 Dec. 606; Bane vs. Wick, 14 O. S. 514; Neely vs. Neely, 1 N. P. (N.S.) 97; 48 Bull. 929. The settlement of an administrator will not be opened up after forty years in order to let in the claim of a widow to her year's support, where no such claim was asserted at the time the estate was closed. Evans vs. Evans, 13 C. C. (N.S.) 62; 31 O. C. C. 635; affirmed 83 O. S. —.

[51] Lisk vs. Lisk, 155 Mass. 153.

[52] Heck vs. Heck, 34 O. S. 369.

[53] See Woerner on Admin. 186. The appraisers are not to judge upon the fact whether the widow is entitled to an allowance or not; this is a matter for the court. The Probate Court might pass upon the question where appraisers fail to allow anything. But after an allowance has been made the administrator may have the Common Pleas to pass upon the question. § 34.

If a stated sum is set off to the widow, and likewise a stated sum to each of the minor children unless the widow supports the children, and they are supported elsewhere, she is not entitled to receive it. It must be applied to the children's support. *In re* Patterson, 58 Bull. 312; 11 O. L. R. 373.

§ 330. Apportionment between widow and children.[53a]

The statute provides that the allowance shall be made to the widow and children. It is also held that the widow is entitled to receive the same from the administrator or executor. But this only applies where the widow has charge and provides for the children. If for any reason the children and widow do not live together the Court or the appraisers may apportion the same, and if they fail to do so, the Court may make such order as is just and proper in the case. A need of apportionment may exist under different circumstances; thus if the wife and husband have lived apart and the custody of the child was given to the husband, or if the child has a guardian, or in case where there are two sets of children. While not specifically provided that either the appraisers or the Court may make such apportionment the right has been upheld.[54]

No rule can be given where an apportionment is to be made as to the amount to be given each. Thus the only case found reported in Ohio, the Probate Court and the Common Pleas Court did not agree in their opinion. Each case will depend upon its own individual circumstances. Under the provisions of § 10655, G. C., in reference to the property specifically set apart under § 10654, G. C., it is specifically provided that if the widow ceases to live with the children what property she may retain as her own and what shall be delivered over to the children.

§ 331. Amount of, etc.

There is no rule which can be given to fix the amount that should be set apart to the widow and the children for their year's allowance. Each case will in some respects differ from every other, but in making the provision it should be remembered that it is made for the purpose of supporting the widow and children for a period of one year after the decease of the husband, father or mother. The amount allowed should be in such sum as will maintain them in the same condition that they enjoyed during the lifetime of the husband. If there are no creditors whose rights will be affected, it should be liberal in amount. But if the estate is insolvent, then the amount al-

[53a] Cited *In re* Patterson, 58 Bull. 312; 11 O. L. R. 373.

[54] *In re* Pollard Estate, Goebel 214; Womack vs. Boyde, 31 Miss. 443; Davis vs. Ganse, 85 Me. 167.

lowed should only be such as will give to the wife and children a year's maintainance, taking in consideration the manner in which they had heretofore lived.[55] In some States the fact that the wife had separate property has been taken into consideration. I am not aware of any adjudication upon this question in Ohio; the general practice is to make the allowance regardless of the wife's separate estate.[56] This allowance is made for temporary support and not to furnish the wife with capital for business purposes, or establish a fund from which a permanent income may be derived.[57] Whether or not the amount should draw interest depends upon additional facts.[57a]

[55] *In re* Estate of Mullen, 5 N. P. 392; 6 Dec. 134.

An allowance is excessive when it is more than twice as much as the family have lived on previously, particularly when so large an allowance will prevent a payment of debts, etc. $2,200 cut down to $1,200. *In re* Rahe, 12 Dec. 590.

[56] See Woerner on Admin. 180.

If the wife's means enabled the husband to live in a style beyond that which he could have given his family without such aid such fact might be considered.

[57] 3 Hollenbeck vs. Pixley, 3 Gray 521.

In this case Chief Justice Shaw speaks as follows, as to the right and object of the year's allowance. "Though no general rules have or can be established regulating this judicial discretion, yet, to some extent, the consideration of justice and expediency on which the law is founded are plain and obvious, and from them we may infer the intention of the legislature. The case supposes the death of a husband leaving a widow. In the great majority of cases he will have had a housekeeper; in many, a parent; in many, leaving children helpless and dependent. In many cases the widow, by the decease of her husband, may become the head of the household and family; new duties and obligations may rest upon her, causing an immediate demand for necessaries, sometimes even before letters of administration can be granted. The purpose of the statute, we think, is to make a personal allowance to her to meet these necessities. But no one of these circumstances constitutes a condition to this allowance, or a decisive test of its fitness. The parties may not have been housekeepers, or even living together at the time of the husband's decease. She may have been absent at a hospital or infirmary, for the recovery of her health, bodily or mentally, and stand in immediate need; or she may be on a visit to her friends; or by mutual consent and for their common benefit they may seek employment in different places —as, for instance, the husband at sea, the wife in a school or factory. But these are all 'circumstances' —and they are often numerous and various—to be taken into consideration by the judge to determine whether any allowance shall be made and, if any, what. The amount of money left by the husband, and the amount of the separate estate and means of the wife are also important circumstances bearing upon the question of her necessities."

[57a] See Palmer vs. Robinson, 24 O. C. C. 125.

The allowance must be made with reference to the state of the family at the time of the decedent's death and not at the time that the appraisement is made.[58] Of course if some member of the family has died or if there was a child born after the decease of the father, this might make a difference in the amount to be allowed. While if the estate be insolvent, the amount should not proceed on a liberal basis; yet the fact that there is an insolvent estate, will in no measure deprive the widow and children of their right to have such an amount as will properly sustain them. Of course where there are valid liens on the real or personal property an allowance will not affect them.[59]

Experience demonstrates that the amount is variable; depending often on the different ideas of the appraisers as well as the varied conditions of different families and their mode of living. Likewise there is a difference between city and country, and between large cities and small cities. Where the estate is small and there are no children, the allowance is sometimes as low as two hundred dollars. Generally, I think, in small estates it is somewhere around four or five hundred dollars, in larger estates it is more. It is obvious that, while statutes with respect to the widow' award should be liberally construed, yet the allowance should be within the bounds of reason, and the construction given them should be reasonable.[60] In a note will be appended a number of selections made by J. Woerner of the amounts allowed.[61]

[58] *In re* Hayes, 112 N. C. 76: Porter vs. Porter, 165 Mass. 157.

[59] Jones vs. Allen, 6 N. P. 518.

[60] Boyer vs. Boyer, 21 Ill. App. 534, 537.

[61] Woerner Admin. 167-169.

It may be of assistance to widows, executors and administrators, and to attorneys and Courts, to collate some of the cases illustrative of what Appellate Courts deem reasonable, and what unreasonable allowance, in the method observed by Mr. Thompson, in his valuable Treatise on Homesteads and Exemptions. Thus it was held in a late Illinois case, Boyer vs. Boyer, 21 Ill. App. 534, 537.

That the Court would not be justified in approving the report of commissioners showing on its face the attempt to force results and to make up to the widow an amount not warranted by a proper valuation of the property allowed her by the

§ 332. When and to whom payable.

The statute is silent as to when the amount set apart to the widow in money is payable. She is entitled to have possession

statute. In this case the deceased left an estate in personalty of over $135,000 in value; the commissioners appraised the personalty secured by state to the widow at $806.50 and estimated the amount to be allowed her at $7,075, which award was rejected by the County Court to whom the report was made; whereupon the widow, administratrix, appealed to the Circuit Court, and asked leave to substitute a new estimate of the commissioners, awarding her $6,629, which the Circuit Court refused, and affirmed the action of the County Court in rejecting the original report. On appeal to the Appellate Court, the action of the Circuit was confirmed in both respects, on the ground that, whether the Circuit had power to act upon a new report from the commissioners or not, the new report must be rejected as well as the original one, as being unreasonable and excessive.

Several cases from New Hampshire indicate the unwillingness of its court of last resort to allow undue partiality to be shown to the widow at the cost of either creditors, children or collateral distributees. Thus, where an estate amounted to $2,250, the debts to $575, and there were no lineal descendants, an allowance of $600 to the widow was on appeal cut down to $200. Foster vs. Foster, 36 N. H. 437.

Where the whole estate was worth $11,000 and that out of which the widow was entitled to dower $2,000, an allowance of $2,000 was on appeal reduced to $300. Duncan vs. Eaton, 17 N. H. 441.

Out of an estate worth $25,000 there being no debts except voluntary bonds to two sons, disputed, and without valuable consideration, the land assigned as dower yielding a net income of $200 per year, $1,250 allowed by the Probate Court was reduced to $750. Kingman vs. Kingman, 31 N. H. 182.

So in an insolvent estate, amounting to $6,400, in which the widow had been allowed $600, and her dower was worth $643, besides owning a house in her own right worth $566, a further allowance was held unreasonable, and set aside. Cummings vs. Allen, 34 N. H. 194, 197.

In Massachusetts an allowance of $895, beside her wearing apparel, was deemed reasonable for a widow of "elevated quality and degree." (Her husband had been sheriff of the county at the time of his death, and for many years a major-general of militia, "an office of much distinction and trust.") Crane vs. Crane, 17 Pick. 422, 428.

In another case, where the real estate amounted to $4,000, the personal estate to $6,000, and the only heir was the intestate's father, an allowance of $3,000 was cut down to $1,000, considering that the widow would get $500 on distribution, as the one-fourth of the residue after paying debts. Washburn vs. Washburn, 10 Pick. 374.

And in a later case, where it appeared that an intestate's estate, wholly personalty, amounted to over $163,000, but was insolvent; that the widow had a private income of $1,200 a year; that there were no

at once of the specific articles set aside to her and her children. Taking the object and the purpose of this year's allowance it should be given to her just as soon as the administrator or executor can do so.[61a] Therefore it may be said that it is payable at

children, and that she and her husband had been living without charge with her father; and that they were persons of high social standing, accustomed to a costly mode of living —an allowance of $5,000 by the Probate Judge was reduced on appeal to $500. Dale vs. Bank, 155 Mass. 141.

In Maine the widows seem to fare better. Out of an estate in which the personalty was insufficient to pay the debts, leaving $700 to be paid out of the proceeds of real estate valued at $2,000, the widow (of a packet master sailing between Eastport and Belfast) was allowed $500. Brown vs. Hodgdon, 31 Me. 65, 70.

In another instance the widow of one whose estate amounted to between $500,000 and $600,000 was allowed by the Probate Judge $75,000, which sum, on appeal by one of the executors, was by the Appellate Court increased to $85,000. Gilman vs. Gilman, 53 Me. 184, 191.

More liberal views are entertained in some other States. Thus it is held in Georgia that "the wise and liberal policy of our legislation certainly designed to include in the years' support something more than a bare subsistence, with clothes and shelter, and perhaps the means of locomotion for the family." Hence it is error, in passing upon the report of the commissioners setting aside the year's support to reject evidence to show the amount of outlay made by the decedent in the maintenance and education of his adult children, the gifts made to them upon attaining their majority and the advances made to some of them for which they were not required to account. Cheney vs. Cheney, 73 Ga. 66, 70.

An allowance of $5,000 made by the Ordinary in addition to certain household and kitchen furniture and other personal property was on appeal to the Superior Court reduced by the verdict of a jury to $2,500; and it was held by the Supreme Court that the rejection of the evidence above alluded to and of the expense of keeping minors at school and college, unduly restricted the jury and a new trial was ordered. Cheney vs. Cheney, *supra.*

In California the widow of a decedent whose estate was valued at $10,000,000, mainly community property and free of debt, was allowed $2,500 per month out of the estate and the Supreme Court refused to disturb the allowance.

In Illinois the "family" for which provisions is to be made by the allowance is held to include not only the widow and minor children but also adult children living with her, a woman who had been raised in the family, the superintendent of the farm under the widow's control, the housekeeper, cook and other house servants. An allowance of $400 for beds and bedding, of $1,600 for furniture, and of $1,642 for a year's provisions, was held reasonable out of an estate valued at $500,000. Strawn vs. Strawn, 53 Ill. 263, 272; Boyer vs. Boyer, 21 Ill. App. 534.

[61a] See Steward vs. Barry, 102 O. S. — (1921), where this doctrine is followed.

once upon its allowance, unless the matter be brought to the Probate Court, increased or decreased, and there be appealed. I have no doubt where the administrator has funds in his hands applicable to the payment of such allowance, and refuses or neglects to do so. that an order of the Probate Court might be had, compelling him to make such application; whether a suit might be had on the bond before an order of the Probate Court is made (§ 266) is not clear, but it is a liquidated demand and the action might lie. The better course to proceed, however, would be to file an application in the Probate Court to compel the administrator to pay the amount. Our statute does not say to whom it is payable, whether it is payable to the widow alone or to the children, or to both of them. Undoubtedly unless the Court sees fit to make an apportionment of the allowance, it should be paid to the widow for the heirs are minors and unable to receipt or account for any part thereof, without the appointment of a guardian, which the law does not contemplate.[62]

§ 333. Allowance may be increased or diminished by the Court. "On petition of the widow, or other person interested, the probate court may review the allowance made to the widow or children, and increase or diminish it, and make such order in the premises as it deems right." [R. S. § 6043.][63]

[62] Says Strong, J.: "It was assumed her affection for the children would be a sufficient safeguard for their interests. In most cases the widow is the mother of the children. If she be but a stepmother, they are generally safe in her regard, not only for them, but for the deceased. Certainly it would not tend to the promotion of domestic harmony to invite the children (or relatives of the first wife using the names of the children) to assail the character of their father's widow, though but a stepmother, and contest her right to administer a bounty given by the law for herself and her deceased husband's family. Were such a door open there is reason to believe it would not unfrequently call forth some of the worst passions, and the bounty of the legislature, instead of being a blessing, would prove a curse." (p. 232.) To the same effect Johnson vs. Corbett, 11 Paige, 265.

See § 661, payment of debts, etc. If the administrator has doubts he may file a petition in the Court of Common Pleas. Under §§ 10857-8 G. C., § 34.

[63] § 10659 G. C.

Our Supreme Court recognizes the fact that the administrator should have one year to ascertain condition of estate and collect assets. Gray vs. Case School, 62 O. S. 1.

Allowance made in a proceeding to sell real estate, belonging to her deceased husband, to pay debts, to which no error was prosecuted, can not be collaterally attacked by exceptions to her account as administratrix. *In re* Hess, 14 O. C. C. (N.S.) 463; 23 O. C. C. C. 449.

§ 334. Petition for, etc.

This section contemplates that the appraisers have acted and set aside some portion of the husband's estate to the support of the widow or children. If the appraisers have failed to make any allowance, the application should not be made under this section. The Court should call back and instruct the original appraisers to attend to their duties. If that were unable to be done, the Court might order a new appraisement.[64] The allowance is to be increased or decreased on the petition of the widow or other interested person. This petition should set out sufficient facts to make out a *prima facie* case, and it should be sworn to.[65] It should be made at as early a date as the same can be done. Whether or not the provisions of § 10639 (§ 312), G. C., which provide that exceptions may be filed any time within six months, applies to this application for review, is very questionable. If the allowance made to the widow and children is to be made on a separate schedule and merely returned with the inventory it would rather seem that this for the purpose of review, etc., is to be considered separate and apart from the inventory. A reasonable time should be allowed in which to file this petition for review, as to the time within which the petition should be filed, the statute does not expressly provide, and there is none implied.[66] It is said that it is the duty of the Appellate Court to hear and determine the question anew, and make such allowance in lieu of the allowance made by the appraisers as may appear reasonable and proper.[67] In one case

A paper styled a motion that sets forth sufficient facts is sufficient. *In re* Rahe, 12 Dec. 590.

[64] Heck vs. Heck, 34 O. S. 369.

[65] *In re* Rahe, 12 Dec. 590.

[66] Sherman vs. Sherman, 21 O. S. 631.

If the administrator should pay over the money to the widow in good faith, it would, in the opinion of the author, be too late for any person to file an application to review thereafter, at least so far as to hold the administrator responsible. This is approved in Steward vs. Barry, 102 O. S. — (1921).

[67] Cummings vs. Allen, 34 N. H. 194; Gilman vs. Gilman, 53 Me. 191.

"In exercising the discretion vested in Probate Courts, and commissioners appointed by them to designate and set apart the property and money allowed for the provisional support of the family, they are not to proceed in an arbitrary or capricious manner, setting up their own fanciful views or unsupported individual opinions as the criterion by which to measure the rights of the family on the one hand; and of the creditors, heirs or legatees, on the other; but they exercise a sound judicial discretion subject to be reviewed and corrected on appeal. Piper vs. Piper, 34 N. H. 563, 566;

it was held proper to entertain a petition for review although it was not filed until after the expiration of twelve months from the death of the widow.[68] If filed after payment how should affect administrator, etc.[68a]

§ 335. Who may file petition.

The widow or other interested person may bring the action to review the allowance made by the appraisers. A person with whom the widow lived during the twelve months and until her death and who supported and took care of her and incurred expenses for her in sickness, and who has a valid claim against her estate, "is a person interested," and within the meaning if this section may file a petition for review.[69] Of course an executor or administrator of a deceased, widow, or a guardian of a minor child or possibly a person acting as next friend of the minor child might file a petition to have the allowance reviewed.

§ 336. Form of petition to increase or decrease allowance.

A form of petition herein given is by a widow in behalf of herself and her children for increase.

(*Title.*)

Now comes A. B., widow of C. D., and respectfully represents that the appraisers of the personal estate of the said decedent allowed the sum of .....dollars in money in addition to the articles specifically set apart for the support of herself and E. F. and G. H., minor children, under fifteen years of age, of said decedent, for one year from the time of his death. That said sum is wholly insufficient to support herself and her said children and that she will require an additional sum of..... dollars.

Wherefore she prays that said allowance may be increased by the said sum of.....dollars and that the executors or administrators of said estate be directed to pay said additional sum to her as provided by statute.

....

Applegate vs. Cameron, 2 Bradf. 119. Cited, Woern. Admin. § 79.

[68] Sherman vs. Sherman, 21 O. S. 634.

An application to review must be filed in the Probate Court that made the appointment, it having original and exclusive jurisdiction. Moore vs. Idler, 6 C. C. (N.S.) 19; 26 O. C. C. 502.

The administrator may have the Court of Common Pleas, under §§ 10857-8 G. C., pass upon the question whether the widow is entitled to any allowance. McCalla vs. McCalla, 46 Bull. 280. As to evidence, etc., see *In re* Rahe, 12 Dec. 590.

[68a] Steward vs. Barry, 102 O. S. — (1921).

[69] Sherman vs. Sherman, 21 O. S. 631.

The administrator should have notice. Heck vs. Heck, 34 O. S. 369.

State of Ohio,
Clark County, ss.

A. B., being first duly sworn, says that the allegations of the above petition are true, as she verily believes.

.....Sign.

Sworn to before me and subscribed in my presence this.....day of ....., 190..

FORM FOR DECREASE OF ALLOWANCE.

(*Title.*)

Now comes A. B., a creditor of the estate of C. D., and respectfully represents that the appraisers of the personal estate of said decedent allowed to the said E. F. for the support of herself and the minor children of the said C. D., under fifteen years of age, the sum of.....dollars. He further alleges that the said sum is in excess of the amount required to support said widow and children for one year in the manner and condition that the deceased was accustomed to support them during his life, and further alleges that the said estate is insolvent and that under the circumstances the allowance made by the appraisers is unjust and not such as the law contemplates. (He further alleges that the said widow has had, during the lifetime of her husband a very large estate of her own and that she contributed during the lifetime of her husband from her own separate estate the sum of.....dollars annually in support of herself and the family of her husband.)[70]

Wherefore the said A. B. prays that the said allowance be reduced to the sum of.....dollars and that the administrator (or executor) of the estate of said C. D. may be directed to pay said widow as an allowance made for her year's support, the sum of.....dollars, instead of .....dollars allowed by the appraisers.[71]

§ 337. Form of entry, etc.

(*Title.*)

This day came.....and filed herein her application for increase (or decrease) of the allowance made to the widow and children of said C. D. by the appraisers of the personal property, and the said cause is set for hearing on the.....day of ....., at.....o'clock and it is ordered that notice of the filing of said petition and the time of hearing thereon be given to the (here insert, if the application is filed by the widow, the name of the administrator; and if filed by a creditor insert

[70] It has been heretofore said that the widow is entitled to the allowance made to her regardless of her separate estate, yet if her separate estate was used to maintain herself and her children during the life time of her husband and probably enabled them to live in a style and condition far beyond that which the husband would have been enabled to furnish them from his own efforts or estate, it seems that this fact should be taken in consideration.

[71] Verified as the preceding form, etc.

the name of the administrator and the widow), at least.....days before said hearing.

§ 338. Notice, etc.

The statute does not provide that notice should be given of this kind of a proceeding, but the executor or administrator represents the estate and, in a sense, the creditors; upon the plainest principles of justice he is entitled to notice of these proceedings.[72] Likewise it may be said that for the same reason the widow ought to be notified; and the proceeding without such notice would be very justly set aside in a higher court. Form of notice may be in the following:

To (here insert the name of the person who is to make the service): You are hereby commanded to notify.....that on the..... day of.....one A. B. (here state whether a creditor or widow, etc.,) filed in the Probate Court of.....County, Ohio, an application to increase (or diminish) the allowance made to the widow and children of said C. D. deceased, and said application is set for hearing on the.....day of....., at.....o'clock, and that the said..... (here insert the name of the person to be notified) will take notice of said hearing.

§ 339. Entry on hearing to increase or decrease.

(*Title.*)

This day this cause came on to be heard on the petition of A. B. to review the allowance made to the widow and children of C. D., deceased, for an increase (or decrease) of the amount allowed to them by the appraisers of the personal property; and the same was heard upon the testimony of witnesses and was submitted to the court. Whereupon the court finds that all the parties interested therein had due and legal notice of said proceeding in conformity to law and the form or orders of the court. The court further finds that the allowance made to the said widow and children of C. D., deceased, ought to be increased (or decreased), wherefore it is ordered and adjudged that said allowance as fixed by the appraisers be, and it is hereby set aside. And the court finds that the sum of..... dollars is necessary for the support of said widow and children, and fixes her said allowance at said sum; and orders that the sum be paid to her by the administrator from and out of the first money of the estate coming into his hands, applicable to that purpose. The court further orders that the costs of this action, amounting to.....dollars, be paid by..... ....., and a judgment is hereby rendered for the same. To all of which orders and decisions of the court the said.....excepts and hereby gives notice to appeal the same and asks the court to fix the amount of the appeal bond.

[72] Heck vs. Heck, 34 O. S. 370.

As a general rule it may be said that the costs of such actions are taxed against the estate. But if it appears to the Court that justice demands otherwise, the order should be made accordingly.

§ 340. Error and appeal, etc.

Section 11206 (§ 39), G. C., specifically provides for appeal in such cases; and no doubt the same can be reviewed on proceedings in error. But the order of the Probate Court in overruling an application of the widow for a review of the allowance made her by the appraisers for a year's support from the estate of her deceased husband, is an adjudication of the rights of the widow and other persons interested as to the question of allowance, and unless such order is vacated by appeal or other proceeding, is a final determination between them; and a second application for review cannot be entertained by the Court.[73] Like other orders made by the Probate Court, such order cannot be questioned collaterally, however unjust and disproportionate it may seem to be.[74]

§ 341. Widow's and widower's quarantine.

"The widow or widower may remain in the mansion house of the deceased consort free of charge for one year, if dower is

[73] Moore vs. Moore, 46 O. S. 89.

The question as to whether she is the widow may be reviewed on exceptions to the inventory, and the action may be appealed from. *In re Scott* Est., 19 Dec. 577.

The duty of the Court was to review the proceedings of the appraisers. That duty it performed in the case first brought, and made a final order, and its power over the question was thereby exhausted. This conclusion may seem to involve hardship, but a contrary one would involve the most perplexing uncertainties as to the rights of widows and the duties of administrators. If a widow may have such a question again reviewed by the same Court, an administrator or other person interested may. The appraisers, in making their allowance, are expected to take into account the age of the widow, her condition and prospect as to health, and all surrounding circumstances. If the widow was permitted to review as often as she might desire, the question involved, because of a changed condition of health, it would follow that, in a case where the widow was ill at the time the appraisers acted, and recovered later, the administrator, or any interested person, might seek such continued reviews by the same court for the purpose of reducing the allowance, and thus the question of allowance be kept open, to the unreasonable embarrassment and injury of those interested in the settlement of the estate.

See *In re* Hess, 14 O. C. C. (N.S.) 463; 23 O. C. C. 449.

[74] Litchfield vs. Cudworth, 15 Pick. 23; Boyden vs. Ward, 38 Vt.

not sooner assigned." This provision made by statute of our State in reference to dower in law is a widow's quarantine.[75] At common law this was fixed at the period of forty days, from which fact it derived its name of quarantine. It might more properly be treated of when speaking about dower in real estate. For if for any reason the dower right has been forfeited or does not attach, the right of quarantine will fail. As the widow has no right to any part of the real estate until the same is set aside and at common law there being no provision made for a year's allowance as the laws now generally provide, this provision was made for her temporary support until she could have dower set aside to her. It is a personal right attaching to her alone and not to the children.[76]

The right of a widow to remain in the mansion house of her deceased husband, as provided by statute, is not restricted to a personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the possession of the premises, and may therefore either personally occupy them or she may rent them, as she may deem best promotive of her comfort.

If the administrator of her husband's estate assumes to control the mansion house of the decedent, and denying the widow's right to the possession thereof, rents it to another person, the widow is entitled to remain in the premises. If the administrator has collected the rents to which the widow is so entitled, and has appropriated them to the payment of debts due from his intestate, she may elect to charge him in either his personal or representative character, and he can not defeat a recovery by her in an action against him in his representative capacity, on the ground that he is personally liable therefor.

An administrator who, without authority, collects rents of his intestate's real estate, and uses them as assets in paying the debts of the estate, is liable to the party entitled to such rents and he may recover the amount thereof of the administrator or in his representative character.[77]

628; Drew vs. Gordon, 13 Allen 120; Richardson vs. Merrill, 32 Vt. 27.

[75] §§ 8606-7 G. C., § 944.

[76] Johnson vs. Corbett, 11 Paige, 265.

[77] Conger. Admin.; Atwood, 28 O. S. 134.

CHAPTER XX.

ADMINISTRATION BY TRUST COMPANIES.

§ 342 Trust companies acting as executor.
§ 343 (§ 710-150 G. C.) Trust companies may accept business when.
§ 344 (§ 710-151 G. C.) Foreign trust companies may when.
§ 345 (§ 710-152 G. C.) File certificate of compliance with tax commission.
§ 346 (§ 710-153 G. C.) Examination of trust company—Expense.
§ 347 (§ 710-154 G. C.) Compliance with law before qualifying as executor, etc.
§ 348 (§ 710-155 G. C.) Retirement from state must give notice.
§ 349 (§ 710-156 G. C.) From whom moneys may be received.
§ 350 (§ 710-157 G. C.) Court may order money deposited with company.
§ 351 (§ 710-158 G. C.) Empowered to act as agent.
§ 352 (§ 710-159 G. C.) Management of trusts.
§ 353 (§ 710-160 G. C.) May accept trusts of executorship, etc.
§ 354 (§ 710-161 G. C.) Capital and deposits with state treasurer.
§ 355 (§ 710-162 G. C.) Court may order investigation of company.
§ 356 (§ 710-163 G. C.) Who may sign papers in court.
§ 357 (§ 710-164 G. C.) Investment of money held in trust.
§ 358 (§ 710-165 G. C.) Mingling of securities prohibited.
§ 359 (§ 710-166 G. C.) Investment of trust funds.
§ 360 (§ 710-167 G. C.) Reserve fund required.

§ 342. Trust companies acting as executor, etc. Leading text-book writers say:

"Whether a corporation aggregate can be an executor has long been doubted."[1]

In some parts of the United States this point is decided adversely as to aggregate corporations in general,[2] although companies may now be found whose charters permit the exercise of

[1] Schouler Executors, 3rd ed. § 32. Citing Williams Executors, 7th ed. 228-229.

[2] Georgetown College vs. Brown, 34 Md. 450; Thompson's Estate, 33 Balt. 334.

such functions in connection with the care and investment of trust funds.[3]

"In the United States the prevalence for authority, once against the competency of corporations aggregate to act as executors, seems now to turn the other way."[4]

But it is held that a corporation can not lawfully be appointed unless the right to administer has been conferred by the charter.[5] The first law granting to safe, deposit and trust companies power to act as executors was passed in 1891 and limited the[6] appointment to counties having a city of the first grade of the first class. This was amended in 1894 to make it apply to cities of the first or second grade of the first class,[7] and in 1896 it was amended to apply to a city of the first or second grade of the first class, or third grade of the second class,[8] and again amended in 1897 to apply to the foregoing and all counties containing a city, which by the preceding federal census had a population of 33,000 or more. except cities of the second grade of the second class,[9] again amended in 1898 to apply only to counties containing a city of the first class and counties containing a city of the second class of 33,000 population.[10] In 1904 the law was declared unconstitutional, as being a statute of general nature and not of uniform operation throughout the state.[11]

The statute was again under consideration by the Supreme Court in 1908, and while the question was then made as to the legal capacity of the corporation to act, the case was decided on another question, *i. e.*, the right to, in a collateral action, set aside the appointment made by the Probate Court, and it was

[3] Schouler Executors, 3rd ed. § 33.

[4] Woerner Admin. § 233. See Rice Pro. Prac. 328.

[5] 18 Cyc. 95; Henry Pro. Prac. § 32; Thornton & Blackledge, Administration, 47; a large number of the states now authorize by statute certain corporations to serve as executors, etc.

[6] 88 vs. 407.

[7] 91 vs. 255, Cincinnati and Cleveland.

[8] 92 vs. 62.

[9] 93 vs. 337.

[10] 94 vs. 132.

[11] Schumaker vs. McCallip, 69 O. S. 500; Telegraph Co. vs. Savings Co., 30 C. C. 380.

held that even though the corporation was legally incompetent to act, the order of the Probate Court could not be set aside.[12] While I suspect there were some attempts, no law was passed until 1819, when as a part of the general[13] codification of the banking laws, the present statute was enacted into law. The fact that the matter was left in abeyance for 15 years, and then not enacted as a separate law, indicates that there was no crying demand for the law. While it may in some instances work well, in the administration of estates, it becomes machine work, and the individuality, a thing often of much value and desirability, is lost. That follows when an artificial and not a natural person assumes the execution of the matters connected with the administration of estates.

The trust company looks at the matter from a cold business standpoint. Of course where it is named in the will, there is nothing to do but make the appointment; but in other instances the court should be well satisfied, that the best interests of the estate, and the beneficiaries, will be better secured by the appointment of the corporation than of an individual, before the corporation will be preferred.

NOTE: The Federal Reserve Act provides that the Federal Reserve Board, may by special permit to National Banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds. Whether banks could so act, unless also so authorized by the laws of the state, may be questioned. My own judgment would be that if not permitted by some statute of the state, they could not so act.[14]

§ 343. Trust companies may accept business — when. § 710-150. No trust company, or corporation, either foreign or domestic, doing a trust business shall accept trusts which may be vested in, transferred or committed to it by a person, firm, asso-

[12] Bank vs. Telegraph, 79 O. S. 89. This is a very interesting decision on the question of collateral attack of the orders of the Probate Court.

[13] 108 vs. 80-129.

[14] See 63 Bull. 7.

ciation, corporation, court or other authority, of property within this state, until its paid in capital is at least one hundred thousand dollars, and until such corporation has deposited with the treasurer of state in cash the sum of one hundred thousand dollars, except that the full amount of such deposit by such corporation may be in bonds of the United States, or of this state or any municipality or county therein, or of any other state or any municipality or county therein, or in the first mortgage bonds of any railroad corporation that for five years last past has earned at least five per cent. net on its issued and outstanding capital stock, which securities and the sufficiency thereof shall be approved by the superintendent of banks. From time to time said treasurer shall, with the approval of the superintendent of banks, permit withdrawals of such securities or cash, or part thereof, upon deposit with him and approval of the superintendent of banks, of cash or other securities of the kind heretofore named, so as to maintain the value of such deposits as herein provided, and so long as it continues solvent he shall permit it to collect the interest on its securities so deposited. [108 v. 118.][15]

§ 344. Foreign trust company may do business — when. § 710-151. Every foreign trust company shall, upon being admitted to do business within this state as otherwise provided by law, file a certified copy of its certificate of admission with the superintendent of banks, together with a certified copy of the last published statement made by it and filed with the proper department of the state in which it is organized and doing business, and upon approval thereof and of the funds and securities to be deposited as in the preceding section provided, he shall certify that fact to the treasurer of state, and upon deposit

[15] If any trust company seeks the appointment of executor, administrator or trustee in any court, or the deposit of any trust funds, there should be filed in such court a statement from the proper authorities that the provisions of this section have been complied with.

of such funds and securities with the treasurer of state the superintendent of banks shall thereupon, and upon the payment of a license fee of one hundred dollars therefor, license said trust company to transact business within this state for the period of one year thereafter. [108 v. 118.]

§ 345. File certificate of compliance with tax commission. § 710-152. Every foreign trust company doing a trust business in this state shall annually within thirty days after complying with all the provisions of law in relation to foreign corporations transacting business within this state, file with the superintendent of banks a certificate of the Tax Commission of Ohio as to such compliance together with a copy of the last published statement of said corporation, and if such trust company is not in default as to any trust matter or estate within this state, the superintendent of banks shall thereupon, and upon payment of a fee of one hundred dollars therefor, license said corporation to transact business within this state for a further period of one year. [108 v. 119.]

§ 346. Examination of trust company—expense. § 710-153. The superintendent of banks shall have the right to examine, by any deputy, examiner or person especially appointed for that purpose, the books or affairs of any foreign trust company, or any corporation doing a trust business, as to any and all matters relating to any trust, estate or property within this state and concerning which such trust company is acting in a trust or representative capacity, the expense of which shall be charged to and paid by such trust company. [108 v. 119.]

§ 347. Compliance with law before qualifying as executor, etc. § 710-154. No such trust company, foreign or domestic, authorized to accept and execute trusts, either directly or indirectly through any officer, agent or employe thereof, shall certify to any bond, note or other obligation to evidence debt, secured by any trust deed or mortgage upon or accept any trust

concerning property located wholly or in part in this state, without complying with the provisions of sections 150, 151 and 152 of this act. But nothing herein contained shall prevent a foreign corporation from qualifying as executor or administrator of property in this state, after appointment as executor or administrator by the courts of any other state as provided by law, when the decendent was a resident of such state at the time of his death, or from acquiring, holding or transferring title to lands or other property within this state as trustee to secure any bond, note or other obligation aforesaid, or from certifying thereto, but provided always, that by the laws of such other state a trust company organized and doing business under the laws of this state shall have equal privileges as to any similar estate, deed or trust of property in such other state. [108 v. 119.]

§ 348. Retirement from state must give notice. § 710-155. Upon the retirement from this state of any foreign trust company, notice of such proposed retirement shall be published once each week for four consecutive weeks in a newspaper of general circulation in the city or village in which the principal place of business of such company is located within this state and proof of such publication shall be filed with the superintendent of banks. Such company shall within thirty days after the expiration of the period provided for in such notice, file its application in the court of common pleas of the county in which its principal place of business is located within the state, for authority to withdraw from the treasurer of state the securities or fund deposited with him under the provisions of section 150 of this act; and said court, if satisfied that such company has fulfilled and met all of its obligations may so find and may authorize the withdrawal of such securities by such trust company; and upon receipt of a certified copy of such order, the superintendent of banks shall so certify to the treasurer of state and thereupon such treasurer of state shall deliver and sur-

render to such trust company the securities or funds heretofore deposited with him for the faithful performance of the trusts assumed by such trust company. [108 v. 119.]

§ 349. From whom moneys may be received. § 710-156. A trust company may receive and hold moneys, or property in trust, or on deposit from executors, administrators, assignees, guardians, trustees, corporations or individuals upon such terms and conditions as may be agreed upon between the parties. [108 v. 120.][16]

§ 350. Court may order money deposited with company. § 710-157. Any court in this state, including probate courts, may by order, decree or otherwise, direct moneys or property under its control, or paid into court by parties to an action or legal proceedings, or which are brought into court by reason of an order, judgment or decree, in equity or otherwise, to be deposited with a trust company, by such court designated upon such terms and subject to such instructions as are expedient. [108 v. 120.][17]

§ 351. Empowered to act as agent, etc. § 710-158. A trust company may act as agent or trustee for the purpose of registering, countersigning or transferring the certificates of stock, bonds, or other evidences of indebtedness of a corporation, association, municipality, state or public authority, upon such terms as may be agreed upon, and act as trustee under any mortgage or deed of trust to secure bonds issued by any corporation, association, municipality or body politic, and may accept and exe-

[16] Executors, etc., before they make deposits in any such company, should be assured, in some satisfactory manner that the trust company is authorized as required by law to do business in this state.

[17] If an investment is sought under this section, application should be made as for investment of funds generally. Before the court should order or approve the investment of any funds in any trust company, it should require a showing to be made, that the company has complied with the law required from it, before it can do business in this state.

cute any other corporate or municipal trusts not inconsistent with the laws of the state. [108 v. 120.]

§ 352. Management of trusts, etc.. § 710-159. A trust company may act as agent, and take, accept and execute any and all trusts, duties and powers in regard to the holding, management and disposition of any property or estate, real or personal, which may be committed or transferred to, or vested in said trust estate, and the rents and profits thereof or the sale thereof, as may be granted or confined to it by any person, association, corporation, municipal or other authority; and may act as trustee under any will or deed or other instrument creating a trust for the care and management of property under the same circumstances and in the same manner, and subject to the same control by the court having jurisdiction of the same as in the case of a legally qualified person. [108 v. 120.]

§ 353. May accept trusts of executorship, etc. § 710-160. A trust company may take, accept and execute all such trusts which may be committed to it by order of any court of record or probate court of this or any other state or of the United States, to act as executor, administrator, assignee, guardian, receiver, or trustee, or in any other trust capacity, and receive and take title to any real estate which may be the subject of any such trust; and such courts of record and probate courts may appoint such trust company to act as executor, administrator, assignee, guardian, receiver, trustee or in any other trust capacity, provided that any such appointment as guardian shall apply to the estate only and not to the person. But no such trust company shall be required to assume or execute a trust without its consent thereto. [108 v. 120.][18]

[18] Before the trust company can receive such appointment it must have deposited the bond required by G. C. § 710-150 (§ 343). If it is a foreign corporation it should file a certificate of its admission to do business with the superintendent of banks, G. C. § 710-151. Also with the tax commission, G. C. § 710-152. An exception is made

§ 354. Capital and deposits with state treasurer held as security. § 710-161. The capital stock of such trust company, with the liabilities of the stockholders existing thereunder, and the fund deposited with the treasurer of state as provided by law shall be held as security for the faithful discharge of the duties undertaken by such trust company in respect to any trust, and no bond or other security, except as hereinafter provided, shall be required from any such trust company for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, assignee, or depositary; except that the court or officer making such appointment may, upon proper application, require any trust company which shall have been so appointed to give such security for the faithful performance of its duties as to the court or officer shall seem proper, and upon failure of such trust company to give security as required may remove such trust company and revoke such appointment. [108 v. 121.][19]

§ 355. Court may order investigation of company. § 710-162. Any judge of a court in which such trust company is acting in such trust capacity, if he deems it necessary, or upon the written application of any party interested in the estate which it holds in a trust capacity, at any time, may appoint a suitable person

where the appointment is made in a foreign jurisdiction, G. C. § 710-154. And before such appointment is made the court should have knowledge that these conditions have been complied with.

[19] This section gives the court power to require bond, if any interested person makes a proper application. Just what showing is required before the court will require such bond is not clear. Must some cause be shown, or will the mere asking suffice? Generally, when bond is dispensed with, the court will order bond on the mere asking of the same by some person in interest, and I am inclined to believe it was the intention to apply the same rule here. If no application for bond is made none will be required by the court, the assumption being that a proper or sufficient bond has been filed with the state officials. There may be instances where, however, the bond will not be sufficient, and the court would be justified on its own motion in requiring a bond.

or persons, who shall investigate the affairs and management of such trust company concerning such trust and make sworn report to the court of such investigation. The expense thereof shall be taxed as costs against the party asking for such examination, or the trust fund of such trust company as the court decrees. Such court at any time may examine any officers of such trust company, under oath or affirmation, as to its trust matters in the court, or as to its affairs and management while considering its appointment in such capacity; and for any cause, applicable to natural persons in the same capacity, order that such trust company forthwith settle its trust. [108 v. 121.]

§ 356. Who may sign papers in court. § 710-163. In proceedings in the probate court or any court of record, connected with any authority exercised under this act, all accounts, returns and other papers may be signed and sworn to in behalf of such trust company by a duly authorized officer thereof. The examination and answers of such officer under oath shall be received as the examination and answers of the trust company. The court may order and compel any of its officers to attend such examinations and to answer such questions as may be put to him relating to any such proceeding, in all respects as otherwise provided by law. [108 v. 121.]

§ 357. Investment of money, etc., held in trust. § 710-164. In the management of money and property held by it as trustee, such trust company may invest such money and property in a general trust fund of the trust company. But it shall be competent for the authority making the appointment to direct whether such money and property shall be held separately or any part thereof invested in a general trust fund of the trust company. The trust company always shall follow and be entirely governed by the directions contained in any will or instrument under which it acts. [108 v. 122.]

§ 358. Mingling of securities prohibited. § 710-165. No property or securities received or held by any trust company in trust shall be mingled with the investments of the capital stock or other properties belonging to such trust company or be liable for its debts or obligations. Moneys pending distribution or investment may be treated as a deposit in the trust department, or may be deposited in any other department of the bank, subject in other respects to the provisions of law relating to deposit of trust funds by trustees and others. [108 v. 122.]

§ 359. Investment of trust funds. § 710-166. A trust company may invest in or loan its trust funds upon the securities, bonds and other interest-bearing obligations enumerated in sections 111, 112 and 140 of this act, but subject to all limitations as to the amount of the investment or loan therein or thereon as provided by law, and in stocks and bonds of corporations when authorized by the affirmative vote of the board of directors, or of the executive committee of such trust company. [108 v. 122.]

§ 360. Reserve fund required. § 710-167. A trust company shall keep the same reserve as is required of savings banks, and shall be governed by the same provisions of law in all respects relating thereto, but shall not be required to keep a reserve on trust funds or property held in trust. [108 v. 122.]

CHAPTER XXI.

ASSETS GENERALLY.

§ 363 Definition.
§ 364 Personal property, definition.
§ 365 Fixture.
§ 366 Trees, wood, etc.
§ 367 Manure.
§ 368 Emblements, definition.
§ 369 When emblements shall be assets.
§ 370 Power to cultivate and gather crops.
§ 371 Rent of farm land.
§ 372 Rents generally.
§ 373 Leases or chattels real.
§ 374 Annuities. Dividends.
§ 375 Copyrights and patents.
§ 376 Pension money.
§ 377 Trust property.
§ 378 Money on deposit.
§ 379 Fire insurance money.
§ 380 Life insurance money.
§ 381 Mutual benefit insurance.
§ 382 Good-will of business.
§ 383 Property conveyed by decedent to defraud creditors.
§ 384 Proceeds of real estate.
§ 385 Choses in action, etc.
§ 386 Mortgaged premises to be considered personal assets. Executors, etc., may take possession.
§ 387 Executor or administrator may discharge mortgage. Possession before redemption.
§ 388 How executor or administrator to foreclose mortgage.
§ 389 Naming a person as executor not to discharge a debt.
§ 390 Debt of an executor or administrator becomes assets.
§ 391 Discharge of debt in a will against an executor, etc., how construed.
§ 392 A debt due from an heir or legatee is assets.
§ 393 Assets not possessed by deceased.[1]

§ 363. Definition.

The word assets is derived from the French word *assez*, meaning sufficient, and originally signified a sufficiency of property to pay the decedent's debts. In a course of time the idea of sufficiency gave way to that of applicability; and in modern usage the term means property applicable to the payments of the decedent's debts, and includes every kind of property owned by a decedent, tangible or intangible, legal or equitable.[2] This definition is a general one and there may be, if not real, apparent exceptions. Unless otherwise provided by will the real estate of a decedent passes to his heirs directly and the personal

[1] See Chap. 20, § 506 *et seq.* care and manage of estate.

[2] 11 Am. & Eng. Ency. of Law, 2d. ed. 829.

property to the administrator. Over the real estate the administrator has no control whatever; other than when the personal property is insufficient to pay the debts. He may file his petition in Probate Court and have the land sold for that purpose. The proceeds of such sale are assets in his hands for payment of debts and if more is sold than is required, to distribute the remainder. He has no right to collect the rents even when the estate may probably be insolvent.[3] The powers of an administrator or executor in reference to real estate will be discussed in a subsequent chapter under the title of sale of real estate, etc. What we wish more particularly to deal with in this chapter is personal property.[4]

§ 364. Personal property, definition.

Under the name of things personal are included all sorts of things movable which attend a man's person wherever he goes. Chattels are real, or personal chattels. Real are such concerning the realty as a term for years, etc. Chattels personal are cattle, fowl, deer, fish in a tank, tithes severed from the nine parts, trees sold or reserved upon sale. The terms, goods, and chattels include choses in action as well as those in possession.[5]

It is sometimes very difficult to determine the dividing line between certain classes of property, as to whether it is real or personal. That kind of property which if it stood by itself would be personal property; and which when connected to real estate would be real property is known as a fixture. It therefore follows that personal property which were it not attached to the real estate would go to the administrator, by reason of its connection with real estate goes to the heir.

[3] Overturf vs. Dugan, 29 O. S. 230.

[4] See § 470, Sale of Personal Property; § 712, Adm's accounting; § 1549, What property may be assigned; ch. 29, § 506 *et seq.*, care and management of assets.

[5] Cooley's Blackstone, vol. 2, 283. Advancements are not assets in the sense that the administrator must look after them, but they must be considered in the distribution of the estate. Tobias vs. Richardson, 5 C. C. (N.S.) 74; 26 O. C. C. 81; affirmed, 72 O. S. 626.

Personal property covered by a mortgage if in the possession of the mortgagor, belongs to his administrator, and the mortgagee has no right to replevin the same. Lighter vs. Kraft, 16 Dec. 474.

Unfiled chattel mortgage is void as to creditors, and administrator takes charge of such property, converts it into money, and distributes the proceeds to creditors as provided by law. Kilbourne vs. Fay, 29 O. S. 264.

Growing crops are sometimes considered as personal property and sometimes as partaking of the value of realty. Miller vs. Miller, 24 Dec. 1.

§ 365. Fixture.

All courts and text book writers have recognized a difficulty in giving the definition of a fixture. A distinguished author says: "The old notion of physical attachment is said by some courts to be exploded; the true criterion to determine whether the fixture constitute a part of the realty or not, or rather where property treated as personal becomes annexed to and goes with realty as fixtures, must depend upon the circumstances of each case viewed in the light of the policy of the law and of the intention of parties." [6]

In an early case in Ohio it is said a fixture "Is an article which was a chattel, but which being affixed to the realty became accessory to it and parcel of it. The true criterion of a fixture is the united application of the following requisites, to wit: *First.* Actual annexation to the realty or something appurtenant thereto. *Second.* Application to the use, or purpose, to which that part of the realty with which it is connected is appropriated. *Third.* The intention of the party making the annexation to make a permanent accession to the freehold." [7]

There are several rules pertaining to persons in different relations in reference to fixtures, that is, as between vendor and vendee, mortgagor and mortgagee, the law favors the grantee. As between the heir and administrator the general rule is that nothing, after having been annexed to the freehold can be severed and removed by the executor or administrator,

[6] Woerner on Admin. 601.

[7] Teaff vs. Hewitt, 1 O. S. 511.

The difficulty which has always perplexed investigation upon this subject has been the want of some certain, settled and unvarying standard, by which it could be determined what amounts to a fixture, or what connection with the land will deprive a chattel of its peculiar legal qualities as such, and make it accessory to the freehold. Fixtures belong to that class of property which stands upon the boundary line between the two grand divisions of things real and things personal, into which the law has classified property; a distinction not merely artificial, but founded on reason and the nature of things—regarding not only the natural qualities of immobility on the one hand and mobility on the other, but also the legal constitution and incidents to which each class respectively is subject. In the great order of nature, when we compare a thing at the extremity of one class with a thing at the extremity of another, the difference is glaring; but when we approach the connecting link between the two great divisions, it is often difficult to discover the precise point where the dividing line is drawn.

unless some good and sufficient reason should appear why that which has been made a part of the inheritance should be converted into realty contrary to the design of the freehold, as it would appear from the annexation.[8] When the question of the removal of a fixture arises between a landlord and tenant, it is well established that the tenant may sever and remove all fixtures of a chattel nature erected by him upon the leased premises for the purpose of ornament or domestic convenience and to carry on the trade,[9] but the removal must be made without serious injury to the freehold and while the tenant is still in possession.

There are several kinds of fixtures depending largely upon the manner and purpose for which they are attached to the real estate. Thus agricultural fixtures, which include things placed on realty in the farming of the land, seem to be placed upon the same footing as trade fixtures. Trade fixtures are those erected by a tenant on leased premises for the purpose of carrying on a trade or manufactory and removable by him. Such fixtures include buildings, machinery, store fixtures, steam engines, boilers, gas fixtures, bowling alleys and appurtenances.[10]

In a recent Ohio case it was held that the machinery of a manufactory that supplies the motive power, as the engine, boiler, and their usual attachments, as contradistinguished from that propelled by it, where permanently annexed to foundations resting upon the freehold, is generally held to be a fixture, though susceptible of being removed without any material injury to the same or the freehold, and while by the agreement of parties the property may be made to preserve the character of realty, yet when it is attached, but for the agreement it would be a fixture, such agreement will be of no avail against subsequent mortgagee of the realty.[11]

Domestic fixtures are annexations made by tenant to the dwelling house which he occupies to render his occupation more

[8] Am. & Eng. Ency. of Law 47.
[9] Am. & Eng. Ency. of Law. 48.
[10] Am. & Eng. Ency. of Law, 61.
[11] Case Manufacturing Co. vs. Garven, 45 O. S. 289.

favorable or more convenient. They are divided into two classes, useful and ornamental. They are removable by the tenant where their removal does not materially injure the dwelling.[12] A house, fence, or other erection on the land of another, with the mutual intention that it is to be held as the builder's property, continues to be personal property, and may be removed at the end of the license.[13] So the road-bed of a railway and the rails fastened to it may be trade fixtures removable as personal property.[14] Hay scales, annexed to the realty in the usual manner, go to the heir as real estate, although they had been included in the inventory as personalty.[15] So water-wheels, millstones, running gear, and bolting apparatus of a grist and flouring mill, and other fixtures of a like nature, are constituent parts of the mill, descending with the real estate,[16] while carding machines, looms and other machinery used in manufacturing cloth, which are complete in themselves and capable of being used in one place as well as in

[12] 8 Am. & Eng. Ency. of Law, 54.

A temporary fence built by a lessee is not a fixture and a renewal of the lease without mention of the right to remove the fence did not constitute the fence a fixture. Chaffee vs. Fish, 2 Dec. 89; 1 N. P. 211.

A building constituting a trade fixture, erected upon a contingency over which the lessee has no control upon lands leased for a term may, in the absence of an express agreement, be removed before or within a reasonable time after the expiration of the term. Wittenmeyer vs. Bd. of Ed., 6 C. D. 258; 10 C. C. 119.

A boiler standing upright on a good foundation and used to spray oil on the brick kilns, is not as between landlord and tenant a fixture. Com. Barker vs. Brick Co., 4 Dec. 270; 3 N. P. 230.

A pressed brick iron machine placed on a brick foundation, set four feet in the ground, and fastened to it by bolts to keep it firm, erected in its place before the wall of the building was completed, and such size that it could not be taken out of the house, without taking it apart, or taking out a part of the wall, is a fixture. Barker vs. Brick Co., 4 Dec. 270; 3 N. P. 230.

A reservoir constructed for an electric light plant, for the purpose of storing water sufficient to supply the steam engines operating such plant, is a part of the main structure of such plant and is, therefore, an appurtenance to the property. Brush El. Co. vs. Warwick, 6 Dec. 475; 4 N. P. 279.

[13] Chaffee vs. Fish, 1 N. P. 211; Brown vs. Turner, 113 Mo. 27.

[14] Northern R. R. vs. Canton, 30 Md. 347, 352; R. R. vs. Deal, 90 N. C. 110; Wagner vs. Cleveland, etc., R. R. Co., 22 O. S. 563.

[15] Dudley vs. Foote, 63 N. H. 57.

[16] House vs. House, 10 Paige, 158; Lapham vs. Norton, 71 Me. 83.

another, not requiring to be fitted in the building and fixed to it only to give stability to the machinery, are held to be personalty.[17] But if machinery, though so constructed as to be portable and easily conveyed from place to place as may be desired, is affixed with the intention and for the purpose of being used as a permanent structure in connection with the building, it becomes part of the realty.[18] So with pictures, glasses, etc., taking the place of wainscoting; for "the house ought not to come to the heir maimed and disfigured."[19]

§ 366. Trees, wood, etc.

Somewhat similar in the fact that the property in question may under certain circumstances be real estate and go to the heir, and under other conditions be personal property and go to the executor or administrator, is that of trees, bushes, vines, etc. As a general rule so long as they are not severed from the soil, they go to the heir.[20] But even growing timber if it has been sold by the deceased, the title passes away and his heir will be bound, and such property is then personal property; and should the person to whom it is sold die, his executor will be entitled to it. In reference to a nursery, that is, trees that have been grown for the purpose of removal, will also go to the executor. Likewise coal, petroleum, building stone and many other substances are until detached, a part of the realty and go to the heir. However, when timber is detached, or coal, building stone, etc., sold and moved away, they become personal property and belong to the administrator.[21]

[17] Tobias vs. Francis, 3 Vt. 425; Gale vs. Ward, 14 Mass. 352; Walker vs. Sherman, 20 Wend. 636; 3 Redf. on Wills 161, pl. 4; Hill vs. Wentworth, 28 Vt. 428, 432.

[18] Potter vs. Cromwell, 40 N. Y. 287.

And such intention may be presumed from the circumstances. Voorhees vs. McGinnis, 48 N. Y. 278.

[19] Cave vs. Cave, 2 Vern. 508; Guthrie vs. Jones, 108 Mass. 191; Ward vs. Kilpatrick, 85 N. Y. 413.

[20] 7 Am. & Eng. Ency. of Law. 241; Williams on Exr's 708; Price vs. Brayton, 19 Iowa 309; Maples vs. Millon, 31 Conn. 598; Jones vs. Timmons, 21 O. S. 596.

[21] Hirth vs. Graham, 50 O. S. 57.

Where the intestate may have intended to construct a building for the improvement of his real estate and furnished building materials for consummating the work, and died

Somewhat akin to the subject of trees is that of their fruit, such a production is known as a chattel vegetable, unless it has been severed. Trees and the fruit and products therefrom, follow the title of the soil upon which they grow; and when the owner of the land dies, they descend to the heir.[22] This, however, only applies so long as the fruit remains on the trees unripe and unready for harvesting. If it is ripe and sold, or even if unripe and sold, under certain circumstances it might be considered personal property.[23] In a recent case in Ohio it was held that grapes, even before they were severed, were not real estate, but were personalty;[24] but in a recent case in Minnesota it was held that blackberries while growing on the bushes were real estate.[25]

Where land is sold and the trees are reserved, they likewise become personal property and go to the administrator of the person reserving them.[26] It is said, however, that if trees are sold to be cut in some future indefinite time, they retain their character as real estate. Likewise hops have been held to be personal property.[27] A fence enclosing a field, of whatever material or construction, whether having posts inserted in the ground or not, is part of the freehold.[28] Nor does it cease to be so, though accidentally or temporarily detached therefrom without intent on the part of the owner to divert it permanently

before completing the same, the materials furnished upon the ground for the completion of the building, although personal chattels merely, may be regarded as belonging to, and a part of the realty, as well as the unfinished structure upon the land. Pence vs. Pence, 11 O. S. 296; See Fletcher vs. Ashburner, 1 Bro. C. C. 497; Gray vs. Hawkins, 8 O. S. 449.

See Miller vs. Miller, 24 Dec. 1, as to nursery stock.

22 Woerner on Admin. 596.

23 The sale of a crop of peaches then growing in the seller's orchard, the buyer to gather and remove the peaches as they mature, held not within the Statute of Frauds as a sale of an interest in land Purner vs. Piercy, 40 Md. 212, S. C. 17 Am. Rep. 591; Compare Rodwell vs. Phillips, 9 M. & W. 502.

24 Mason vs. Lemmon, 3 N. P. 116; affirmed 56 O. S. 793; See 38 Bull. 197; 4 Dec. 322.

25 See Sipe vs. Murphy, 28 Bull. 212.

26 3 Redf. on Wills 151.

27 See 28 Bull. 211.

28 Smith vs. Carroll, 4 Green (Iowa) 146; Glidden vs. Bennett, 43 N. H. 306; Kimball vs. Adams, 52 Wis. 554.

from its use.[29] But rails in stacks, not having been used for a fence, are personalty.[30] On the same principle, hop poles, necessary in cultivating hops, are part of the real estate, though taken down for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop-raising.[31] That keys, doors, windows, bolts, rings, etc., belonging to a house, though temporarily detached therefrom, belong to the realty, is self-evident.[32]

§ 367. Manure.

Manure made upon a farm by a tenant, in the absence of a special contract or custom, belongs to the lands, and cannot be sold separately on an execution against him.[33] Manure from the barn-yard of a homestead, although neither rotten nor incorporated with the ground, but in a pile for future use, belongs to the realty.[34] But manure made in a livery stable, or in any manner not connected with agriculture or husbandry, is personalty, and goes to the executor.[35] Likewise if manure is made from hay, purchased and brought upon the farm by a tenant.[36] Manure in heaps is held to be personalty.[36*]

§ 368. Emblements, definition.

This term is defined by the Century Dictionary as follows:[36†] Those annual agricultural products which demand culture, as distinguished from those which grow spontaneously; crops

[29] Goodrich vs. Jones, 2 Hill (N. Y.) 142.

Oil extracted from the land becomes personal property. Digby vs. Digby, 5 C. C. (N.S.) 130; 26 O. C. C. 417.

[30] Clark vs. Burnside, 15 Ill. 62.

[31] Bishop vs. Bishop, 11 N. Y. 123.

[32] Cave vs. Cave, 2 Vern. 508; Guthrie vs. Jones, 108 Mass. 191; Ward vs. Kilpatrick, 85 N. Y. 413.

[33] Sawyer vs. Twiss, 6 Fost. (N. H.) 345; Middlebrooke vs. Corwin, 15 Wend. (N. Y.) 169; Wetherbe vs. Ellison, 19 Vt. 379; Lassell vs. Reed, 6 Me. 222; Daniels vs. Pond, 21 Pick. (Mass.) 367.

Compare Staples vs. Emery, 7 Me. 201.

[34] Fay vs. Muzzey, 13 Gray 53; Plumer vs. Plumer, 30 N. H. 558, 568; Kittredge vs. Woods, 3 N. H. 503; Lassell vs. Reed, 6 Me. 22; Snow vs. Perkins, 60 N. H. 493; Norton vs. Craig, 68 M. 275.

[35] Snow vs. Perkins, 60 N. H. 493; Daniels vs. Pond, 21 Pick. 367; Needham vs. Allison, 24 N. H. 355.

[36] Corey vs. Bishop, 48 N. H. 146.

[36*] Parson vs. Camp, 11 Conn. 525.

Manure is a fixture made on a farm; but hay and straw are not, and may be removed by a tenant at the close of his term. Garrett vs. Brent, 6 C. C. (N.S.) 509; 27 O. C. C. 463.

[36†] An administrator is entitled to costs for taking care of a crop. See § 660.

which require annual planting, or, like hops, annual training and culture. Emblements thus include corn, potatoes, and most garden vegetables, but not fruits and generally not grass. They are deemed personal property and pass as such to the executor or administrator of the occupier, instead of going to the heir, if he die before he has cut, reaped or harvested them. The term includes every product of the earth yielding an annual profit, as the result of labor, as corn, wheat, grain, hops, saffron, flax, melons and the like.[37]

But it is said that parsnips, turnips, etc., belong to the realty because it is not right that the executor should take products from the soil, except potatoes which are held to come within the description of emblements.[38] This exception as to roots may be questionable, and the rule at this day would rather be that all such roots that grow annually, the result of labor, would also be emblements. The general exception is made as to grass, but I can conceive that certain kinds of grass would also be emblements, such perhaps as clover, millet, etc. There may be some difficulty as to clover, but it is a crop that rarely extends more than two years, and requires labor and expense; and it seems to me ought to be included as an emblement going to the administrator. Especially is this true, if the matter rests upon the fact that when the estate may be terminated by an event, the time whereof is uncertain, he has a right to reap that which he has sown.[39]

[37] § 476, Emblements.

[38] Woerner on Admin. 598.

[39] Noble vs. Tyler, 61 O. S. 438. In this case it is said that although this may to some extent, trench upon the occupancy of the tenant of the next estate in remainder or reversion, this, however, cannot be said to impair the next estate; for it is an incident, created by law, of every estate in reversion or remainder — a burden, if it be one, imposed, as we have said, in the interest of agriculture; for, when the termination of an estate is uncertain, it would greatly discourage the cultivation of the land, if every such tenant must sow at his peril. Hence it is that the right to harvest growing crops, sown and cultivated before the termination of the particular estate, in no legal sense infringes upon the next estate in possession. Every such estate is created subject to such contingency; and the right is an incident to every estate whose termination is not fixed by some definite time. When the

Of course the executor's or administrator's right to the crops, extends only to such as were planted before the death of the deceased. The selling of the real estate by an administrator thereafter to pay debts would make no difference as to crops that might have been planted subsequently thereon, for under our law the purchaser at a judicial sale acquires no right to the landlord's share of a tenant's growing crop.[40] In such cases the heirs would receive such crops.[41] It is said that the widow is entitled to the crop growing on land assigned to her as dower, but she is not entitled to the grass or fruits on her husband's land not assigned for dower.[42] If she as dowress, sow the land and marry, the crop will go to her, on the husband's death in preference to his executor or administrator. But if she marry, and her husband sow the land and die, the crop will go to his executor, for it is well established upon the termination of a freehold estate held by the husband in right of his wife, the emblements will go to the husband or his representative.

§ 369. **When emblements shall be assets.** "The emblements or annual crops raised by labor, whether severed or not from the land of the deceased, at the time of his death, shall be assets in the hands of the executor or administrator, and be included in the inventory." [R. S. § 6026.][43]

§ 370. **Power to cultivate and gather crops.** "The executor or administrator, or the person to whom he sells such emblements, at all reasonable times, may enter upon the lands to cultivate, sever, and gather them." [R. S. § 6027.][44]

§ 371. Rent of farm land.

As a general rule there is not much difficulty for the executor to determine the property of which he should take charge,

time of the termination of an estate is definitely known, the reason ceases, and no such right exists.

[40] Albin vs. Riegel, 40 O. S. 339; Seybolt vs. Burtner, 4 W. L. J. 551.

[41] Millikin vs. Wellive, 37 O. S. 468.

[42] Woerner on Admin. 599.

[43] § 10642 G. C.
See § 476, Emblements.

[44] § 10643 G. C.
See § 1393, Rents, Gdn.
See § 801, Power to mortgage or trade.

where the land is farmed by a deceased or by a tenant on shares, but when the farm is rented out for cash rent there is some trouble. It has been stated that rent due and *payable* at the time of the death of the decedent, goes to the administrator. But in a recent case our Supreme Court held this was not true, that if the rent had been earned, although by the terms of an agreement it was not payable until a future date, that fact did not prevent the administrator from recovering the rent.[45]

In another case it was held that where farm lands are leased for a term made up of calendar years, with the rent payable at a fixed period therein, in the absence of other testimony, the mere fact that the land is to be farmed will not convert the rent into emblements, and give the right thereto to the administrator.[46] In another case where the landlord rent-

[45] Noble vs. Tyler, 61 O. S. 438. In this case the deceased was the owner of a life estate. On the 15th of August, 1892, she leased her farm to be seeded in the fall 1892, and farmed for the year 1893. That the tenant seeded about 36 acres in the fall 1892 in wheat, which was harvested in June, 1893, fifteen acres of timothy harvested July, 1893, and that in the spring of 1893, he planted forty-two acres in corn on said farm and it was all laid by as early as July, 1893, but was not gathered and harvested until November, 1893; that at the date of said lease said tenant gave his note for Eight Hundred Dollars for said rent, payable to the deceased on or about the 1st of March, 1894. That said deceased died in August, 1893. It was held that the administrator could recover on this note upon the death of the administrator's decedent. The person entitled to the possession, went into immediate possession.

See § 1393.

[46] Dye vs. Dimick, 4 N. P. 185. In this case the decedent on October 24th, 1894, leased to Dimick the farm for a period of three years from March 1st, 1895, upon the condition that the rent should be Nine Hundred Dollars, payable in two payments of Four Hundred and Fifty Dollars each on Nov. 1st, 1896, and March 1st, 1897. The first installment of rent due November 1st, 1896, was paid. The landlord died November 18th, 1896. The question was, who was entitled to the rent that was due March, 1897. It was shown that the tenant farmed the premises in 1896 in wheat, corn and other products, that the crops were all gathered, or at least matured before the landlord's death, and that no crops were or could be raised on the said farm for the balance of said year ending March 1st, 1897, the Court held that this rent went to the devisee and not to the executor. Under the principle laid down in the case of Noble vs. Tyler, *supra*, that where the rent has been earned, although it is not payable, it should go to the executor, this decision seems to be questionable.

ed a farm for the sum of Three Hundred Dollars cash to raise thereon a crop of corn, and after the corn was planted and gathered in July, the landlord died, the tenant paid the rent to the executor. The Court held that the remainderman could not recover any portion of it from the executor.[47] Whether or not rents may be apportioned between the executor and the remainderman in the absence of statute may be questionable.[48] But it seems that the true rule ought to be where a farm is rented for cash rent for a definite period, and the tenant for life dies before the rent is paid, that it ought to be apportioned between the executor and the remainderman, giving to the executor such portion of the rent as would have gone to him if the decedent had planted the farm in annual crops, or had rented it on share rent, as the statute gives the executor the emblements or annual crops, raised by labor, whether severed or not. If such use of the farm exhausts its value for the entire period, then the entire rent should go to the executor. If it does not exhaust its value, then whatever is the proportionate value of the farm from the time that the landlord died until the end of the term, subject to the right of the tenant to remove the emblements or annual crops, under the same conditions that the administrator could have removed them, if they would have been planted by the deceased, should be apportioned to the remainderman.[49]

[47] Van Hayes vs. West, 3 C. C. 64; 2 C. D. 37.

The Court seems to have held that neither the administrator nor the remainderman could have collected this money, but as it was voluntarily paid to the administrator, the remainderman could not recover. But in the opinion the Court seems to justify the payment of the rent to the administrator because if the landlord had lived and *planted* the *crop*, his executors would have been entitled to recover it.

Where a life tenant dies during the term, an equitable distribution among claimants of rent due after the death of the tenant will not be disturbed. Capallo vs. Weiman, 9 C. C. (N.S.) 412; 29 O. C. C. 542.

[48] Woerner on Admin. 637.

[49] The above is not given as a rule established by court, but one which would be fair and just. The rules of good husbandry require, that certain times be fixed for entering and leaving under farm leases. These periods are generally fixed in the spring and fall. Thus if a tenant goes into possession on the 1st of March, for one year under cash rent, he is entitled to the use of all parts of the land for one crop, and if there is wheat on the land when he goes into possession, he is entitled to put out as much wheat as there

In considering this matter of rent it should not be forgotten that the owner of the fee can make a lease of his premises for any time that he sees fit, and if he dies it will not affect the termination of such lease. But if the owner is only tenant for life, he can not make a valid lease for a longer time than the termination of his estate. Another matter that should be remembered is that where real estate is devised, it is very often considered that the rights of the devisee are superior to either that of the heir or the administrator. An administrator would not be responsible for failure to collect rent between the time the property is ordered for sale and the date of sale.[49a]

§ 372. Rents generally.

As before herein stated, real estate descends to the heir and not to the administrator. The rule follows that all the rent which accrued at the death of the testator would go to the administrator and that which would accrue thereafter becomes the property of the heir.[50]

was when he went into possession; and for the purpose of reaping and gathering this grain he can go onto the farm after his lease is terminated. Likewise good husbandry and custom takes the buildings with the land for the period of the lease. Therefore, whether or not, where a tenant for life, leases real estate for a period of one year, as is the custom of the country, and dies before the expiration of the year, the tenant can remain until the end of his period, is a matter I am not sure about. If the above rule is adopted, he could hold to the end of his tenancy without affecting injuriously, the interests of any one.

[49a] *In re* McCary, 22 Dec. 697.

[50] 7 Am. & Eng. Ency. of Law 278.

Rent accruing after the death of the testator under a lease made by him, passes to the devisee of the premises leased, unless otherwise disposed of by the will, and if to the executor, he becomes liable to the devisee for money had and received. Loveless vs. Erie R. R., 35 O. C. C. 87.

The Probate Court does not necessarily have any jurisdiction over the rents. The administrator neither has the right against the consent of the heirs, nor is he required to accept the estate or collect the rents therefrom. He may receive the income of the real estate by the request of the heirs, or with their acquiescence. He would not be regarded as a trespasser in so doing, unless done in opposition to their interests, or in defiance of their wishes. It is often convenient, and sometimes of decided advantage for him to do so; as where the heirs are minors without guardians; or are abroad, or unacquainted with the management of affairs and where the administrator may be himself an heir, or have intimate business or family relations with the estate, and in other cases. In many cases, there is an understanding or agreement, that the administrator shall take the rents, and account for them as assets for the benefit of the estate, where such a course may save a sale of the real estate for debts, or where the heirs get the advantage of them in the general distribution. In such case the administrator would account in the Probate Court for such rents with the general assets according to such agreement, but not necessarily by force of any re-

To this general rule there may be some exceptions as referred to in the previous section. Likewise when the rent has been paid in advance for a term. Rent that is payable in advance accrues at the time specified for its payment; and on the death of the lessor after that time, within the period for which the rent is reserved, it passes to the administrator.[51] Rent accrues at the time it is earned and the mere fact that it is payable in the future will not give it to the heir.[52] If the term for which the rent was to be paid is passed, and the rent is unpaid, it belongs to the administrator. If the term is not passed, and the rent remains unpaid, it belongs to the heir. If the rent for the term has been paid in advance and the owner dies during the term, the money so collected would belong to the administrator. A tenant for life cannot lease the premises for a longer period than until his death, unless it might be in the case of farm lands under and by virtue of the provisions of secs. 10642 and 10643, G. C. (§§ 369 and 370). If the owner rents a piece of property and receives therefore a note, such note, although it might not be due until after the death of the owner, passes to the administrator.

Where the will directs the sale of land by the executors after a period named, it effects a conversion from that time and the executors are thereafter entitled to the rents.[53] But before execution of the power, they have no authority to collect the rents and profits; if they do so collect, they are accountable therefor, in the interest of the beneficiaries, and the insertion

quirements of the statute. Such we believe to be a somewhat common practice.

Peters, J., in Kimball vs. Sumner, 62 Me. 305, 310.

See also Stearns vs. Stearns, 1 Pick. (Mass.) 157.

Shaw, C. J., in Wilson vs. Shearer, 9 Met. (Mass.) 504; Newcomb vs. Stebbins, 9 Met. (Mass.) 540; Palmer vs. Palmer, 13 Gray (Mass.) 326; Gibson vs. Farley, 16 Mass. 280; Almy vs. Crapo, 100 Mass. 221, 218; Taylor, Landl. & Ten. § 390; Griswold vs. Chandler, 5 N. H. 492; Jones' Appeal, 3 Grant (Pa.) 250; Conger vs. Atwood, 23 Ohio St. 134.

[51] 11 Am. & Eng. Ency. of Law 841, 2nd ed; Matter of Weeks, 5 Dem. (N. Y.) 194; Miller vs. Crawford, 26 Abb. N. Cas. (N. Y. Supreme Court) 376, disapproving Matter of Eddy, 10 Abb. N. Cas. (N. Y. Supreme Ct.) 396.

[52] Noble vs. Tyler, 61 O. S. 432.

[53] Shumway vs. Harmon, 4 Hun 411.

*§ 369, § 370.

of the items in their account is properly made.[54] The rent is due at midnight of the last day of the term, unless otherwise fixed by the lease.[55] The rent of the lands of an insolvent intestate accruing between the death of the intestate and a sale of the lands for the payment of the debts by an administrator, belong to the heir and not to the administrator.[56]

The administrator has no right to collect the rent of the mansion house, and if he does collect the same, he is liable to the widow for the amount so collected.[57] Where the administrator has taken possession of real estate other than has been set aside for the payment of debts, collects the rents and accounts for them and applies them to discharge of the debts due from the estate, he is entitled to be credited for money paid for taxes and repairs.[58] Likewise where an administrator by the advice of a family and infant heir receives rents from the real estate and applies them in the payment of debts of the ancestor's estate instead of selling lands for that purpose and the arrangement is beneficial to the heir, the heir's administrator

[54] Matter of Boyd, 4 Redf. 154.

A general devise to executors to sell and distribute, in a specified way, the proceeds of real estate, does not convert it into personalty, so as to make them accountable for such as has not been sold, as personalty, upon their final accounting, and, if a sale is not made within a proper time, the remedy is by application to the Court to compel them. Matter of Hunter, 3 Redf. 175.

[55] Although the time of sunset is the time appointed by law to demand rent, to take advantage of a condition of re-entry, or to tender it to save a forfeiture, yet the rent is not due till midnight of the rent-day. If the lessor dies after sunset, and before midnight, the rent belongs to the heir; for, the lessor dying before it was completely due, the personal representative can take no title to it. If, however, the tenant had voluntarily paid the rent on the rent-day, and then after it was paid, and before midnight, the lessor had died, such payment would be a good satisfaction against the heir or remainderman, and the executor would not be liable to refund to him. Wms. Exrs. (7th Eng. ed.) 823.

Lord Kenyon's judgment in Leftley vs. Mills, 4 Term Reps. (Eng.) 170.

Blackstone, J., in Cutting vs. Derby, 2 W. Bl. (Eng.) 1075; Clun's Case, 10 Coke 127; Duppa vs. Mayo, 1 Saund. (Eng.) 275, note 17; Norris vs. Harrison, 2 Madd. (Eng.) 268; Rockingham vs. Penrice, 1 P. Wms. 177 s. c.; 2 Salk. (Eng.) 578.

[56] Overturf vs. Dugan, 29 O. S. 230.

[57] Conger vs. Atwood, 28 O. S. 134 (§ 341).

[58] *In re* Turpin's Estate, 7 N. P. 569.

cannot afterward recover such rents from the administrator of the ancestor, although the arrangement has the effect to change the distribution of the infant's estate to the extent of the rents so applied.[59] If an administrator receives rents which he is not entitled to and receives that which properly belong to the heirs, he may be required to account for the same.[60] At common law, rent was not portionable.[61] Some States as well as England have statutes in relation to the apportionment of rents, but none exists in Ohio. Whether under certain circumstances a Court of Equity might, like an English court in the case of an annuity apportion the rent, is a new question in Ohio.[62]

§ 373. Leases or chattels, real.

The estate of a deceased person may occupy either the position of lessor or lessee of certain real estate. When the deceased's estate occupies the position of lessor, then the duty of the administrator in reference thereto, would be for the collection of the rents due therefrom. This has been spoken of in the preceding section. If the deceased was the lessee, then such a lease would become assets in the hands of the administrator. Ordinary leases are considered when speaking of the different kinds of property as chattels real. It is generally

[59] White vs. Turpin, 16 O. S. 270.

[60] Campbell vs. McCormick, 1 C. C. 504; 1 C. D. 281.

[61] Noble vs. Tyler, 61 O. S. 432; Van Hayes vs. West, 3 C. C. 66; 2 C. D. 38.

At common law rent could not be apportioned with respect to time. Hence, if a tenant for life made a lease for years, reserving rent, and died between two rent-days, the accrued rent was lost, both to the executor and the remainderman, or reversioner, however great the fractional portion of the year might be since the last day of payment, and could not be recovered either in law or equity.

Jenner vs. Morgan, 1 P. Wms. (Eng.) 392; Hay vs. Palmer, 2 P. Wms. (Eng.) 502; 3 Kent 471.

See also Cutter vs. Powell, 6 T. R. (Eng.) 320; Stillwell vs. Doughty, 3 Bradf. (N. Y.) 359; Marshall vs. Moseley, 21 N. Y. 280.

[62] 7 Am. & Eng. Ency of Law 280.

See § 1393, Gdns.

Rents of lands occurring after an assignment, as between general creditor, and a mortgage which pledges such rent, etc., should be applied on the mortgage. Hutchinson vs. Straub, 45 Bull. 390.

considered to be an interest in real estate and less than a freehold.[63]

In the absence of statutory provisions, no matter what would be the length of time, were it for one year or a thousand years, it would be a chattel real and become assets in the hands of the administrator. In Ohio, however, permanent leasehold estates renewal forever, shall be subject to the same law of descent as estates in fee.[64]

A lease made to a man "and to his heirs," or "and to his heirs forever," etc., is not changed in its character by introducing these words of inheritance, but remains a chattel none the less; and so of a lease from year to year, so long as both parties please — the interest of the tenant being personal assets after his death.[65]

An estate granted to A., which is to exist during the lifetime of B., and then cease, has not a definite space of time to exist, measured by years, months or days, for it is uncertain how long B. may live. This estate of A. is therefore not a chattel, but a freehold estate; and, as estates of freehold go to the heir or devisee, this estate, upon the death of A., goes to his heirs and not his administrator, if B. be still alive.[66]

If an estate be limited to A. and his assigns during his life, it is a freehold estate; but if it be limited to A. and his assigns

[63] Real chattels are chattels which are annexed to or concern real estate, as a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it, and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description; and so in fact will be found to be any other interest in real estate whose duration is limited to a time certain beyond which it can not subsist and which is, therefore, something less than a freehold.

A ground rent is a freehold estate. McCarmon vs. Cooper, 1 N. P. (N.S.) 154; 12 Cir. D. 677; affirming 69 O. S. 366.

Bouv. Law Dic., Art. "Chattels."

[64] § 8597 G. C., § 942.

Perpetual leasehold estates are to be treated as estates in fee simple, only in being subject to judgment liens and execution the same as real estate, and are not considered as estates of inheritance, within the meaning of the dower act.

[65] Murdock vs. Radcliff, 7 Ohio 119.

[66] Bank vs. Roosa, 13 Ohio 334.

for one hundred, or any other certain number of years, if A. shall so long live, it is a chattel.[67]

The duties of an administrator in reference to a leasehold interest is very well set forth in the opinion of Judge Spear in Becker vs. Walworth (45 O. S. 169), which is as follows:

"That a leasehold interest in a term for years passes, upon the death of the lessee, to the personal representative, and not to the heir, and that such representative thereby becomes an assignee of the lease by operation of law, is elementary. He may dispose of the unexpired term by sale, as of other assets, and by assignment, and thus avoid personal liability for rents coming due, though the estate would remain liable to the lessor upon the covenants in the lease. But if the representative enters into possession of the leased premises, he thereby incurs liability, in his personal character, to the extent of profits actually received. If the rent be of less value than the profits of the land, as the law *prima facie* supposes, so much of the profits as suffice to make up the rent belongs equitably to the lessor, and cannot lawfully be otherwise applied; hence the personal liability to the extent stated. It may be charges against the representative who refuses to so pay over that he owes and unlawfully detains. So that, while his personal liability does not exceed what the property yields, nevertheless the rents received by him, being treated not so much as assets as profits of the land, the law specifically appropriates them to the benefit of the landlord to an amount equal to the rents reserved in the

[67] Murdock vs. Radcliff, 7 Ohio 119.

"An estate of freehold, *liberum tenementum*, frank-tenement, is defined by Britton to be 'the possession of the soil by freeman.' And St. Germyn tells us that 'the possession of the land is called in the law of England the frank-tenement or freehold.' Such estate, therefore, and no other, as requires actual possession of the land, is legally speaking, freehold." Hence, "It is such an estate in lands as is conveyed by livery of seizin, or in tenements of any incorporeal nature, by what is equivalent thereto. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seizin, these are properly estates of freehold; and as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates."

2 Bl. Com. 104.

lease. The representative takes the lease as assignee by virtue of his office, as he takes other chattel interests of the deceased. The term is assets in his hands, and he is none the less an assignee because the liability incurred is not in all respects as onerous as that of an assignee in fact. The rule is not a hard one. It but enjoins good faith, and a proper discharge of duty." [68]

As such a lease is binding on the estate of the decedent, it must be disposed of in some manner. If the administrator continues to occupy the same, he must pay the rent, and see that it is fulfilled according to the contract made with the decedent. The estate is liable for this rent, whether it is occupied or not, unless released by the owner. Such a lease should be disposed of by sale or otherwise, as will be to the best interests of the estate. If it is sold according to law at public sale or otherwise, the administrator will be relieved from further personal responsibilities. No rule can be given to guide an administrator or executor in such a case. In some instances it might be to the advantage of the estate to retain the leasehold interest, and in others it would be to the advantage of the estate to dispose of it speedily. The safer plan would be to apply to the Court for an order to sell the same where the landlord refuses to allow a surrender of the lease.

An administrator of the assignee of a perpetual leasehold is not personally liable for the rent and taxes to the owner of the fee covenanted in the lease.[69]

§ 374. Annuities. Dividends.

An annuity is defined to be a yearly payment of a certain sum of money granted to another for life, or for a term of years, and when charged upon the real estate it is called a

[68] Citing Taylor's Landlord and Tenant, § 434, 461; 3 Williams on Exr's, 1854; Suttliff vs. Atwood, 15 O. S. 186; Jevens vs. Harridge, 1 Saunders 1; Tremeere vs. Morison, 1 Bingham New Cases 89; 1 Chitty on Pleadings 383; Howard vs. Heinerschit, 16 Hun 177.

[69] Gausen vs. Moosmann, 5 N. P. 254.

See § 799, Sale of real estate. § 801, Mortgage, etc.

rent charge. As personal property, an annuity passes to the personal representative; but if granted with words of inheritance, it is descendable and goes to the heir to the exclusion of the executor.[70]

Shares of stock in a corporation, owned by the decedent at the time of his death, are personal property and pass to the administrator.[71] And the same is true of dividends declared after, but for a period that expired before, the decedent's death, even though the stock be given by will to a legatee.[72]

§ 375. Copyrights and patents.

All copyrights pass to the administrator.[73] The administrator has also the right to all patents, and may apply for and take out a patent for the benefit of the estate.[74] So he may

70 Woerner on Admin. 632.

71 Citizens' Street R. W. Co. vs. Robbins, 128 Ind. 449; Weyer vs. Second National Bank, 57 Ind. 198.

How sold, see § 572.

72 Johnson vs. Bridgewater Mfg. Co., 14 Gray 274; Wells vs. Cowles, 4 Conn. 182.

An annuity may be assigned the same as other personal property. Trust Co. vs. Kirby, 17 Dec. 194; 40 L. R. 304.

See Wilberding vs. Miller, 90 O. S. 28, where the matter is very fully discussed as to whether the surplus accumulated from earnings belongs to the life tenant or remainderman. Also see Worthington, Trustee, vs. McAlpin, 18 N. P. 436.

See § 1289, as to Dividends.

73 Wilson vs. Rousseau, 4 How. 646; Dudley vs. Mayhew, 3 N. J. 9.

The right of an author to the exclusive sale or use of his intellectual productions, including books, maps, charts, pamphlets, magazines, engravings, prints, dramatic and musical compositions, paintings, drawings, photographs, sculpture, models, busts, designs, and the right of inventors, originating any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement therein, are species of property unknown at common law, and of purely statutory origin, both in England and America. For the encouragement and development of learning and literature, and to promote the progress of useful arts and sciences, Congress has secured to the author or inventor the absolute and indefeasible interest and property in his literary production, or the subject of his invention, for a specified time, which, upon certain conditions, may be extended for a further term of years. During this period it has impressed upon these productions all the qualities and characteristics of property, has enabled the author or inventor to hold and deal with the same as property of any other description, and on his death it passes with the rest of his personal estate, to his legal representatives, becoming part of his assets.

Citing Wilson vs. Rousseau, 4 How. (U. S.) 646, 674; Dudley vs. Mayhew, 3 N. Y. 9.

74 Stimpson vs. Rogers, 4 Blatchf. 333.

take out an extension of either a patent or a copyright.[75] He may sell it.[76]

For all infringements of a patent or a copyright, the administrator may sue, even joining with the holder of a moiety thereof in another State, and without taking out letters of administration in such State.[77] But in the case of trade-marks, the heir and not the administrator seems to be entitled to them.[78]

§ 376. Pension money.

By the pension laws of Congress and United States statutes (sec. 4718), an accrued pension is declared not to be considered as a part of the assets of the pensioner's estate, nor liable to be applied to the payment of his debts, but shall inure to the sole benefit of the widow and children. This law of exemption is said to be founded on just views of human generosity, and should be liberally construed in favor of the debtor and his family.[79] Hence pension moneys received by a widow, and passing unexchanged for other property to her executor, are not liable for her debts where she leaves children under sixteen years of age.[80] But, otherwise, where the pensioner received his pension in his lifetime, and deposited it in a bank, taking a certificate of deposit, which he had at the time of his death, the money collected on such certificate by the executor is assets applicable to the payment of debts.[81]

[75] Washburn vs. Gould, 3 Story 122; Brooks vs. Bicknell, 3 McLean 250, 432.

[76] Wintermute vs. Reding, 1 Fisher Pat. Cases 239; Brooks vs. Bicknell. *supra.;* Pitts vs. Jameson, 15 Barb. 310.

[77] Whittemore vs. Cutter, 1 Gall. 429; Smith vs. Mercer, 3 Pa. L. Jour. Rep. 529; Kirk vs. Du Bois, 28 Fed. Rep. 460.

[78] Kidd vs. Johnson, 100 U. S. 617, 620; Leather Cloth Co. vs. American Co., 11 H. L. 523; Pratt's Appeal, 117 Pa. St. 401; Woerner on Admin. 634.

[79] Wilcox vs. Hawley, 31 N. Y. 648; Shaw vs. Davis, 55 Barb. 389; Lockwood vs. Younglove, 27 Id. 505; Van Buren vs. Loper, 29 Id. 388.

[80] Hodge vs. Leaning, 2 Dem. 553.

[81] Beecher vs. Barber, 6 Dem. 129.

In the case of Fulwiler vs. Infield's Guardian 3 C. D. 338; 6 C. C. 36; affirmed, 32 Bull. 374, it is held that pension money is not exempt from liability for the pensioner's debts after it has come into his hands. Pension that a widow receives on account of her child, is hers, and she is not required, after such child has attained its majority

§ 377. Trust property.

If there was any specific personal property in the hands of a decedent belonging to others, which he held in trust or otherwise, and it can be clearly distinguished from the decedent's own property, it is not assets in the hands of his personal representative; but if such property has no earmarks and is not distinguishable from the mass of the decedent's own property, the person owning it must come in as a general creditor of the estate, and the property itself is assets in the hands of the executor or administrator.[82]

In this category are moneys or securities received by a public officer in his official capacity, or by an agent or attorney, and not mingled with his individual funds.[83]

But money held in a fiduciary capacity has been decided not to lose its distinctive character merely because it is so intermingled with other funds that the particular coins or bills cannot be identified. It is enough if the fund can be substantially followed, and the recent tendency seems not to require the same strictness of proof as formerly.[84]

to pay over the amount so received. It would therefore be assets in the hands of her executor. See Creekbaum vs. Sohner, 1 N. P. 34. See article on pensions, 18 Am. & Eng. Ency. of Law, 294.

[82] Trecothick vs. Austin, 4 Mason (U. S.) 16; U. S. vs. Cutts, 1 Sumn. (U. S.) 133; 25 Fed. Cas. No. 14, 912.

[83] Moneys received by a public officer in his official capacity are not assets in the hands of his administrator, but are trust funds for his successor in office, if they have been kept separate as an official fund, or can be traced and identified as such. People vs. Houghtaling, 7 Cal. 348; State vs. Corey, 4 West L. Month. (O.) 563; 2 Ohio Dec. (Reprint) 669.

And the proceeds of a note given to an officer in his own name for the purpose of satisfying an execution in the hands of the officer, belong to the execution creditor, and do not go to the executor or administrator of the officer as assets of the estate. Child vs. Jordan, 106 Mass. 321.

[84] Woerner on Admin. 646.

Where a testator, at the time of his death, held certain bonds in personal trust for the sole benefit of others and was in no default as to the duties of his trust; and said bonds were afterward collected by his executor, with the knowledge and apparent acquiescence of the beneficiaries, and the proceeds were not paid to the parties entitled thereto under the trust, *held:* That the trust funds were not assets of the estate of the testator; and there-

If notes be delivered to an executor to indemnify the estate against a liability where the testator was a surety, such notes and the money collected on them are not the property of the estate, and the estate is not liable for the misconduct of such executor in respect to such notes and money. Under such cirstances the executor is a trustee for the person delivering the notes, and he alone is responsible for a faithful application of the money collected.[85]

It is no part of the duty of executors, acting for the benefit of creditors of the estate, to account to the Court for trust funds that, when collected, should be distributed to heirs and devisees, and not paid as assets of the estate to creditors presenting claims.[86]

§ 378. Money on deposit.

Deposits in banks and in savings banks pass to the administrator, and he is authorized to draw out the same.[87]

Money in hands of the decedent belonging to another, but which has no earmarks and is not distinguishable from the mass of his own property, is assets in the hands of the administrator.[88] But it is otherwise where such money has been left separate and distinct.[89]

Money received from the government by the administrator constitutes assets of the estate.[90] Post office money orders undelivered are assets in the hands of the administrator.[90a]

fore, an action could not be maintained by one of the beneficiaries against the sureties in the executor's bond, for a misappropriation of the trust funds so collected. Quinby vs. Walker, 14 O. S. 193.

85 Arbuckle vs. Tracy, 15 O. 432.

86 *In re* Estate of Gallagher, 5 N. P. 518.

87 Schluter vs. Bowery, etc., Bank, 1 N. Y. Supp. 655.

88 Trecothick vs. Austin, 4 Mason 16; Matter of O'Brien, 45 Hun 284; Attorney-General vs. Bigham, 142 Mass. 248.

89 Fowler vs. Rice, 31 Ind. 258.

90 Grant vs. Bodwell, 78 Me. 460; Rogers vs. Hosack, 18 Wend. 319.

90a McKelvey vs. McKelvey, 33 O. C. C. 117.

Money or property found on deceased persons: §§ 2862 and 2863 G. C., provides in substance, that if any property is found upon a deceased person the Probate Court shall make an order for its preservation until further identification, and money found shall be applied to the payment of burial expenses, etc., and the remainder turned in the public treasury, but that the provisions of this section do not inter-

§ 379. Fire insurance money.

Fire insurance policies on which moneys had become due by the loss before the decedent's death, are assets. If the loss occurs after the death of the insured, the insurance money, while perhaps collectible by the administrator, is to be distributed as real estate, and the widow is entitled to dower in such money in the same manner as she would have been in the real estate.[91]

Whether or not the administrator is entitled to collect such insurance in the absence of a creditor's or mortgagee's interest in the real estate, is questionable. As the real estate descends to the heir, whatever losses result to it after the death of the ancestor would be collectible by the heir.[92]

If the loss occurs before the death of the assurer, but is not paid, the better opinion seems to be that it is assets in the hands of the administrator.

§ 380. Life insurance money.

Where the decedent had an insurance policy upon his life, payable to his executor or administrator, the fund is of course assets.[93] So is an interest in a policy in the life of another.[94] But if the policy is made payable to a third person, as to a

fere with the rights of an administrator or executor to administer thereon as upon other property. See § 718.

[91] Flemming vs. Jordan, 28 Bull. 332.

See § 1292, as to trustee's insurance and life tenure.

[92] In the case of Flemming vs. Jordan, *supra*, the administrator had the property insured for the benefit of the estate. Here it was very properly held that he had a right to collect the insurance, as the insurance was made to protect mortgagee's interests in the real estate.

Winman vs. Winman, 26 N. Y. 253; Culberson vs. Cox, 29 Minn. 309.

When insured property is mortgaged, and a loss by fire occurs, the insurance money, being the proceeds of the property, belongs to the mortgagee; and if paid to the mortgagor he holds the same in trust for such mortgagee, and may be compelled to pay the same over to him. James vs. West, 47 Bull. 750.

[93] Webb vs. Roetinger, 12 C. C. 730, 10 Dec. 12; Affirmed 37 Bull. 56, 4 C. D. 270.

[94] Johnson vs. Smith, 25 Hun 171.

Policies of insurance which are the property of the deceased, are part of her estate whether mentioned in her will or not. Plant vs. Mutual Life, 4 C. C. (N.S.) 94; 16 Cir. D. 499; 26 O. C. C. 499; affirmed, 65 O. S. 586. Where a life insurance policy on the life of the husband is payable to the wife, her executors or assigns, she has such interest therein as she can pass by her will, and a devise to him will pass the proceeds to him. Teepon vs. Schlacter, 18 N. P. 33; Schlacter vs. Teepon, 23 O. C. C. (N.S.) —.

widow or children, the proceeds belong to the person or persons so named, and are not assets of the estate of the insured.[95]

Where a policy is made payable to his widow or children, it is exempted from all claims of his creditors and goes direct to the widow or children.[96]

If the assured takes out a policy upon which the annual premium is over $150, and he dies insolvent, the administrator is entitled to all of the insurance in excess of what $150 carried.[97]

If the beneficiary died before the person whose life is insured, the policy goes to the assured and becomes assets in the hands of the administrator.[98]

The wife may insure the life of the husband, and if surviving, it shall be payable to her free from the claim of his creditors, etc.[99]

[95] 11 Am. & Eng. Ency. of Law 846, 2d ed.

[96] *Who may be beneficiary.* § 9393. Any person may affect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his wife and children, or of either or other relative or relatives dependent upon such person or any creditor or creditors as he may cause to be appointed and provided in the policy.

Exemption from claims of creditors. § 9394. All policies of life insurance upon the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of, or *bona fide* assigned to the wife or children, or any relative dependent upon such person, or any creditor, shall be held subject to a change of beneficiary if desired, for the benefit of such wife or children, or other relative or creditor, free and clear from all claims of the creditors of such insured person; and the proceeds or avails of all such life insurance shall be exempt from all liabilities from any debt, or debts, of such insured person.

Premiums paid in fraud of creditor. § 9395. Subject to the statute of limitations, the amount of any premiums for insurance for the benefit of wife and children, or of either, or other relatives dependent upon such person or any creditor, paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy. [103 v. 558.]

[97] 38 Bull. 239; Trane vs. St. of Ohio.

[98] Ryan vs. Rothweiler, 50 O. S. 595; Frank vs. Bauman, 35 Bull. 59.

[99] §§ 9397-8-9 G. C.

[100] Cross vs. Armstrong, 44 O. S. 613.

Insurance was procured by a husband on his own life for his wife's benefit, the annual premium being $630, and the statute in force provided that insurance for wife or children should be exempt from claims of representatives or creditors, provided the annual premium did not exceed $150, and if in excess of that only such proportion as $150 bears to the whole annual premium. The husband having died, and it being uncertain whether his estate is insolvent or not: Held, that the administrator was entitled, out of the proceeds of the insurance, to the amount of the last four years' premiums, with interest—four years being the period of the statute of limitation in cases of property given in fraud of creditors—and the balance should go to the widow. U. S. Life Insurance Co. vs. Eckert, 6 Rec. 452.

The proceeds of life insurance policies, taken out by a man on his own life, also for the benefit of his wife and three children, in excess of the amount protected from creditors by

If suit be brought by any creditor in relation to such policy in which the administrator or executor is made a party, it must be brought in the county in which the administrator is appointed.[100]

A voluntary transfer by an insolvent debtor to his wife and daughter of an insurance policy on his own life, taken out by him for the benefit of his estate before incurring debts, is void as to his creditors, and is not protected by the act which allows one to insure his life for the benefit of his wife and children free from the claims of creditors.[101]

A divorced wife is entitled to proceeds of a policy of insurance, she having been named as beneficiary and subsequently divorced.[102]

Where each of two partners had his life insured for the benefit of the other, and assigned the policies to the insurance company as security for a partnership loan, but not as a condition of such loan, and one dies, the proceeds of such policy will go to the surviving partner, and not to the executrix of the deceased.[103]

§ 381. Mutual benefit insurance.

Moneys received on a certificate of membership in a mutual benefit association, the constitution and by-laws of which provide for insurance for the benefit of the member's family, or

act of 1847, § 737, and another for the benefit of his wife and four children; there having been born a later born child, can not be disposed of by his will; but the earlier policy goes to exhaust the statutory exemption, and will, to that extent, go to its beneficiaries, and the balance of such policy and the proceeds of the latter policy, will go to the administrator to pay debts, costs of administration and year's allowance to widow, the balance after which will go to the widow and the four children, according to the statute of descents. Wagner vs. Karman, 7 Rec. 670.

[101] I. Co. Savings Bank vs. McLean (Mich.), 25 Bull. 235.

[102] Com. Insurance Policy, *In re* 5 Dec. 561.

[103] Com. Dyas vs. O'Neil, 3 Dec. 309; 2 N. P. 81.

Where a person procures insurance on his life in two or more companies or beneficiary associations in favor of his wife and children, and after his decease an action is brought by a creditor of said person to recover from the funds the amounts allowed creditors under § 9393 G. C. and § 11722 G. C., each policy must stand and be considered alone, and the amounts resulting on the different policies can not be added together in determining the amounts that may belong to creditors under said section. 1894. Com. Hinsch vs. d'Utassy, 1 Dec. 372.

A life insurance policy on the life of one leaving a widow and one child which was payable to his heirs, means those who would be his distributees under §§ 4163, 6194, R. S., and the widow and child divide the fund in the proportion of descent of the estate and not equally. Young M. M. L. Assn. vs. Pollard, 2 C. D. 333; 3 C. C. 577.

for such persons as the member may designate, go on the death of the member, to his family, or the person designated by him, and are not assets subject to the payment of his debts.[104]

It is provided by statute for the organization of mutual associations;[105] and it is held under such statute that no one can be a beneficiary unless he is of the family of the assured, or may, upon his death, become an heir.[106] Likewise the assured cannot transfer his policy to anyone but a member of his family.[107]

A change of the beneficiary can only be made in accordance with the mode appointed by the by-laws of the association.[108]

"Legal heirs," as beneficiaries in a policy of a national accident insurance company, issued to one having no wife and children, means next of kin as distributees under the statute of descents, and the insurance money is not subject to the claims of the creditors of the assured.[109]

Money paid to an employer by an employers' liability insur-

[104] Worley vs. Northwestern Masonic Aid Assoc., 10 Fed Rep. 227; 3 McCrary (U. S.) 53; 14 Cent. L. J. 154; 11 Ins. L. J. 141; 16 West Jur. 85; Kentucky Masonic Mut. L. Ins. Co. vs. Miller, 13 Bush (Ky.) 489; Duvall vs. Goodson, 79 Ky. 224; Maryland Mut. Benev. Soc. vs. Clendenen, 44 Md. 429; Catholic Mut. Ben. Assoc. vs. Priest, 46 Mich. 429; Catholic Mut. Ben. Assoc. vs. Firnane, 50 Mich. 83; Brown vs. Catholic Mut. Ben. Assoc., 33 Hun (N. Y.) 263; Hellenberg vs. District No. 1, 54 N. Y. 580; Matter of Wendell, 3 How. Pr. N. S. (N. Y. Surrogate Ct.) 68; Brummer vs. Cohn, 86 N. Y. 11; Matter of Palmer, 3 Dem. (N. Y.) 216; Matter of Brooks, 5 Dem. (N. Y.) 326; Greeno vs. Greeno, 23 Hun (N. Y.) 478; Hodge's Appeal, 8 W. N. C. (Pa.) 209.

[105] §§ 9393-4-5-6 G. C.

[106] Mutual Aid Association vs. Gonser, 43 O. S. 1.

[107] Odd Fellow's Assoc. vs. Diebert, 2 C. C. 462; 1 C. D. 589.

[108] Charch vs. Charch, 57 O. S. 561.

P. became a member of a mutual life association and received a policy which on his death entitled his "heirs" to receive a certain sum from the association. He died leaving a widow and one child surviving him. Held: That his widow and child were his heirs as to said sum and took it as tenants in common and in the proportions fixed by the statute of descent and distribution when the intestate has died, leaving a widow and a child or children. Young Men's Mut. Life Ass'n vs. Pollard, 3 C. C. 577; 2 C. D. 333.

[109] *In re* Estate of Andress, 5 N. P. 253; 6 Dec. 174.

ance company on a policy indemnifying him against loss by reason of injuries to employees, is not assets of the estate of the employee on account of whose injury payment is made.[110]

§ 382. Goodwill of business.

The goodwill of a decedent's business passes as an asset to his representative, and on his appropriating the business to his own use he will be chargeable upon his accounting with the value thereof, but the right to use testator's name is not an asset for which a personal representative is accountable.[111]

§ 383. Property conveyed by decedent to defraud creditors.

The administrator or executor has no authority over real estate that has been conveyed with the intent to defraud creditors, unless it is necessary to sell the real estate of the deceased in order to pay debts. Therefore it may be said that in Ohio such property does not come within the general term of assets going to the administrator.[112]

§ 384. Proceeds of real estate.

When real estate is sold either under a provision of the will or by order of Court, the proceeds of such sale are assets in the

[110] Hawkins vs. McCalla, 95 Ga. 192.

Where the deceased is a member of a mutual fire insurance company, the administrator should collect all the assessments due at the time of decedents death, although the estate is liable until the policy is cancelled.

[111] Matter of Randell, 8 N. Y. Supp. 652.

It is very difficult to determine the value of the good will of any business. For it is nothing but the chance of being able to keep the business which has been established; the sale of a mere chance which vests in the purchaser nothing but the possibility, but the preference which has been usually extended may continue.

See Art. Goodwill, 8 Am. & Eng. Ency. of Law; Chapter on Partnership. § 416, § 425.

Without attempting an accurate or exhaustive definition of the good will of a business it may be said that it practically consists of that favorable reputation it has established creating a disposition or inclination of persons to extend their patronage to the business on that account. . . The good will of a partnership is an asset.

Snyder Manf. Co., 54 O. S. 9; Brass & Iron Works vs. Payne, 50 O. S. 115.

[112] See 11 Am. & Eng. Ency. of Law 847 2d ed.; § 10778 G. C., § 823.

hands of the executor or administrator, for which his sureties on his bond will be held accountable.[113]

Likewise if real estate is sold on partition, and part of the proceeds comes into the hands of the administrator, it will be held to be assets.[114] Such proceeds are to be considered and disposed of as real estate.[115] And if an executor fraudulently sold property for less than its true value, the difference between its true value and that which he actually received would also be assets.[116]

Of course all notes held by the decedent, whether arising from the sale of real estate or other property, are considered assets in the hands of the administrator.[117]

§ 385. Choses in action, etc.[117a]

All choses in action are assets in the hands of the administrator.[118] Likewise are judgments.[119]

Damages assessed during the lifetime of the deceased, although not payable until after his death, for a right of way through land, go to the administrator.[120] Otherwise if he received money from a railroad for a release of right of way.[121]

113 Wade vs. Grayham, 4 O. 126.

114 Campbell vs. English, Wright 119; Stiver vs. Stiver, 8 O. 217.

115 Grisswold vs. Frink, 22 O. S. 79.

116 Reed vs. Brown, 10 C. C. 44; 6 C. D. 15; Affirmed 56 O. S. 264.

A devise of realty to an executor in trust to sell will, of course, vest the title in him. And as equity will consider as actually done that which ought to be done, land is, under some circumstances, regarded as money, and money as land — as where the will directs that the land shall be sold, or that money shall be laid out in land. A devise directing lands to be sold and the proceeds to be divided, etc., is therefore a disposition of money and not of land, and is good, as a power to the executor to sell, although they are not expressly named as the donees of the power. In selling under such a power the executor acts in his character as such, and not as trustee, and is accountable for the proceeds of any sale made by him, as he is also for the rents and profits. Redf. Prac. 426.

117 Coldron vs. Rhode, 7 Ind. 151.

117a See § 1240, Gifts *causa mortis;* § 929, Gifts *inter vovis.*

118 Hayes vs. Hayes, 45 N. J. Eq. 461.

See Ambler vs. Administrator, Boone, 34 O. C. C. 512, where a note was claimed to be a gift, yet the court held it was not and was an asset.

See § 442, Diligence in collecting.

119 Morris vs. Buckeye Engine Co., 78 Ind. 86.

120 Welles vs. Cowles, 4 Conn. 182; Goodwin vs. Milton, 25 N. H. 458; Neal vs. Knox, etc., R. R. Co., 61 Me. 298.

121 Hankins vs. Kimball, 57 Ind. 42.

So a salary voted deceased, even after his death.[122] So money received on an appeal bond given to the administrator.[123] So a surplus arising from a trustee's sale of real estate after the death of the grantor, after discharging the debts.[124] Shares of stock of any railroad company are assets.

The general rule is that with respect to such personal actions as are founded upon any obligation, contract, debt, covenant or other duty, the right of action, on which the testator or intestate might have sued in his lifetime, survives his death, and is transmitted to his executor or administrator, whether the breach occurred in the lifetime or after the death of the decedent.[125]

A right of action founded on the tort of a decedent does not survive. Death from a wrongful act is provided for by special statute, and that which is recovered goes to the widow and children, and is assets in the hands of the administrator to be accounted for, but such is not liable to the creditors of a decedent. If a covenant is broken in the lifetime of an ancestor, it becomes a mere chose in action, and does not descend to the heir, but the administrator alone can sue on it.[126]

[122] Loring vs. Cunningham, 9 Cush. 87.

[123] Sasscer vs. Walker, 5 G. & J. 102.

[124] Jones vs. Lackland, 2 Gratt. 81.

[125] Holbrook vs. White, 13 Wend. 591.

Thus, an administrator may have an action in his own name for an injury to personal property intermediate the granting of letters and the death of the intestate. His title takes effect by relation. Valentine vs. Jackson, 9 Wend. 302; Babcock vs. Booth, 2 Hill 181.

The administrator has a right to recover the purchase money due on a contract for the sale of land, made by the intestate in his lifetime, and may, it seems, extend the time of payment. Schroeppel vs. Hopper, 40 Barb. 425; Smith vs. Gage, 41 Id. 60.

But the interest of a purchaser in an executory contract of sale of land does not pass to his executor. Griffith vs. Beecher, 10 Barb. 432.

The personal representative may sue on a demand against a co-tenant in common of the decedent for his share of rents and profits. Hannan vs. Osborn, 4 Paige 336.

[126] Tapscott vs. Williams, 10 O. 444.

See § 713, Accounting, etc.

Where alimony is allowed, and pending an appeal both parties died, the action may be carried on by the administrators. Coffman vs. Finney, 65 O. S. 61.

An action will not lie against a grantee in possession of real estate, conveyed with intent to defraud,

§ 386. Mortgaged premises to be considered personal assets. Executor, etc., may take possession. "When a mortgagee of real estate, or an assignee of such mortgagee, dies without foreclosing the mortgage, the mortgaged premises, and the debts secured thereby, shall be considered as personal assets in the hands of his executor or administrator, and be administered and accounted for as such." [R. S. § 6070.][127]

Possession. "If the mortgagee or assignee did not obtain possession of the mortgaged premises in his lifetime, his executor or administrator may take possession by open and peaceable entry, or by action, as the deceased might have done if living." [R. S. § 6070.][127*]

§ 387. Executor or administrator may discharge mortgage. Possession before redemption. "In case of the redemption of a mortgage, the money paid thereon must be received by the executor or administrator and thereupon he shall release and discharge the mortgage. Until such redemption, the executor or administrator, if possession has been taken, either by himself or by the deceased, shall be seized of the mortgaged premises, in trust for the same persons, whether creditors, next of kin, or others who would be entitled to the money, if the premises had been redeemed." [R. S. § 6071.][128]

§ 388. How executor or administrator to foreclose mortgage. "A mortgage belonging to the estate may be foreclosed by the executor or administrator." [R. S. § 6072.][129]

Mortgages, as well as deeds of trust, always go to the executor or administrator,[130] even though foreclosure proceedings were pending when the decedent died,[131] and although the heirs

etc., to recover the value of the real estate. Doney vs. Demmick, 8 C. C. 163; 4 C. D. 380.

Unless the grantee has conveyed them to an innocent purchaser. Id. 55 O. S. 294.

[127] § 10692 G. C.

The Probate Court can not compel an administrator to cancel an uncancelled mortgage. Jones vs. Green, 21 O. C. C. 96; 11 C. D. 548.

[127*] § 10693 G. C.

See § 521. Highway vs. Pendleton, 15 O. 736.

[128] § 10694 G. C.

[129] § 10695 G. C.

[130] Smith vs. Dyer, 16 Mass. 18; Taft vs. Stevens, 3 Gray, 504; Long vs. O'Fallon, 19 How. 116; Clark vs. Blackington, 110 Mass. 316; Williams vs. Ely, 13 Wis. 1.

[131] Fay vs. Cheney, 14 Pick. 399; Stevenson vs. Polk, 71 Ia. 278.

A mortgagor dying in possession, his administrator has a right to convert the property into money and pay the mortgage claim thereon out of the proceeds. The mortgagee has no right to replevin the same. Linghler vs. Kraft, 3 N. P. (N.S.) 653; 16 Dec. 474; affirmed 79 O. S. 225.

The interest of the mortgagee is transferred to the fund. Id.

A chattel mortgage unfiled at the time of decedent's death, is void as to creditors, even though it be afterwards placed on record. Kilbourne vs. Fay, 29 O. S. 264.

obtain possession before the appointment of an administrator.[132] So real estate purchased by the administrator upon a sale on a judgment of the estate belongs to him until it is determined whether it will be necessary to use it to pay debts.[133]

A vendor's lien for purchase-money goes to the administrator.[134]

If lands be devised to an executor in trust for certain purposes, he is the proper plaintiff in a suit for trespass thereto after the death of the testator.[135] And if deceased held land as trustee, and some one else has succeeded to the estate as succeeding trustee, that person must bring the action.[136]

If land of the decedent be sold on a mortgage, the surplus goes to the heirs, and not to executor or administrator,[137] unless the administrator needs the same to pay debts.

If an executor convey land and is compelled to take it back under the mortgage given by the purchaser, such lands belong to him as assets.[138]

§ 389. Naming a person executor not to discharge a debt.

It was a rule of common law that, if a person was named executor in a will, that this extinguished any debt that he might have owed to the decedent. This was on the theory that, in order to collect the debt, the executor would be compelled to bring action against himself, which could not be done. It is very questionable whether such was ever the rule in Ohio.[139] But whatever may have been the rule at common law, the same is settled now to be extinguished by the following statute:

"The naming of a person executor, in a will, shall not operate as a discharge or bequest of a just claim which the testator had against such executor. It shall be included among the credits and effects of the deceased in the inventory. The executor shall

132 Haskins vs. Hawkes, 108 Mass. 379; Demarest vs. Wynkoop, 3 Johns Ch. 129.

133 Webber vs. Webber, 6 Me. 127; Boylston vs. Carver, 4 Mass. 598; Gibson vs. Bailey, 9 N. H. 168.

134 Evans vs. Enloe, 70 Wis. 345.

135 Pittsburg, etc., Ry. Co. vs. Swinney, 97 Ind. 586.

136 Benoit vs. Schneider, 39 Ind. 591.

137 Cox vs. Burney, 2 Sandf. 561; Dunning vs. Ocean Bank, 61 N. Y. 497; Vincent vs. Platt, 5 Harr. (Del.) 164; Varnum vs. Meserve, 8 Allen 158.

138 Yonkers Savings Bank vs. Kinsley, 78 Hun. 186; S. C. 28 N. Y. Supp. 925.

139 Tracy vs. Card, 2 O. S. 450.

be liable for it as for so much money in his hands at the time such debt or demand becomes due, and must apply and distribute it in the payment of debts and legacies, and among the next or kin, as part of the personal estate of the deceased." [R. S. § 6069.][140]

§ 390. Debt of an executor or administrator becomes assets.

The effect of the above section is, that if a person owing a debt to the decedent is appointed and qualified as executor[141] or administrator,[142] such debt becomes assets at once in the hands of the executor or administrator, for which he must account to the estate. Hence an administrator *de bonis non* can sue a former administrator for such a debt.[143]

But appointing a debtor administrator does not convert the debts into assets in his hands, where his liability is only a contingent one, as where a surety on a defaulting executor's bond is made administrator *de bonis non*.[144]

Likewise where one of several joint and several debtors is made administrator, the debt is not assets.[145]

If a surviving partner becomes administrator, the balance that may be found against him, on settlement of the firm, becomes assets, although the partners do not owe each other; and it was unliquidated, and not left uncollected by fault of the administrator.[146] And this applies though the debt was created after the decedent's death, as where a person to whom executors loaned money of the estate, taking his note, afterwards became administrator *de bonis non*.[147]

140 § 10691 G. C.

See § 689, Legacy to debtor.

141 Bigelow vs. Bigelow, 4 O. 138; Collard vs. Donaldson, 17 O. 264; Tracy vs. Card, 2 O. S. 431; Mitchell vs. Towner, 7 W. L. J. 581; Raab's Estate, 16 O. S. 273, 282.

142 Bigelow vs. Bigelow, 4 O. 138.

That where one of two administrators is indebted to an estate and gives a joint bond, such indebtedness will be treated as an asset for which their joint bond is liable. Dorger vs. Woodward, 4 C. C. (N.S.) 623; 27 O. C. C. 123; affirmed, 74 O. S. 502.

If the executor does not inventory the debt and dies, yet his estate will be charged with the same, and the Probate Court has jurisdiction over such matter. Jones vs. Willis, 72 O. S. 189.

Where the administrator was principal, and the deceased surety on a note, which the administrator paid, this should be charged against the administrator as an asset of the estate, and he is liable on his bond. Yakey vs. Strunk, 18 Dec. 726; affirmed, 81 O. S. 568.

143 Tracy vs. Card, 2 O. S. 431; Mitchell vs. Towner, 7 W. L. J. 481; Collard vs. Donaldson, 17 O. 264.

144 Shields vs. Odell, 27 O. S. 398.

Where the surety on an unpaid note dies and the principal of the note is appointed administrator, the debt represented by said note is not chargeable as an asset of the estate, especially before the estate is required to pay the note. Urpham vs. Urpham, 1 O. App. 476; 21 C. C. (N.S.) 600; 35 C. C. 442.

145 Rossman vs. McFarland, 9 O. S. 369.

146 Goebel, 233.

147 Martin vs. Train, 6 C. C. 49; 3 C. D. 344.

Appointing a debtor as executor

There has been a good deal of controversy, from the seeming injustice of the matter, whether in the absence of fraud, the debt of an insolvent executor becomes assets of the estate, so as to charge his co-executor or sureties. Three cases appeared in the ninth C. C. Report. The first case is Brown vs. Harshman.[148] In this case it was held that the joint executor would not be liable for the debts of his insolvent co-executor.

In Perkins vs. Scott,[149] it was held that the sureties upon an administrator's bond are liable for the debt of the administrator, due the decedent regardless of the solvency or insolvency of said administrator.

And in the case of McCoy vs. Allen,[150] it was held that if it appeared to the Court that the administrator was insolvent at the time of his appointment, and continued so during the whole period of his administratorship, he should not be held accountable for the amount of such debt.

This matter was set at rest, however, by the Supreme Court, holding that the indebtedness of an executor to his testator is assets with which he is chargeable at its maturity, as so much money in his hands; and the sureties on his bond are liable for his failure to administer and distribute the same according to

will not extinguish his liability and it is sufficient consideration after his resignation to support a mortgage given by him to one entitled to the debts under a will. Collins vs. Nugent, 1 Cleve. 190; 3 B. 519.

But it is said that this doctrine cannot be resorted to to work a fraud. Thus, where the only person interested in the estate, the sole asset of which was due by J. who was insolvent, procured J. to be administrator, and by fraud induced the defendant to go on his bond for the sole purpose of making him liable for J.'s worthless debt. It was held that the fraud was a good defense. Campbell vs. Johnson, 41 O. S. 588.

An administrator is chargeable in his accounts as money in his hands, with all debts which he owes individually and unconditionally to the estate.

A debt which he owes as principal, and which is evidenced by his note, signed also by another person who is in fact only surety, is his individual and unconditional debt, and chargeable to him as money in his hands.

Debts owing to the estate by a firm of which he is a member, are not individual unconditional debts, and are not chargeable to him as money in his hands. James vs. West, 47 Bull. Sup. Ct. 750.

[148] 9 C. C. 1; 6 C. P. 10.

[149] 9 C. C. 207; 6 C. P. 226.

[150] 9 C. C. 607; 6 C. P. 659.

law and the will, although he was insolvent at the time of his appointment and continued to be so until the settlement of his final account. And the sureties will not be discharged from such liability by fraud of the executor in procuring their execution of the bond, where the beneficiaries of the estate, in whose interest the liability is sought to be enforced, are themselves innocent of the fraud.[151]

A debt existing in the lifetime of the testator against one who becomes executor of his last will, is transmuted into money in the hands of such executor by the force of sec. 10691, G. C., § 389; and no act of the executor can turn it again into the character of a mere demand or obligation. It could not be classed as an uncollectible or desperate claim, by reason of the insolvency of the executor; and the Probate Court has no jurisdiction to order the sale of an asset of this character as a desperate claim. If a sale is made under order of the Court, it carries to the purchaser no title.[152]

§ 391. Discharge of debt in a will against an executor, etc., how construed. "The discharge or bequest, in a will, of a debt or demand of a testator, against an executor named therein, or against any other person, shall not be valid as against the decedent's creditors, but shall be construed only as a specific bequest of such debt or demand. The amount thereof must be included in the inventory of the credits and effects of the deceased, and, if necessary, be applied in the payment of his debts. If not necessary for that purpose, it shall be paid in the same manner and proportion as other specific legacies." [R. S. § 6068.][153]

§ 392. A debt due from an heir or legatee is assets.

A debt due from an heir or legatee to an estate is an asset of such estate, and where the distributive portion of such heir or legatee is equal to, or greater, than such a debt, the administra-

[151] McGaughey vs. Jacoby, 54 O. S. 487; The case of Allen vs. McCoy, 9 C. C. 607; 6 C. P. 659, was reversed on the authority of the above case. 57 O. S. 641.

[152] Cheney vs. Powell, 20 C. C. 398; 11 C. P. 279.
See § 713, Accounting, etc.

[153] § 10690 G. C.
See § 457.

tor or executor should charge himself with the full amount of the same. This right exists whether the heir or legatee was indebted to the deceased before his death, or contracted a liability to the estate thereafter, or became in any way, indebted to the estate at any time before final settlement.[154]

Substantiating the above are two recent cases of the Supreme Court. In Martin vs. Martin,[155] it was held that the personal property of an intestate, who leaves neither wife nor children, passes to such of his brothers and sisters as survive him, and to the legal representatives of those who died before him, and children of a pre-deceased brother, take in a representative character and subject to the indebtedness of their principal to the intestate.

In Keever vs. Hunter,[156] it was held when lands of an intestate descend to his children, there being no personal estate for distribution, the interest of each child in the lands is subject to his indebtedness to the intestate.

It has recently been further held that a debt due an estate by a son is superior to a mortgage given by him, and will be deducted from his legacy, unless his interest in the lands comes by way of specific devise.[157]

154 *In re* Ellis, 5 N. P. 207.

155 56 O. S. 333.

156 62 O. S. 616.

157 Woodruff vs. Woodruff, 23 C. C. 408.

An heir indebted to an estate need not, when he is also administrator, turn it over to the estate. The amount due the heir should be treated as a credit on the amount due the administrator. Dorger vs. Woodward, 4 C. C. (N.S.) 623; 27 O. C. C. 123. Approved by Supreme Court in Lambright vs. Lambright, 74 O. S. —.

In this case the debt did not mature until after the death of decedent.

Where a devisee died before the testator, it is likewise held that a debt due from the devisee to the estate must be deducted. Baker vs. Carpenter, 48 Bull. 907; 69 O. S. —.

A note from son to father, which the father directs in his will shall be charged to the son, is an asset of the estate. *In re* Bullock, 3 N. P. (N.S.) 190; 15 Dec. 783; affirmed 75 O. S. —.

Generally before such a debt can be an asset it must not be barred by the statute of limitations. See § 760.

An inherited title to a share in ancestral real estate is not divested by the fact that such heir is indebted to the ancestral estate. There must be some proceeding in court to have such debt applied on the heir's interest, either on administration of the estate or a suit in partition. Lockwood vs. Whitlery, 23 Dec. 107.

§ 393. Assets not possessed by deceased.

Property may be assets in the hands of the executor or administrator, though never owned by the decedent. Within this principle is everything acquired by an executor or administrator by his use of or dealing with the estate. Everything acquired under contracts made by the decedent in his lifetime, or accruing after his death, by pre-existing contingencies or conditions, all increases or profits of the personal estate after the decedent's death,[158] such as money received from the United States government by an executor or administrator in consequence of a treaty with a foreign nation as indemnity for loss of property taken from the deceased,[159] damages assessed during the lifetime of a decedent for laying out a highway through his land, but not payable until one day after his death, is assets.[160]

In the same line include all rents and all profits derived from any use of the property of the decedent, such as continuing the business under a will;[161] or if money was loaned out, or put in bank, the interest therefrom would be assets.[162]

The right to a widow's allowance is an asset in the hands of her administrator.[163] Until liquidation the interest of a deceased partner does not become assets of his estate.[164]

[158] 11 Am. & Eng. Ency. of Law 836 2 ed.

[159] Grant vs. Bodwell, 78 Me. 460; Rogers vs. Hossack, 18 Wend. 319.

[160] See 11 Am. & Eng. Ency. of Law 845 2d ed.; Woerner on Admin. 646.

[161] Gondolfo vs. Walker, 15 O. S. 251.

[162] Diehl vs. Diehl, 3 Bull. 298.

[163] Bain vs. Wick, 14 O. S. 505; Dorah vs. Dorah, 4 O. S. 292.

[164] 11 Am. & Eng. Ency. of Law, 837 2d ed.

CHAPTER XXII.

ASSETS CONCEALED OR EMBEZZLED.

§ 394 Nature of proceedings.
§ 395 Proceedings when property of estate concealed or embezzled.
§ 395a When probate may reserve case to common pleas.
§ 396 Kind and scope of proceeding.
§ 397 Jurisdiction of court, etc.
§ 398 Complaint, etc.
§ 399 Parties.
§ 400 Form of complaint.
§ 401 Entry ordering citation, etc.
§ 402 Imprisonment for disobeying citation.
§ 403 Party failing to appear or refusing to answer.
§ 404 Form of commitment to jail.
§ 405 Examination to be in writing.
§ 406 Examination of witnesses to be in writing, etc.
§ 407 Comments. Form of examination.
§ 408 Judgment of Court thereon. Lien.
§ 409 Trial. Jury.
§ 410 Trial issues.
§ 411 Verdict, etc.
§ 412 Judgment.
§ 413 Transcript to be filed in Common Pleas and execution issued.
§ 414 If judgment in favor of the State, when prosecuting attorney to attend to it.
§ 415 Conveyances to evade these proceedings void.

§ 394. Nature of proceedings.

In addition to the ordinary remedies given to an administrator or executor to recover assets belonging to the estate of a deceased person, the legislatures of the various States have provided summary proceedings. They do not take away the ordinary remedies, but are intended to provide a more speedy and less expensive mode than by the original remedies, of bill of discovery, replevin, and other actions at law.

The statutes of no two States seem to be exactly similar, except that they are made to apply where the party conceals or embezzles, or wrongfully conveys away, property that belongs to the estate of a deceased. The statutes of our State have undergone a considerable change from their original wording.

At first[1] it was only contemplated that the party should be called before the Court and his evidence reduced to writing, evidently preparatory to some other proceeding. This section was extended by the act of 1853,[2] to provide for a regular hearing, and if the party was found to have concealed or embezzled, or conveyed away, assets, to render a judgment for the amount of the same, and the Court afterwards,[3] having found that the law was unconstitutional, it providing for a judgment to be taken without a right to trial by jury, the statute was amended, permitting the question raised to be tried by a jury. And later,[4] the Court having held that an action could not be brought against an administrator or executor, the statute was again amended to include and permit the action to be brought against an embezzling administrator. The reported decisions upon this kind of proceeding are very meager in Ohio.[5]

[1] See § 239 of the act of March 23, 1840; Curwen Statutes 755.

[2] O. L. vol. 51, 354.

[3] Howell vs. Fry, 19 O. S. 556.

[4] Meinzer vs. Bevington, 42 O. S. 325.

[5] The object of the proceeding is two fold,—a discovery of personal property to the end that the representative may obtain immediate possession; or to the end that it may be included in the inventory, but cannot be so included because the party proceeded against refuses to impart knowledge or information concerning the same. It is certainly not the object of the proceeding to enable the representative to collect debts due the decedent, and was not intended as a substitute for ordinary civil remedies in cases where the latter are appropriate. Redf. Sur. Prac. 463.

In Illinois the statute was construed as including property of the estate coming into the hands of the party charged since the death of the decedent; such as money collected on securities of the deceased when the securities themselves were taken during his lifetime. Blair vs. Sennett, 134 Ill. 78.

But in a later case the Court said that the "doctrine of that case should be limited to the facts thereof, and its language should be qualified so as to conform to such facts;" and it was held that the statute was inapplicable to compel the production of proceeds of collections made by an attorney for the administrator. Dinsmoor vs. Bressler, 164 Ill. 211.

"The remedy was cumulative to these, and the only change it intended to introduce from an ordinary trial involving the ownership of property was to enable the Court to compel the person charged with having the property to discover on oath whether he had property in possession." Per Walker, J., in Wade vs. Pritchard, 69 Ill. 279. See also Martin vs. Martin, 170 Ill. 18, 27.

The object is a discovery to the end that measures may be taken in

§ 395. Proceedings when property of estate concealed or embezzled. "Upon complaint made to the probate court or the common pleas court of any county, by the executor, administrator, creditor, devisee, legatee, heir or other person interested in the estate of a deceased person, or by the creditor of any devisee, legatee, heir or other person interested in such estate, against the executor or administrator of such deceased person, or against any person suspected of having concealed, embezzled or conveyed away moneys, goods, chattels, things in action, or effects of such decedent the court shall cite such executor, administrator, or other person suspected, forthwith to appear before it to be examined, on oath, touching the matter of the complaint." [R. S. § 6053.][6]

395a. When probate may reserve case to common pleas. "When complaint is made to the probate court and a jury is demanded by either party, the court may forthwith reserve the case to the court of common pleas for hearing and determination, and it thereupon shall proceed in all respects as though the complaint had been originally made therein." [R. S. 6053.][6*]

§ 396. Kind and scope of proceeding.

It is generally held that it was not the intention of the legislature to confer upon the court in the way of a proceeding brought under the above section, the power to try the right of title to property or recover a money judgment therefore, except where the party charged in a complaint made, is guilty of having concealed, embezzled or conveyed away some property belonging to the estate of the deceased. If it can not be ascertained that the party is guilty of one of these three things, no judgment can be rendered. Therefore if the party charged with having concealed, embezzled or conveyed away the property, produces such property and claims an ownership therein, no judgment could be rendered against him in this kind of

the proper court for its recovery; the Probate Court is not such a court. Dodge vs. McNeil, 62 N. H. 168. See § 1586, Assignments.

[6] § 10673 G. C.

The purpose of this section is to provide a speedy remedy. Leonard vs. State, 3 O. App. 313; 20 C. C. (N.S.) 340.

[6*] § 10674 G. C.

This section does not authorize proceedings against an administrator or executor by a creditor of heir. Memzer vs. Bevington, 42 O. S. 325.

The burden of proof is on the plaintiff. Leonard vs. State, 20 O. C. C. (N.S.) 340; 3 O. App. 313.

It is now held that the statutes of Ohio, as they now stand, provide for the trial of the right of property in the Probate Court, and proceedings before that court pursuant thereto may be pleaded in bar to an action in another court to try title to or right of possession of the property involved in the proceedings. Tibbott vs. Cadish, 28 O. C. A. 481. Motion to certify overruled in Supreme Court May 18, 1916. The court bases its decision on *In re* Huffman, 132 Mo. App. 44.

proceedings. The administrator or executor would be compelled to resort to other remedies provided by law.[7]

If, however, the party charged is found guilty of having concealed, embezzled or carried away property of the deceased, then a judgment may be rendered for its full value. The proceedings is somewhat similar to a bill of discovery, wherein it provides that the party charged may be brought before the Court, both to answer concerning the property which he is charged to have had, and to suffer imprisonment if he refuse to answer. It is much more expeditious than some of the ordinary and usual proceedings, and is intended no doubt to be used where the party charged is wrongfully eluding the vigilance of an interested person in ascertaining the wherabouts and value of the property of the deceased. And so the power is given to order the party to appear and answer at once without giving him notice, for by having notice he may further conceal or put away property which it is sought to recover for the benefit of the estate.*

§ 397. Jurisdiction of court, etc.

The action may be brought in either the Probate Court or the Common Pleas Court of any county in the State in which the defendant can be served with process. There are no limitations as to what county in the State action shall be brought. There might often exist good reasons for permitting the action to be brought wherever a person charged might be found. The nature of the act is such that it may be presumed that the party will endeavor to elude any process which may be brought to compel him to divulge the sought for information, and that if he is base enough to embezzle or defraud the estate, he will also endeavor to keep out of the reach of the law. And for that reason the statute no doubt purposely has permitted the action to be brought in any county of the State; and there being no other limitation, we may presume that it may be brought in any county where the defendant can be served. If a jury is demanded

[7] See Woerner on Admin. 679.
All personal property vests in the administrator from the time of the death of decedent. Sullivan vs. Sullivan, 12 O. L. R. 224.
No action will lie in equity to recover heirlooms, etc. Ireland vs. Loomis, 17 C. C. 37; 9 C. D. 393.

* See Jennie Tibbott, Admr., vs. Cadish, 32 O. C. A. 161, where it is held that the court has the right to try the title to the property, and the judgment rendered is binding upon any other court on the question as to title to the property.

and the action is brought in Probate Court, the Court may reserve it, to the Common Pleas, where the same proceeding shall be had as if it were originally brought there; and it seems that if a judgment is rendered in the Probate Court, a transcript shall be filed in order to make the finding effective in the Court of Common Pleas.

§ 398. Complaint, etc.

The statute does not prescribe in what manner the complaint shall be made or what it shall contain. But as it is expected that the Court will act upon the filing of this complaint, it should set forth sufficient facts to make out a *prima facie* case of the matter charged. While the proceedings might not be fatally defective for want of proper allegations in the complaint, yet no case is such that the complaint really ought not to contain all the substantial allegations required to sustain the action. It ought to set out, in addition to the names of the parties, the kind, nature, character and value of the property that the person charged with having concealed, embezzled or conveyed away, has had in his possession. It also ought to state, if possible, whether he is charged with having concealed, or with having embezzled, or with having conveyed away such property. In other words, the defendant ought to be able to ascertain from the complaint just what he is charged with. It ought to be sworn to. Of course the affidavit need only be upon information and belief. It ought to set out the character and the interest of the person making it.[8]

In Harris vs. Westervelt,[10] it was held that it was not improper to join in one proceeding an application for the recovery

[8] If the affidavit alleging concealment or embezzlement do not affirmatively show that the party making it has an interest in the estate it is defective and gives the Court no jurisdiction of the person complained of; and where the defendant in such case appeals to the Common Pleas Court, in which there is a trial *de novo*, it is too late to file an amended affidavit by the administrator, who has not before appealed. But the affidavit may be amended in the Probate Court. Woerner citing.

Shaw vs. Groomer, 60 Mo. 495; Wade vs. Pritchard, 69 Ill. 279; Blaid vs. Sennett, 134 Ill. 78.

[10] 15 C. C. 534; 8 C. D. 367.

of assets of an estate and for the removal of the administrator of such estate. It seems to me, from the reading of that case, that it was not in fact a joinder of two causes of action, but that it might very properly have been considered to have been an action brought to recover concealed assets. The matter of removing the administrator, follows, by virtue of the statute, which provides that if he is found guilty of such charge, he must be removed by the Probate Court.

§ 399. Parties.

The statutes providing for these proceedings being penal as well as summary, are to be strictly construed. Therefore no one can bring the proceedings who does not come within its terms. Neither can they be brought against any one not specifically mentioned therein. Therefore, before the section was amended in its present form, the Supreme Court held no such action could be maintained against an executor or administrator.[11]

And, in another case, it was held that a party was not liable who merely assisted another to get possession of the property, and who did not then have any control over it.[12]

It would seem therefore, before a judgment could be rendered against anyone, the person must have at some time held the property subject to his own control.[13]

It will be observed that the statute gives to the executor, administrator, creditor, devisee, legatee, heir or other person interested in the estate, the right to maintain the action. That it may be brought against the executor or administrator, or any person or persons suspected of having concealed, embezzled

[11] Meinzer vs. Bevington, 42 O. S. 325.

[12] *In re* Sattler, Goebel 183.

[13] In the case of *In re* Sattler's *supra* the deceased divided certain bonds among his children; they met and divided them. Afterwards a citation was brought to compel them to turn them over to the administrator. One of the heirs refused so to do. It was held that the mere fact that the other heirs anticipated in the division of the bonds, did not make them liable for the amount of the bonds they had agreed might be turned over to the heir who refused to surrender them to the administrator. The Court rendered judgment, however, against such refusing heir.

or conveyed away the property. The proceedings cannot be maintained by one of two administrators against the other, for the reason that each of them has full control of the assets. Where the action is brought by two or more administrators, all of them should be made parties.

§ 400. Form of complaint.

(*Title.*)

The undersigned A. B. (here state whether the party making the complaint is executor, administrator, creditor, devisee, legatee, heir of the deceased, or if he is interested in any manner, he should set out in what manner he is interested). And respectfully represents that he has good cause to suspect and does verily believe that C. D. of said county has (here state whether he has concealed, embezzled, or conveyed away) certain goods, chattels, and effects of said deceased. The same being to the best of his knowledge and belief is as follows: (Here describe the article or whatever it may be that is charged to have been concealed, embezzled, or carried away.) In fraud of the rights of the undersigned and others interested in said estate. Wherefore he asks that a writ of citation may issue against said C. D. that he may be compelled to answer under oath, touching the matters of this complaint, that such other proceeding may be had in the premises as is authorized by law.

.....Sign.

State of Ohio,

.....County, ss.

A. B. being duly sworn says that the allegations of the above complaint are true, as he verily believes.

.....Sign.

Sworn to and subscribed before me and in my presence, this.....day of .....

.....

§ 401. Entry ordering citation, etc.

While the statute does not contemplate a hearing upon this complaint before a citation is issued, and while there is nothing said as to the evidence required before the judge is to act, yet the statute being analogous to the one in New York, in which it is required that before the judge issues a citation, he must be satisfied of the truth of the complaint; it may be said that a safe rule to be followed in our State would be, that the Court should be satisfied that there is good cause for issuing the citation before it is done. No one in this summary manner should be dragged into court without at least some evidence of a cause

against him.[14] The Court having determined to issue a citation, the following may be used as an entry:

FORM OF ENTRY.

(*Title.*)

This day came A. B. and filed herein his complaint, praying that a citation be ordered against C. D. to appear in this court to be examined, touching his alleged (here state what the charge is) of certain effects of the estate described in said complaint; and it appearing to the court that a citation should issue thereon; therefore it is ordered that a citation be issued and directed to the sheriff of.....county, ordering the said C. D. to appear before this court for (here mention a day) to be examined, touching his alleged concealment (or other matters charged).

FORM OF CITATION.

(*Title.*)

To the Sheriff of said County, greeting:

Whereas complaint has been made to the Probate Court of said county against C. D., charging him with having concealed (embezzled or conveyed away) the assets of the estate of E. F., deceased. You are, therefore, required to summon the said C. D. to appear before said court forthwith (or if special time fixed by the court, so state)to be examined on oath, touching the matter of said complaint. Hereof fail not; and of this writ make legal and due returns.

Witness my signature and seal of the Probate Court.

.....

Probate Judge.[15]

§ 402. **Imprisonment for disobeying citation.** "If a person so cited, refuses or neglects to appear and submit to an examination, or refuses to answer interrogatories lawfully propounded, the court issuing the citation shall commit such person to the jail of the county, there to remain in close custody until he submits to its order and direction in that behalf." [R. S. § 6054.][16]

[14] It is said that the allegations on the part of the petitioner may be exclusively on information and belief, without disclosing the sources or grounds thereof; the only prerequisite to the issuing of a citation being the satisfaction of the Surrogate that there are reasonable grounds for the inquiry. But a petition only stating petitioner's belief, without disclosing any fact, is fatally defective. Delay in making the application, e. g., eleven years after decedent's death, will defeat it; especially where the application is apparently for inquisitorial purposes only. Redf. Sur. Prac. 465.

[15] This citation must be served and returned, the same as summons.

[16] § 10675 G. C.

§ 403. Party failing to appear or refusing to answer.

If a party fail to appear, the Court may, by attachment, order him to appear,[17] or it may proceed and order his imprisonment. If he appears and refuses to answer, he may be imprisoned. The entry may be as follows:

(*Title.*)

This day came E. F. before the court upon a citation heretofore issued, and the following interrogatories were propounded to him, touching the charge against him (here state the interrogatories) and the said E. F. refuses to answer the same.

Therefore it is adjudged by the Court, that the said E. F. be committed to the jail, and there to remain in close custody until he shall submit to answer or otherwise be legally discharged.

§ 404. Form of commitment to jail.

State of Ohio.

.....County, ss.

In Probate Court.

To the Keeper of the Jail of said County, Greeting:

Whereas the.....day of....., C. D. having been legally brought before said court for examination touching, an alleged (here state them) by him of certain goods, moneys and things, in action of the deceased late of said county. The following interrogatories were propounded to him (here state which he refuses and still refuses to answer, contrary to the statute in such cases made and provided). Wherefore he has been ordered by said court to be committed to the jail of said county, there to remain in close custody until he shall submit to the order and direction of the court in that behalf.

You are therefore commanded to receive the said E. F. in your custody in the jail of the county aforesaid, there to remain until he shall submit to the order and direction of the court aforesaid, or till he be discharged by due course of law.

Given under my hand and seal of said court, on this....day of.....

.....Sign.[18]

§ 405. **Examinations to be in writing.** "Such examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed in the court before which they were taken." [R. S. § 6055.][19]

§ 406. **Examination of witnesses to be in writing, etc.** "If required by either party, the probate court shall swear such

[17] If he fails to appear he is guilty of contempt and may be proceeded against accordingly.

[18] See § 5648 R. S., As to release from imprisonment.

[19] § 10676 G. C.

other witness or witnesses as may be offered by either party touching the matter of such complaint, and cause the examination of every such witness, including questions and answers, to be reduced to writing, signed by the witness, and filed as aforesaid." [R. S. § 6056.][20]

§ 407. Comments. Form of examination.

Under the present form of the statute, which provides that the matter in controversy may be tried by the Court, or by the jury, the utility of the provisions of the above sections requiring examination to be reduced to writing, are not very apparent, but when we consider the two-fold character of the proceeding, that is, one as an action for discovery and the other as one to recover a judgment for the value of the property, it becomes clearer. Our administration laws were taken from the statutes of Massachusetts, and in that State the proceeding is treated more in the nature of an auxiliary one, and therefore evidence in a case of this character might justify the administrator or other party to pursue an action at law to recover the articles or the value of the articles embezzled. And so, when testimony is reduced to writing, the administrator might, if the discovery is sufficient, find it more to the interest of the estate to proceed in an action at law, and recover the specific articles by an action of replevin, than to proceed and get a judgment against an offending party. It is provided in some States that the Court may make an order directing the turning over of the specific articles found in the possession of the offending party. But our statute contains no such provision.[21]

[20] § 10677 G. C.

[21] Welch, J. We think the Court of Common Pleas erred in ordering the written examination to be stricken from the transcript. They are a very important part of the proceeding, and, indeed, the only part which the statute directly requires to be recorded. Without them it is impossible to say whether the court had jurisdiction, it is impossible to find anything which gave it power to render the judgment. If the examinations showed that the defendant assented to the truth and justice of the charges, the court had authority to render the judgment. Howell vs. Fry, 19 O. S. 556.

The following are comments upon the Massachusetts statute: "The authority given to the Probate Court by the above provisions, extends only to an examination for the purpose of discovery. No other power is giv-

FORM OF EXAMINATION.

State of Ohio,

.....County, ss.

In matter of the Estate of

E. F., deceased.

C. D., being first duly sworn by me to make true answer to such questions as may be legally propounded to him, touching the matter of the complaint in the case, deposes and says:

Question.....?

Answer.....

.....Signed.

§ 408. Judgment of Court thereon. Lien. "By the verdict of a jury, if either party requires it, or without, if not required, the court shall determine whether the person or persons accused is or are guilty of either having concealed, embezzled or conveyed away moneys, goods, chattels, things in action or effects of such deceased persons, and if found guilty, the amount of damages to be recovered on account thereof. In all cases except when the person so found guilty is the executor or administrator of such deceased person, the court forthwith shall render judgment in favor of the executor or administrator, or if there be no executor or administrator in this state, in favor of the state, against the person or persons so found guilty for the amount of the moneys or the value of the goods, chattels, things in action, or effects so concealed, embezzled or conveyed away, together with ten per cent. penalty and all costs of such proceedings or complaint, which judgment shall be a lien upon the real estate of the person or persons against whom it is rendered within the county from the rendition thereof. If the person so found guilty is the executor or administrator of such deceased person, the court forthwith shall render like judgment in favor of the state against him for such amount or value, together with penalty and costs as aforesaid." [R. S. § 6057.][23]

Judgment a lien. "Such judgment shall be a lien upon the real estate of the executor or administrator, within the county from the rendition thereof. The probate court must forthwith remove such executor or administrator and commit the administration of the estate, not already administered, to

en. The examination is not to be controlled by other evidence, nor can relief be directly granted upon it by any decree of the Probate Court. The process can only result in a disclosure of facts to serve as the basis of the proceedings."

Smith Probate law 157.

Under our statute the Probate Court can render judgment and grant full relief. Tibbott vs. Cadish, 28 O. C. A. 481.

some other person or persons. The executor or administrator so removed, shall not receive compensation for acting as such, and must be charged in his account with the amount of such judgment. His property also shall be liable for the satisfaction of the judgment on execution issued thereon by his successor, who, when the judgment is rendered by the probate court, must file a transcript with the clerk of the common pleas court and cause such proceedings to be had as are contemplated in the next following section." [R. S. § 6057.][23*]

§ 409. Trial. Jury.

If the party appearing before the Court desires the matter to be tried by a jury, then it would be the duty of the Court to order the empanelling of a jury; and the trial would then proceed as an ordinary jury trial or the court may reserve the case to the Court of Common Pleas. Section 10174 G. C. (§ 395a). If no such jury is demanded, the court will proceed to hear the case. Whether or not where a cause is being tried by the court or jury, on the issue of guilty or not guilty of the charges made in the complaint, the testimony must be reduced to writing and signed by the party, is a very serious question. But as most courts are now provided with official stenographers, or if not so provided, the testimony can easily be reduced to writing; it would be the safer course to have it reduced to writing. The entry ordering a trial by jury may be as follows:

(*Title.*)

This day this cause came on to be heard and E. F. having demanded a jury to try the issue thereon, it is ordered that a notice issue to the clerk of the Court of Common Pleas, and the sheriff of.....county, to draw 12 names from the jury box to serve as a jury herein as provided by law; that said clerk certify the names of the list so drawn in the order in which they are drawn to this court, and that venire issue for said jurors, returnable as required by law that they appear in this court on the..... day of....., at.....o'clock, for the trial of said cause.[24]

ORDER TO DRAW JURY.

Probate Court.....County, Ohio.

.....*vs.*.....

To the Clerk of the Court of Common Pleas and the Sheriff of.....County:

[23] § 10678 G. C.

[23*] § 10679 G. C.

[24] As to jury proceedings, etc., §§ 1702, 1761.

It would be unconstitutional not to give opportunity to have a jury trial. Howell vs. Fry, 19 O. S. 556.

You are hereby notified and directed, forthwith on the receipt hereof, to draw....names from the box containing the names of persons selected as jurors for the county, to serve as jurors.....in the Probate Court of said.....County, and the clerk aforesaid will return to me this writ with a list of the names so drawn endorsed thereon.

Witness my hand and the seal of said Probate Court, this.....day of .....A. D. 190..

.....Probate Judge.

CERTIFICATE OF JURORS.

The State of Ohio,

.....County, ss.

Court of Common Pleas.

To the Honorable Probate Judge of said County, Greeting:

Pursuant to your notice of.....190.., I have with the sheriff of said county, on this.....day of.....190.., drawn, according to law, the following names from the box containing the names of persons selected as jurors for the County, to-wit: (Here insert names and residences of jurors drawn).

Witness my signature and the seal of the Court of Common Pleas of said county, this.....day of.....190...

.....Clerk.

By.....Deputy Clerk.*

VENIRE FOR JURY, IN PROBATE COURT.

The State of Ohio,

.....County, ss.

Probate Court.

To the Sheriff of said County, Greeting:

We command you that, without delay, you summon (here insert names and residences of jurors summoned) to be and appear before the Probate Court of said County of.....at the court house within and for said county, on.....the.....day of .....A. D. 190.., at.....o'clock...M., and so from day to day until discharged, then and there to serve as jurors; ..... and how you shall execute this writ make appear to our said court on the day above named, and have you then and there this writ.

*(a) In Municipal Appropriation case, Sec. 2240, or Municipal Damages case, § 2317, *twelve*, or such less number as may be agreed upon by the parties are to be drawn.

(b) In Drift removal case, § 4577, or Road case, §§ 4628 and 4700, *twelve* are to be drawn.

(c) In County Ditch case, § 4465, *sixteen* are to be drawn.

(d) In Criminal case, §§ 6466, 5167, *twelve* are to be drawn.

NOTE.—After the clerk of Common Pleas Court has certified the above list to the Probate Judge the venire for them is to be issued by the Probate Judge. (§§ 4465, 6466.)

Witness my signature as judge and ex-officio clerk of said court, at .....this.....day of.....190..

.....

Probate Judge and ex-officio Clerk of the Probate Court.

By.....Deputy Clerk.

The State of Ohio,

.....County, ss.

Sheriff's Office,.....190..

On the.....day of.....190.., I received this venire and served the same on the several persons therein named, at the times and in the manner placed opposite their names endorsed hereon. (Here insert names of jurors drawn, when served, how served, and number of miles distant from court house.)

....., Sheriff.

§ 410. Trial issues.

The issue in a trial of a matter provided for under sections of the General Code commented on, in this chapter is, was the party who has been cited to appear before the Court guilty of having concealed, embezzled or conveyed away any of the money, goods, chattels, things in action, or effects of the decedent? If the party is not guilty of having either concealed, or embezzled, or conveyed away any such property, then no judgment can be rendered against him, and the proceedings should be dismissed. The statutes of New York provide that, if the party files an answer duly verified, claiming to own the property or have a lien thereon, that it would be a good defense to the action. Our statute does not so provide, but if on trial it be shown that the party offending holds the property by virtue of a claim of ownership, or some other legal cause for so doing, he cannot be found guilty of charges made, of concealing, embezzling or conveying away, etc. The exceptions might be in the case where the party charged had conveyed away the property; then it would be no defense to merely claim an ownership. But if he proved an ownership, he could not be found guilty of having conveyed away property of the deceased; and in this way the title of the property might be tried in these proceedings. But where it is shown that the defendant still holds the property unconcealed and unappropriated to his own use, the action should be dismissed and the administrator pro-

ceed at law to recover the property. If the verdict of the court or jury be that the offending party is guilty, then the court should render up judgment as provided in the statute. In such case they should then also find the value of the property concealed, embezzled or conveyed away. The burden of proof is on the plaintiff.[24a]

§ 411. Verdict, etc.

If the case is submitted to a jury, the usual proceedings pertaining to a jury trial can be followed; and the general practice applicable to such trials would be applicable to a proceeding under this chapter. Form of verdict may be as follows:

(*Title.*)

And the said jury being empaneled in this cause, do upon their oath aforesaid, say that said C. D. is guilty as charged in the complaint filed herein; and the said jury do assess the value of the property so concealed (embezzled or conveyed away) at.....dollars.

....., foreman.

The entry upon the return of such verdict may be as follows:

(*Title.*)

Now comes the said parties by their attorneys, and thereupon came the jury, to-wit: (here insert names of jury) who being empanelled and sworn the truth to speak, upon the issue joined between the parties, having heard the evidence and arguments of counsel upon their oath aforesaid say (here copy the verdict).

(If the motion for a new trial is filed, nothing further should be done until that is disposed of. If the court is informed that no motion for a new trial will be filed it may proceed to render judgment as provided in the following section.)

§ 412. Judgment.

If the verdict of the Court or of the jury be that the offending party is guilty, then the Court shall forthwith render judgment for the amount or value of the goods concealed, embezzled or conveyed away. If the case is tried by a jury, undoubtedly the jury should find the value of such property. The Court will add the penalty. If the application is filed against an executor or administrator in the same court which made the appointment, the judgment should also be entered removing the executor or administrator; for, if he is found guilty, the statute

[24a] Leonard vs. State, 3 O. App. 313; 20 O. C. C. (N.S.) 340.

seems to be mandatory in requiring his removal. The following may be used as forms of entries:

FORM OF ENTRY WHEN SUBMITTED TO COURT.

(*Title.*)

This day this cause came on to be heard upon the complaint of A. B., charging C. D. of having concealed (embezzled or conveyed away) the property, goods and chattels belonging to the estate of E. F., no jury having been demanded by either party; and the same was submitted to the Court upon the testimony of the said C. D. and other witnesses, and the arguments of counsel. Whereupon Court finds that the said C. D. is guilty of having concealed (embezzled or conveyed away) the following described goods and chattels belonging to the estate of the said E. F. (here describe the same). And the Court further finds the value of said property to be.....dollars.*

It is therefore considered and adjudged by the Court that the said G. H., administrator of the estate of E. F., deceased, recover against C. D. said sum of.....dollars, with 10 per cent. penalty thereon, amounting to.....dollars, costs of this proceeding taxed at..... dollars.

If the judgment be against an administrator or executor, it may be in the following form, commencing from the star in the above:

It is further considered and adjudged by the Court, that the State of Ohio, for the use of the estate of E. F., deceased, recover against the said A. B. the sum of.....dollars, and the cost of this proceeding taxed at.....dollars.

And it is further ordered by the Court that the said C. D., administrator, be removed from his said trust, and that he be required to file an account herein within.....days.

If the case was submitted to a jury and the verdict rendered by them, the following form of entry may be used:

(*Title.*)

This cause having been submitted to a jury, the same having been demanded by....., and the jury having found the defendant guilty, and assessed the value of the property by him concealed (embezzled or conveyed away) at.....dollars, and the said defendant having filed his motion for a new trial, which was submitted to the Court and by the Court overruled, it is now further considered and adjudged by the Court that the said C. D., administrator of the estate of G. H., recover against the said A. B. the said sum of.....dollars, with 10 per cent. penalty thereon, amounting to.....dollars, costs of this proceeding taxed at.....dollars.

If the administrator or executor is an offending party, then beginning from the star down should be changed in the preceding form.

§ 413. Transcript to be filed in Common Pleas and execution issued. "The executor or administrator in whose favor such a judgment has been rendered by the probate court, may forthwith deliver to the clerk of the common pleas court in the county, an authenticated transcript which the probate judge on demand of such personal representative shall make out and deliver to him. On such transcript the clerk forthwith must issue an execution of the common pleas court for the amount of the judgment and costs, and the costs accrued, or that may accrue thereon. Thenceforth proceedings on execution shall be the same as if the judgment had been rendered in such court." [R. S. § 6058.][25]

§ 414. If judgment in favor of the State, when prosecuting attorney attend to it. "If such judgment is rendered in the name of the state, and there is no executor or administrator within this state, the prosecuting attorney of the county must cause the transcript to be filed in the clerk's office, and proceed thereon to execution as before provided. He shall pay the money realized upon such execution to the treasurer of the county, for the use of such estate, reserving such compensation only to himself as the probate court allows." [R. S. § 6059.][26]

§ 415. Conveyances to evade these proceedings void. "All gifts, grants or conveyances of land, tenements, hereditaments, rents, goods or chattels, and all bonds, judgments or executions, made or obtained with intent to avoid the purposes of these proceedings, or in contemplation of any such examination or complaint, shall be void and of no effect." [R. S. § 6060.][27]

[25] § 10680 G. C.
[26] § 10681 G. C.
[27] § 10682 G. C.

CHAPTER XXIII.

PARTNERSHIP ASSETS.

§ 416 Right at common law.
§ 417 Duties of surviving partners.
§ 417a Foreign executor or administrator.
§ 417b When surviving partners may make application.
§ 418 Where and by whom application to be made.
§ 419 Application.
§ 420 Entry ordering notice, etc.
§ 421 Form of notice of hearing application for appointment of appraisers.
§ 422 Form of entry ordering appraisement.
§ 423 Form of inventory and appraisement.
§ 424 Entry confirming appraisement, etc.
§ 425 Oath. Inventory, how made, etc.
§ 426 When executor, etc., to have appraisement made.
§ 427 When survivor may purchase partnership property.
§ 427a Bond of surviving partner.
§ 427b When survivor refuses to purchase.
§ 427c Will may define manner of settlement.
§ 428 Application of surviving partner to take at an appraisement.
§ 429 Form of bond of surviving partner.
§ 430 Entry of court approving election, etc.
§ 430a When bond to be filed.
§ 430b Evidence of notice.
§ 430c Presentment of claims.
§ 430d Account of surviving partner.
§ 430e Discharge of surviving partner and sureties.
§ 430f Where surviving partner elects to take after giving bond.
§ 431 When partner fails to take.
§ 432 When statute does not apply.
§ 433 Right of surviving partner.
§ 434 Where executor is surviving partner.
§ 435 Executor continuing the business.
§ 436 Administrator carrying on business.
§ 437 How partnership real estate to be conveyed.
§ 438 What is partnership real estate.
§ 439 Form of executor's deed.

§ 416. Right at common law.

At common law the surviving partner, in the absence of a contract to continue the partnership after the death of a deceased partner, has the sole right to wind up the business and whatever remains in his hands after the partnership is closed up, and nothing more, is an asset which could be collected by an administrator. Unless the contract so provided, the administrator had no authority whatever over partnership assets. Neither has the administrator now any right, even by consent of the surviving partner, to participate in the business of the partnership, unless the contract of partnership gives such a right, or the will of the decedent so provided.[a] The common law is still in force in Ohio unless abrogated by statute.[b] In

Applies to both the professional and commercial partnership. Champion vs. Williams, 2 N. P. 329; 2 Dec. 388.

Does not abolish right of surviving partner when so directed by will to continue partnership. Covington Bank vs. Wight, 4 N. P. 173; 6 Dec. 352.

Surviving partner does not become owner until statute is complied with. Phoenix Ins. Co. vs. Callahan, 63 O. S. 265.

[a] See § 8092 G. C.; § 427c.

[b] Insurance vs. Callahan, 19 O. C. C. 97; 11 C. D. 225; Jones vs. DeCamp, 2 N. P. (N.S.) 169.

order to protect the estates of deceased persons and give to its legal representative the power to speedily settle up the affairs of the partnership, as well as to protect the rights of the surviving partner, the sections of the General Code in this chapter were passed by our legislature. It was for the benefit of the deceased person's estate, rather than for the remaining partner, that these laws were enacted.[1]

These provisions, probably, do not oust the jurisdiction of a court of equity to wind up a partnership which has been dissolved by death. Neither do they deprive the surviving partner of his right over the partnership property until a receiver is appointed, or he accepts the privileges of the statutes and takes the property at the appraisement.[2]

It will not be within the scope of this work to enter into an extended discussion of the rights of a surviving partner of a deceased.[3]

§ 417. Duties of surviving partners. "When a member of any partnership in this state dies, the surviving partner or partners, upon the appointment of an executor or administrator of the estate of such deceased partner, shall, forthwith, make application to the probate court of the county in which the partnership existed, upon first giving notice of the time of the hearing of such application to the executor or administrator, for the appointment of three judicious disinterested appraisers, who shall make out, under oath, a full and complete inventory and appraisement of the entire assets of the partnership, including any real estate, together with a schedule of the debts and liabilities thereof, and deliver it to the surviving partner or partners, to be by him or them forthwith filed in the probate court of the county in which such appraisers were appointed." [R. S. § 3167.][4]

[1] Remmelsberg vs. Mitchell, 29 O. S. 22.

[2] In Ohio the statute is entirely silent as to what shall be done with the firm's property between the death of the partner and the appointment of a receiver. At common law, the right of the surviving partner to administer upon the partnership estate, is not taken away from him except upon one contingency, that is, when he offers to buy the interest of the deceased partner. Until that contingency happens, the surviving partner, and no one else, has the possession and control of the partnership property, subject, of course, to equitable rights of the representatives of the deceased partner and of the firm's creditors to see that the duties of the surviving partner are properly performed. Pugsley, J. *In re* Estate of Crane, 29 Bull. 93; 4 Dec. 398.

[3] See Champion vs. William, 2 N. P. 329; 2 Dec. 388.

See § 382, As to what constitutes good will, etc.

[4] § 8085 G. C. This and the following sections provide the method whereby partnerships are to be wound up when one partner dies, and it is exclusive of any rights which the partner may have had at common law. Insurance vs. Carnahan, 19 O. C. C. 97; 11 C. D. 225, and the rights of decedent's estate and of surviving partners are defined in this and the following sections. Jones vs. DeCamp, 2 N. P. (N.S.) 169. But just how far the will of a deceased partner controls has never been judicially determined.

§ 417a. Foreign executor or administrator. "When the executor or administrator is appointed in a county other than that in which the partnership existed, a certified copy of such inventory and appraisement must be forthwith filed by such surviving partner or partners in the probate court of that county, and it shall be docketed under the settlement of the estate of the deceased partner. When the whole, or a part of the assets of such partnership consists of real estate, it shall be inventoried and appraised upon a separate schedule, which schedule must be recorded in the record of inventories in such court." [R. S. § 3167.][4*]

§ 417b. When surviving partners may make application. If the person or persons entitled to administer upon the estate of such deceased partner, fails or neglects for thirty days after his death, to take out letters testamentary or of administration, such surviving partner or the partners may make application to the proper court and cause the estate of the deceased to be administered upon." [R. S. § 3167.][4†]

§ 418. Where and by whom application to be made.

It will be observed that the preceding sections make it the duty of the surviving partner to at once,[5] upon the appointment of an administrator of the estate of the deceased partner, to make application to a Probate Court of the county in which the partnership is situated, to have an appraisement. This power of asking for an appraisement does not exist until there is an administrator or executor appointed. If no other interested party procures the appointment of an administrator or executor, the surviving partner may make such application and have some one appointed, provided thirty days have elapsed since the death of the deceased partner. No such appraisement can be had without notice to the executor or administrator. While the notice might be given before the application is filed, yet if the executor is unwilling to enter his appearance, it might be

4* § 8086 G. C.

4† 8087 G. C.

[5] The former statute allowed thirty days.

Remmelsberg vs. Mitchell, 29 O. S. 22.

This section only gives the surviving partner the right to hasten the administration; it does not authorize the same to make an appointment otherwise than is provided by see § 10617 G. C. § 114. Page vs. Warnock, 25 O. C. C. 695.

It has been held that if no person entitled by law appears within thirty days, and takes out letters, that after that time, the court may make an appointment without notice to the next of kin. *In re* Est. of John W. Warnock, 1 N. P. (N.S.) 287 (1903); 20 L. R. 528; 15 Cir. D. 695.

It would not give him the right to be appointed administrator. Page vs. Warnock, 1 N. P. (N.S.) 287; 14 Dec. 278.

better to file the application, and let the Court order notice to be given and set a day for hearing. If the administrator or executor makes application for the appraisement, like notice should be given the surviving partner.[6]

The title of a surviving partner, who takes the assets of a partnership in proceedings had in the Probate Court under this act, is not vitiated by the fact that the appraisers were appointed by the Probate Court upon the recommendation of the parties, and that the appraisers returned under oath, as their report, an inventory and appraisement previously made by them at the request of the surviving partner, and the personal representative of the deceased partner.[7]

§ 419. Application.

The statute does not indicate what the application should contain. But it should show the jurisdictional facts upon which the authority of the Court rests to make the order, which would be, *first,* that the party making the application is the surviving partner of the partnership existing at the death of the deceased; and, *second,* that there has been an executor or administrator appointed. The application can be in the following form:

(*Title.*)

The undersigned, I. J., respectfully represents that he is the surviving partner of the late firm of I. J. & Co., composed of the said I. J. and A. B.,

[6] The first question arising under this act is, do its provisions apply in a case where the surviving partner is one of the personal representatives of the estate of the deceased partner? Whether they would or not, where the survivor is the sole representative, we need not now inquire. It would seem, however, that the statute only contemplates a case where a person, other than the surviving partner, represents the estate. But we think, nevertheless, that the terms as well as the purpose of the act may be fully satisfied and accomplished by its application, if the case be one in which the estate is represented by an executor or administrator who is not the surviving partner, although the survivor may also stand in the relation of personal representative to the estate. Under our system of administering estates, where the trust is confided to two or more persons, any one of them may bind the estate without the concurrence of his co-representatives.

[7] Remmelsberg vs. Mitchell, 29 O S. 22; see 44 O. S. 69.

deceased, which firm were doing business in.....county, State of Ohio, at the time of the death of the said A. B.; and on the.....day of....., the said A. B. died intestate (or testate) and the said C. D. has been duly appointed and qualified as administrator (or executor) of his estate and is still acting as such. Wherefore the undersigned makes application for the appointment of three judicious disinterested persons to act as appraisers to make a full and complete inventory and appraisement of the entire assets of the said partnership, including real estate, if there be any, together with the schedule debts and liabilities thereon, according to the statute in such cases made and provided; and respectfully suggest M. N., O. P., and Q. R. as suitable persons for such appraisers.

.....Sign.

Sworn to and subscribed before me and in my presence this.....day of.....

.....

ENTRY OF APPEARANCE.

The undersigned, administrator of the estate of A. B., deceased, hereby enters his appearance and consents to the appointment of the appraisers, as suggested in the above application.

§ 420. Entry ordering notice, etc.

If the administrator or executor refuses to endorse the petition as suggested in the above form, or the surviving partner where the administrator makes the application, and the application is filed in the Probate Court without proof of notice having been given, the following would be a suitable entry:

(*Title.*)

On this day came I. J., surviving partner of the firm of I. J. & Co., of which A. B., deceased, was a member, and filed his application in this court to have an appraisement of the partnership of the property and assets of said firm. Wherefore it is ordered that said matter be set for hearing on the.....day of....., and that notice thereof be given to C. D., administrator (or executor) of the said A. B., of the time of hearing of said application.

§ 421. Form of notice of hearing application for appointment of appraisers.

To.....

You will take Notice, That the application of the undersigned..... .....of the late partnership of....., doing business at....., in the county of....., Ohio, for the appointment of three judicious, disinterested appraisers, to make out under oath a full and complete inventory and appraisement of the entire assets of such partnership, including real estate, together with a

schedule of the debts and liabilities thereof; will be for hearing before the Probate Court of.....County, Ohio, on....., the..... day of....., A. D. 190..., at....o'clock...M.

.....

The State of Ohio,

.....County, ss.

....., being duly sworn, says that on the.....day of..... ....., A. D. 190.., he delivered to.....a true copy of the above notice.

.....

Sworn to before me, and signed in my presence, this.....day of..... ....., A. D. 190...

.....

§ 422. Form of entry ordering appraisement.

(*Title.*)

This day this matter came on to be further heard upon the application of I. J., the surviving partner of the firm of I. J. & Co., and it appearing to the Court that C. D., the duly appointed and qualified administrator (or executor) of the estate of said A. B., has been notified of this proceeding, and that the said M. N., O. P., Q. R., three judicious, disinterested persons, are suitable persons, it is ordered that they make, under oath, a full and complete inventory and appraisement of the entire assets of the said partnership, to include real estate, if there be any, together with a schedule of debts and liabilities thereon, and deliver the same to the surviving partner, to be by him forthwith filed in this court.

§ 423. Form of inventory and appraisement.

PARTNERSHIP ASSETS, ETC.

Probate Court,.....County, Ohio.

In the matter of the Estate of

....., deceased.

No.....

Inventory and Appraisement.

Partnership of

.....

ORDER TO APPRAISERS.

To.....

You have been, by the Probate Court of said county, appointed appraisers to make out, under oath, a full and complete inventory and appraisement of the entire assets of the partnership of....., including real estate, if there be any, together with a schedule of the debts and liabilities thereof, and deliver the same to the surviving partner or partners, to be by him or them forthwith filed in the Probate Court of this county in which you are appointed.

Witness my hand and the seal of the Probate Court of said County, this.....day of....., A. D. 190...

.....Probate Judge.

OATH OF APPRAISERS.

The State of Ohio,

.....County, ss.

We, the undersigned, do make solemn oath that we will truly, honestly and impartially, make out a full and complete inventory and appraisement of the entire assets and liabilities of the partnership of..... .....in obedience to the foregoing; and perform the other duties required by law of us in the premises, as such appraisers, to the best of our knowledge and ability.

.....

.....

.....

Sworn to before me, and subscribed in my presence this.....day of .....190...

.....

REPORT OF APPRAISERS.

To the Probate Court of.....County, Ohio:

We, the undersigned appraisers, appointed by order of said court, have made out under oath, a full and complete inventory of the assets and liabilities of the partnership of....., and return the same herewith, together with said order.

Dated this.....day of.....190...

.....

.....

.....

Appraisers.

INVENTORY AND APPRAISEMENT.

Partnership of.....

Schedule A. Personal Goods and Chattels.

SCHEDULE B.

Moneys belonging to said partnership:

N. B. If there is no money, state "No Money of any kind."

SCHEDULE C.

The following is a particular statement of all bonds, mortgages, notes and all other securities for the payment of money belonging to said partnership (which are known to the surviving partner or to the administrator or executor).

SCHEDULE D.

The following is a statement of all other debts and accounts, rights and credits belonging to said partnership (which are known to the surviving partner or partners, administrator or executor).

SCHEDULE E.

REAL ESTATE.

We, the undersigned appraisers, do on our oaths, and upon actual view, appraise the real estate, used in whole or in part in the transaction of the business of said partnership, hereinafter described, as follows, to-wit:
Dated.....190....

.....
.....
.....
Appraisers.

The following is a statement of all liabilities, debts and accounts, owing by said partnership:

SCHEDULE F.

PARTNERS' ACCOUNTS WITH THE PARTNERSHIP.—INDIVIDUAL BALANCES.

Due to..... $.....
Due to..... $.....

Total..... $.....
Due from..... $.....
Due from..... $.....

Total..... $.....

STATEMENT.

Appraised value of assets..... $.....
Add total charged partners..... $.....

Total..... $.....
Appraised liabilities..... $.....
Add total credited partners..... $.....
Add expenses of this appraisement..... $.....

Total..... $.....
Net assets — liabilities..... $.....
Decedent's full share..... $.....
Decedent's individual balance added — deducted — we determine his net interest to be..... $.....
Date.....190....

.....
.....
.....
Appraisers.

AFFIDAVIT.

The State of Ohio,.....County, ss.
The undersigned.....
of....., late of said county, being duly sworn according to law, deposes and says that the foregoing inventory is in all respects just and true, that it contains a true statement of the entire assets of the late partnership of.....
....., including real estate, which has come to the knowledge of said affiant, and particularly of all moneys, bank bills, or other circulating medium belonging to the said partnership; and of all just claims of the said partnership against the said affiant.., or other persons, according to the best of affiant's knowledge; together with a schedule of the debts and liabilities of said partnership.
.....A. D. 190....

.....
.....

Sworn to before me and signed in my presence, this.....day of.....
.....Probate Judge.

CERTIFICATE TO COPY FOR FOREIGN COUNTY.

The State of Ohio,
.....County.
Probate Court.
To the Probate Court of.....County, Ohio:

Whereas, The executor or administrator of the within named decedent has been appointed in your said county, and whereas, the within described partnership of which said deceased was a member, existed in this county of ....., Ohio, therefore, in accordance with the laws of Ohio, requiring a certified copy of the appraisement to be filed in your court, I,....., sole judge and ex-officio clerk of the Probate Court within and for said county of..... do hereby certify that the within is a true copy of the original inventory and appraisement now on file in this court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court this.....day of.....190....

.....
Judge and ex-officio clerk.

§ 424. Entry confirming appraisement, etc.

(*Title.*)

This day came I. J. and filed herein an appraisement of the property belonging to the partnership of I. J. & Co., of which A. B., deceased, was a member, and the same appearing regular and correct is approved and confirmed. (And if the administrator or executor was appointed in the Probate Court of another county, add the following:) And it appearing to the Court that C. D., executor (or administrator) of the estate of the late A. B., was appointed as such executor (or administrator) in the Probate Court of.....county, and it is ordered that a certified copy of this appraisement be filed in that court forthwith, by said surviving partner.[7a]

§ 425. Oath. Inventory, how made, etc.

It is very questionable whether the administrator can administer the oath to appraisers of a partnership as provided by sec. 10649 G. C. (§ 209). Such oath may be administered by any person authorized to administer oaths in general. Whatever was said in the chapter on inventories is generally applicable to the manner in which the appraisement should be made—that is, in making out the schedule. The appraisers will often encounter great difficulty in determining the value of the goodwill of a partnership. The value of the goodwill of a business is always difficult to determine. But when the valuation is to be made, taking into consideration the rights of a surviving partner, it is still more difficult to ascertain. The surviving partner is not compelled to give up the business and may

[7a] The practice is not uniform as to whom should be charged the expenses attaching to partnership appraisement, etc. Some courts tax them to the partnership, and others tax them against the estate of the decedent on the theory that it is to the interest of the settlement of the estate of decedent that it is done; others that it is a contingency known at the time the partnership is created, to occur and it being formed with that knowledge, the costs should be assessed against the partnership.

continue in the same kind of trade, and the value of the interest of the deceased partner is limited by this fact, and the sale of the business and good will by the Court are upon the understanding that the survivor can so continue, the purchaser getting the right of a chance of retaining the old customers.[8] With this right existing in an active surviving partner, the good will of the deceased partner is of very little value.

If the transfer of the interest of a partner is involuntary or his retirement enforced, he may solicit the old customers. The reason is that the duty not to solicit them arises from his implied contract not to detract from what he has sold, which is a personal obligation and not an incident to the transfer of property; and hence does not apply to compulsory alienation, as by a sale of his interest in bankruptcy, or at sheriff's sale, or in case of his expulsion from the firm under a provision in the articles permitting it for misconduct, and has been repaid his share of the capital.[9]

The value of the good will of such copartnership is the estimate of advantage secured by succeeding to its business, without reference to the exclusion of any person from engaging in a like business. There is no implied agreement between partners, that upon the dissolution of the firm by the death of a member, that the survivor will not engage in and carry on a like business on his own account. The value of such good will is based on the mere probability that the customers of the firm, and others induced by its reputation, will deal and trade with its successor; the advantage of succeeding is not an asset for distinct and independent valuation, but it is an element in the value of the tangible property of the partnership, and should be considered by the appraisers in making the appraisement of the partnership assets.[10]

[8] Bates Partnership, § 665.

Ante § 382, Goodwill of business.

[9] Bates Partnership, § 667.

A surviving partner can use the name of the deceased partner in continuing business; the estate of the decedent is not hazarded by such use as a holding out.

Bates Partnership, § 673.

[10] See § 382, As to good will, etc.

§ 426. When executor, etc., to have appraisement made. "If the surviving partner or partners neglect or refuse to have such inventory and appraisement made, the administrator or executor of the deceased partner must have it made, in accordance with the provisions of the next three preceding sections." [R. S. § 3168.][11]

The method of procedure by an executor to make the application for an appraisement of the personal assets, is similar to that of a surviving partner, and the forms suggested in the preceding sections can with little alteration be made applicable if the administrator or executor makes the application under this section. The executor or administrator it seems is not bound to wait any particular length of time. Such matters ought to be speedily adjusted, and if the surviving partner does not make the application in a very short time, the statute says *forthwith*, the executor or administrator should proceed to make the application quite soon after his qualification.

§ 427. When survivor may purchase partnership property. "With the consent of the executor or administrator of the deceased partner, and the approval of the probate court by which such executor or administrator was appointed, the surviving partner or partners may take the interest of such deceased partner in the partnership assets, at the appraised value thereof, first deducting therefrom the debts and liabilities of the partnership, upon giving to the executor or administrator his or their promissory note or notes, with good and approved security, for the payment of the interest of the deceased partner in the partnership assets. Such note or notes shall be payable with interest, in not to exceed nine months from the time the surviving partner or partners elect to take such assets, which election must be made within thirty days from the date of filing the inventory and appraisement, or a certified copy thereof in such court." [R. S. § 3169.][12]

§ 427a. Bond of surviving partner. "Such surviving partner or partners shall give bond to the executor or administrator, with surety or sureties to the approval of the court for the payment of the partnership debts and liabilities, and for the performance of all contracts for which the partnership is liable." [R. S. § 3169.][12*]

[11] § 8088 G. C.
[12] § 8089 G. C.
[12*] § 8090 G. C. See § 430a.

§ 427b. When survivor refuses to purchase. "In the event that such surviving partner or partners refuse or neglect to take the interest of the deceased partner in the partnership assets within the time, and in the manner above provided, such executor or administrator forthwith shall apply to a court of competent jurisdiction for the appointment of a receiver for the partnership, who thereupon must proceed to wind it up and dispose of its assets, in accordance with the statutes governing receivers. The probate court shall be a court of competent jurisdiction in the appointment and control of the receiver herein provided for." [R. S. § 3169.][12†]

§ 427c. Will may define manner of settlement. "When the original articles of a partnership in force at the death of a partner, or the will of a deceased partner dispenses with an inventory and appraisement of the partnership assets, and with a sale of the deceased partner's interest therein, and such article or will provides for a different mode for the settlement of such interest, and for a disposition thereof different from that provided for herein, such interest shall be settled and disposed of in accordance with the provisions of such articles or will." [R. S. § 3169.][12‡]

§ 428. Application of surviving partner to take at an appraisement.

The surviving partner has thirty days from the date of the filing of the inventory, or certified copy thereof, within which to make his election to take the property at its appraised value. This application can only be filed in the court in which the administrator or executor was appointed. It can not be made in any other county, although an appraisement may be had in any county in which the partnership existed. It seems that the surviving partner has not an absolute right of election, but that it is dependent on the consent of the administrator and with the approval of the Probate Court. The application should set out all these facts, and may be in the following form:

(*Title.*)

Now comes said I. J., surviving partner of the firm of I. J. & Co., lately composed of I. J. and A. B., deceased, doing business (here state place), under the firm name of I. J. & Co., and hereby elects to take the assets of said firm at ..... dollars, the same being the appraised value

12† § 8091 G. C.

12‡ § 8092 G. C. Of course the surviving partner would be bound by the partnership agreement, but how far his rights, as provided in the previous sections, might be controlled by the provisions of a will of the deceased partner raises an interesting question. If the provisions made in the will are satisfactory to the surviving partner no doubt the partnership interest of the deceased can be disposed of as provided in the will, but if they are not and a good reason can be shown, I am inclined to believe the surviving partner could have the partnership assets disposed of as provided in the preceding sections. See also, Bank vs. Wight, 4 N. P. 173; 6 Dec. 350.

thereof as fixed by the appraisers heretofore appointed by this court, after deducting the amount of the debts and liabilities of said firm. He further represents that C. D., executor (or administrator) of the said A. B., consents to his said election and the said I. J. offers to give said C. D., executor (or administrator) his promissory note for..... dollars, the balance due after deducting debts and liabilities of the said partnership as returned by said appraisers. Said note being dated..... day of....., payable (here insert cash or any time within nine months) to the order of said C. D., administrator (or executor) with U. V. and X. Y. as securities thereon, and also offers his bond in the sum of.....dollars with U. V. and X. Y. as securities for the payment of said debts. Wherefore said I. J. respectfully asks that the Probate Court approve the said election made by him as above herein stated.

.....Sign.

The administrator (or executor) should, in writing, enter his approval, and it may be as follows:

I hereby consent to the election of I. J. to take assets of the late firm of I. J. & Co., as stated above, and ask the court to approve the same.

.....Sign.

§ 429. Form of bond of surviving partner.

Whereas,....., late of..... county, Ohio, deceased, was at the time of his death, a member of a partnership, existing in said.....county, under the firm name of....., and composed of said decedent and of..... surviving partner..—and whereas, said..... .....surviving partner.., as aforesaid, h....., after inventory and appraisement of the entire assets and liabilities of said partnership in the Probate Court of said county, and with the consent of the administrator...executor...of said decedent, and the approval of said Probate Court, elected to take the assets of said partnership at their appraised value and upon the terms prescribed by statute, and to give the bond required by law for the payment of the debts and liabilities of the said partnership.—Now, therefore, we..... ....., as principal, and..... .....as sureties, bind ourselves to..... .....administrator...executor...of the said..... .....deceased, in the sum of..... dollars, that the said.....surviving partner...as aforesaid, will pay the debts and liabilities of the said partnership of..... and if no default be made therein, then this obligation to be void; otherwise to be and remain in full force and virtue in law.

Given under our hands, this.....day of.....A. D. 190...

.....

.....

.....

§ 430. Entry of Court approving election, etc.

(*Title.*)

This day this matter came on to be further heard upon the election of I. J., surviving partner of the late firm of I. J. & Co., to take the assets of said firm as heretofore returned to this court by appraisers appointed, which appraisement and inventory was duly confirmed by this Court. It having been found by said appraisement that the value of said assets was..... .....dollars, after deducting the liabilities; and the said I. J. having tendered his promissory note therefor, according to the statute, with U. V. and X. Y. as sureties thereon, and also having tendered his

Whether or not the surviving partner would be relieved from an individual liability of the payment of the claim that was not presented within one year, would be questionable, and therefore he may be interested in his individual capacity, in knowing that all the claims have been paid or accounted for.

The Probate Court should examine the account and vouchers the same as an administrator's account, and he could call the surviving partner before him to enlighten him on anything that the account did show clearly. This account should show the assets collected and disbursements made as well as the list of creditors who have presented claims.

§ 431. When partner fails to take.

If an appraisement has been made either upon application of a surviving partner, or the executor, and the surviving partner fails and neglects to take the interest of the deceased partner according to the provisions of the statute, than it is the duty of the executor or administrator to forthwith apply to a court of competent jurisdiction, and the Probate Court is a court of competent jurisdiction, for the appointment of a receiver to wind up the partnership in the manner that partnerships are usually settled.[14] While the statute says that " if the surviving partner refuses or neglects to take," I have no doubt that a receiver might be asked for by an administrator when the administrator did not give his consent, or where the Probate Court did not give its approval to the application of the surviving partner to take the assets. Whether or not the Probate Court could compel an administrator to give his consent, has never been determined, but it would rather seem to be the purpose of the statutes that if the appraisement was a fair one, that the administrator or executor could not captiously prevent the surviving partner from taking the assets; and that if he refuses without good cause, the Court might make an order directing him to consent to such sale.

§ 432. When statute does not apply.

Statute itself makes some exceptions to its own provisions. One is where the articles of copartnership provide for a mode

[14] Bates Part, § 740.

of settlement, and the other is where the will of a deceased partner provides for another method of adjustment. In these cases the interest of the deceased partner is to be settled in accordance with the provisions of the articles of partnership, or of the will of the deceased. The statute does not oust a court of equity of its jurisdiction upon the application of creditors to wind up the partnership in such a court and in a proceeding for that purpose.[15]

§ 433. Rights of surviving partner.

At common law the surviving partner had the right upon the death of a member of the firm, to collect the assets, pay the debts and account to the representatives of the estate for the balance. As the common law controls where not supplemented by statute, there may be some question as to the extent of the surviving partner's powers under our law. Unquestionably until an appraisement is made, he may exercise the common law powers of a surviving partner; he could make any contract that would come within the proper scope of the partnership business. If the firm was insolvent he could make an assignment, or he could throw the matter into a court of equity and have the partnership affairs settled in that manner, he might even do this any time before he accepts to take the firm property as provided by statute. If the partnership is insolvent, or the deceased partner was indebted to the

[15] Horsey vs. Heath, 5 O. 353; See McKee vs. Hamilton, 33 O. S. 7; Wise vs. Miller, 45 O. S. 388.

The articles of co-partnership may provide that the partnership shall be continued by the administrator of the deceased, or by any one in the interest of the estate; and in such an event death will not work a dissolution of the co-partnership. Rand vs. Wright, (Ind.) 39 N. E. Rep. 447; Schmidt vs. Archer, 113 Ind. 295; Scholefield vs. Eichelberger, 7 Pet. 586; Laughlin vs. Lorenz, 48 Pa. St. 275; Gratz vs. Bayard, 11 S. & R. 41; Edwards vs. Thomas, 66 Mo. 468; Espy vs. Comer, 76 Ala. 501; Leaf's Appeal, 105 Pa. St. 505.

The deceased member may provide by will that the partnership shall continue; and if his co-partners assent, the partnership will continue, and he may specify to what extent his estate shall be liable for the post-mortuary debts. Rand vs. Wright, (Ind.) 40 N. E. Rep. 447; Burwell vs. Cawood, 2 How. 560; Davis vs. Christian, 15 Gratt. 11; Exchange Bank vs. Tracy, 77 Mo. 594.

I am not sure that a Court of Equity can take away the jurisdiction of the Probate Court. See Insurance vs. Carnahan, 19 O. C. C. 97; 11 C. D. 225; Jones vs. DeCamp, 2 N. P. (N.S.) 133; 15 Dec. 169.

surviving partner, the better course to pursue would be to have a court of equity wind up the partnership affairs and find what was due the surviving partner. For the surviving partner could have no right of action against the administrator or executor of the deceased partner until the amount which the deceased partner owed the survivor is ascertained.[16]

§ 434. Where executor is surviving partner.

Upon this matter Bates very justly says[16*]: "Although it may be improper to appoint the surviving partner administrator of the deceased partner, by reason of the conflict of inconsistent duties, yet his appointment as executor by the deceased often occurs. The advantage in this is, that resort to a sudden and forced winding up is unlikely, and its disadvantage is that settlement between the estate and the surviving partners in any way other than by an accounting and winding up is greatly embarrassed, as will be seen."

If a surviving partner has been made executor or administrator he must necessarily be both buyer and seller, and it seems in such case to be impossible to make any arrangement that cannot be successfully attacked by heirs or distributees, unless they also assented to it; and neither good faith, adequacy of consideration, or the advice of counsel, will protect the title of a trustee buying at his own sale, the policy of the law being to deem such transaction fraudulent *per se* and not sustainable by explanations when objected to by a party in interest. It is the duty of an executor or administrator of a surviving partner who dies with partnership assets in his possession while he is engaged in settling the partnership business to complete such settlement unless relieved by a competent court.[17]

[16] See Bates Partnership, §§ 735, 736, 732.

These matters can only be casually discussed here and reference must be had to general works on that specific subject.

See Lockwood vs. Mitchell, 7 O. S. 387; Kries vs. Gorton, 23 O. S. 468; Bank vs. Wright, 4 N. P. 173; 6 Dec. 350; *In re* Crane, 29 Bull. 93; Leach vs. Church, 15 O. S. 169.

See § 518, Carrying on business of deceased.

[16*] Partnership, §§ 742, 744.

[17] Dayton vs. Bartlet, 38 O. S. 357; *In re* Crane, 4 N. P. 173.

The two members of a firm agree in their partnership articles that, in case of the death of either, the business should be settled up as soon as the survivor and the legal representatives of the deceased partner should deem expedient, and that the business should be continued or sold, as might be agreed. One of the partners died, and the only one of his executors who qualified was the surviving partner. It was held that he could not, as executor, agree with himself as surviving partner concerning the matters referred to in the partnership articles.[18]

§ 435. Executor continuing the business.

There is, possibly, a distinction between an executor continuing the partnership under the directions of a will, and an administrator permitting the partnership to continue. In either case it is not a desirable position for an executor or administrator to occupy. For he incurs a personal liability for the obligations, in effect, of the new firm. If the business is conducted successfully, he must account to the estate; if unsuccessful, he runs the danger of being made personally to suffer the loss.[19] Where good faith and good judgment have been exercised, the courts will always favor the administrator or executor in such matters, and allow him to charge up against the estate whatever debts may be incurred.

As a partner cannot possibly continue to be a member of a firm after his death, any agreement with his executor or other person having a beneficial interest in the share of the assets which belonged to him, for the continuation of the business thereafter with the surviving partner, is, necessarily, the formation of another partnership, the terms of which when not otherwise expressly agreed upon, may be implied, from the manner of conducting the business, to be the same as those of

[18] *In re* Knubley, 20 N. Y. Supp. 58; S. C. 28 Abb. N. C. 457.

See Remmelsberg vs. Mitchell, 29 O. S. 22.

See § 518.

[19] See Woerner on Admin. 282, § 506 *et seq.;* P. C. & St. L. Ry. Co. vs. Schneider, 8 C. C. 355; 4 C. D. 535; Lucht vs. Behrens, 28 O. S. 231.

the former partnership.[20] The extent of the liability of the deceased's estate for debts created after his death, depends on the articles of agreement or the directions in the will.[21] If the provision in the partnership article is that the deceased partner's capital shall remain in the business, his personal representative is not entitled to be admitted into the management of such business.[22] As to past indebtedness, created during his lifetime, his whole estate is liable for its payment, whether all of it be invested in the business or not.[23]

Where the will of the deceased partner provides that the survivor shall continue the business for joint benefit, only so much of the estate as is embarked in the business is hazarded.[24] To render the estate liable beyond the amount invested in the partnership, the language of the article or will, continuing the partnership must be unequivocally to that effect, showing a positive intention that it should be so liable.[26]

[20] McGrath vs. Cowen, 57 O. S. 385.

"What is inaccurately called provisions against the dissolution of the partnership is an agreement that, if either party dies his property shall remain in the firm and in the business for the benefit of his children; or that his children, or some of them, or some other person, shall immediately on his death take his place in the firm and become a partner in his stead. All these agreements and arrangements and all that can be made for a similar purpose, are in fact only bargains for the creation of a new partnership when the old one ceases to exist. And so, too, all arrangements or contracts which may be made between the surviving partners and the representatives or appointees of the deceased have for their effect only the formation of a new partnership, which, upon same terms or other takes the stock, and carries on the business of the old one."

Id. McGrath vs. Cowen, 57 O. S. 401.

[21] Blodgett vs. American Nat. Bank, 49 Conn. 9; Schofield vs. Eichelberger, 7 Pet. 586; Davis vs. Christian, 15 Gratt. 11.

[22] Wild vs. Davenport, 48 N. J. L. 129.

[23] Tompkins vs. Tompkins, 18 S. C. 1; *In re* Clapp, 2 Lowell 168.

[24] Bank vs. Wight, 4 N. P. 173; 6 Dec. 350; See Dair's Estate, 2 Dec. 360; 7 N. P. 309.

[26] Band vs. Wright, (Ind.) 40 N. E. Rep. 447; Burwell vs. Cawood, 2 How. 560; Jacquin vs. Buisson, 11 How. Pr. 385; Brasfield vs. French, 59 Miss. 632; Smith vs. Ayer, 101 U. S. 320; Hart vs. Anger, 38 La. Ann. 341.

If the partnership is continued according to the terms of a will, the effect is to create a new partnership, and the creditors of the new firm have no claim upon the general estate of the deceased — only on so much of it as is invested in the partnership business.

§ 436. Administrator carrying on business.

The administrator has no right whatever to continue the partnership business. Even in a case where a will so directs, an executor may exercise his judgment whether or not he will continue the business, but if an administrator does continue the business, he must do so accepting the full responsibility and assuming a personal liability for all the debts of the new firm, and running the risk whether the same will be allowed as a proper charge in his settlement of the estate. It ought as a rule never to be allowed.

If the administrator of the deceased partner consent that the surviving partner shall carry on the business, then the latter will be liable only for the profits and not for the losses, unless he be negligent and thereby a loss is occasioned.[27] In such an instance the personal representative has no lien upon the property as against subsequent creditors of the concern.[28]

Pitkin vs. Pitkin, 7 Conn. 307; Stanwood vs. Owen, 14 Gray 195; Vincent vs. Martin, 79 Ala. 540.

It is optional with either the executor or administrator to carry on the business even where an apparent duty is imposed by the will.

Edgar vs. Cook, 4 Ala. 588; Wild vs. Davenport, 48 N. J. L. 129; Berry vs. Folker, 60 Miss. 576; Louisiana Bank vs. Kenner, 1 La. 384; Jacquin vs. Buisson, 11 How. Pr. 385.

For if he does carry on the business he will be personally liable to all transacting business with the firm.

Alsop vs. Mather, 8 Conn. 584; Citizen's M. Ins. Co. vs. Ligon, 59 Miss. 305; Wild vs. Davenport, 48 N. J. L. 129.

To escape liability to the heirs he must conduct the business as the will directs; or, if there are no directions, as his testate did and he is not bound to take security for sales on credit as an administrator is usually required to do. Cline's Appeal. 106 Pa. St. 617.

If a partner's will provided for a continuation of his interest in the firm name, the residue of his estate is not thereby implicated in liability for future debts, nor is the settlement of his estate suspended. Peters vs. Campbell, 3 W. L. M. 587.

The will of a partner, providing for continuing his capital in a firm, does not authorize the executors to invest further funds therein, nor does it implicate the rest of his estate for subsequent business debts. And their consent to a change of the articles by admitting new partners and increasing the capital will not implicate the estate beyond the amount vested.

See § 518; See Covington, etc., vs. Wight, 4 N. P. 173; 6 Dec. 350.

[27] See § 506 *et seq.;* Millard vs. Ramsdell, Harr. (Mich.) Ch. 373; also previous section.

[28] Hoyt vs. Sprague, 13 Otto. 613.

Where a going concern passes into the hands of an administrator the court will rely upon his ability to handle the business to the advantage of the estate and will not scrutinize acts of a discretionary character in the absence of any showing of bad faith or incapacity. *In re* Kohangi, 16 N. P. (N.S.) 337.

By merely consenting to the continuance of the partnership business the administrator does not become personally liable.[29] If the deceased partner has withdrawn as much or more of the assets than his share, the survivor is not liable to account for profits.[30] If some of the interested parties consent, and some do not, to the carrying on of the business of the survivor, the earnings must be divided according to the capital to which each is entitled, after deducting such share of them as is attributable to the service and skill of the surviving partner.[31]

§ 437. How partnership real estate to be conveyed. "When the real estate of a partnership is appraised and elected to be taken by the surviving partner or partners, upon the execution and delivery of the note, or notes, and the bond hereinbefore provided for, the probate court shall order the executor or administrator to execute and deliver to the purchaser or purchasers, a deed for the deceased partner's interest in such real estate, which deed shall pass the title thereto. The real estate of such a partnership shall be held to include only such lots, tracts, or parcels of real estate as are used in whole or in part in the transaction of its business." [R. S. § 3170.] [32]

§ 438. What is partnership real estate.

At common law a partnership was incapable of holding the title to real estate. This doctrine, however, has been very much impaired if not entirely abrogated by the decisions of our State. It is now held that real estate purchased for partnership purposes, paid for with partnership funds and actually used in the partnership business, should be regarded as partnership assets, within the meaning and operation of this statute. But real estate not needed or used for a partnership purpose, though paid for with partnership means, is not assets of the firm within the meaning of this act. Notwithstanding

[29] Richter vs. Poppenhusen, 39 How. Pr. 82; Laughlin vs. Lorenz, 48 Pa. St. 275; Avery vs. Myers. 60 Miss. 367.

[30] Hyde vs. Easter, 4 Md. Ch. 80; Taylor vs. Hutchinson, 25 Gratt, 536.

[31] Robinson vs. Simmons (Mass.), 15 N. E. Rep. 558.

See § 518.

[32] § 8098 G. C.

If the court should assume to act under this section, and it should turn out that the partnership real estate was not in fact partnership real estate, the court would be acting without jurisdiction, and the acts could be attacked and set aside in a collateral proceeding brought in the Court of Common Pleas. It is therefore very essential to first determine that it is in fact partnership real estate, and in determining this question it would be well to examine Jones vs. De Camp, 2 N. P. (N.S.) 133; 15 Low. D. 169; affirmed by Circuit Court, June 26, 1903. Affirmed by Supreme Court without report. Delaplain *et al.* (De Camp) v. Jones, 72 O. S. 616.

the rents and profits thereon should be applied to partnership use.[33]

Land purchased with partnership funds and occupied and used by the firm conducting its business, is partnership property, although conveyance is made to the individual members of the firm.[34] In another case it is intimated that a partnership name is an improper one for the grantee, but while the title ought to be taken in the name of the individual partners, yet it would not be invalid to take the title of the name of the firm.[35]

A partnership is capable of holding a mortgage to secure a debt due the firm.[36] There seems to be yet an element of uncertainty whether or not partnership real estate is a complete conversion into personalty, such as will bar the widow's right of dower in the proceeds remaining after the payment of the debt; and whether such proceeds are to be regarded as real estate or personal property for all purposes. In several

[33] Remmelsberg vs. Mitchell, 29 O. S. 23.

It must be conceded that a copartnership is incapable of taking or holding the legal title to real estate, yet it is equally certain that it may acquire an equitable estate therein. It is well settled that whenever real estate is purchased with partnership funds, an equitable estate accrues to the partnership, whether the legal title be conveyed to the partners as individuals, or to either of them, or to a stranger; and in such case, upon the death of the person holding the legal title, it descends to his heirs at law in trust for the benefit of the partnership—at least to the extent that it may be needed to satisfy demands against the partnership, whether such demands exist in favor of a stranger or a member of the copartnership. This doctrine is quite familiar, as is also the doctrine that in such case the realty is regarded and treated as personal property in the hands of the partnership to the extent it may be needed for partnership liabilities.

And we may go a step further. There is no doubt that if, by the terms of the partnership articles, real estate be purchased with partnership funds, or be put otherwise into the partnership stock, to be used and held solely for partnership purposes, it is to be regarded as converted out and out into personalty, so that the heir at law takes no beneficial interest therein in any event, but the proceeds not needed for partnership purposes passes to the personal representatives of the copartners. Remmelsberg vs. Mitchell, 29 O. S. 52.

In Jones vs. De Camp, 2 N. P. (N.S.) 133; 15 Dec. 169; affirmed by Supreme Court without report, Delaplain *et al.* (De Camp) v. Jones, 72 O. S. 616, the question is gone into fully as to what constitutes partnership real estate, and it is there held that one of the essentials is that before real estate can become firm assets and be in fact personal property, it must be purchased with partnership funds. On pages 176 and 177 twelve fundamental principles are given controlling such matters.

[34] Bank vs. Sawyer, 38 O. S. 339.

[35] Teare vs. Cain, 7 C. C. 375; 4 C. P. 643.

[36] Bank vs. Johnson, 47 O. S. 306.

cases [37] it is held that the widow is not entitled to dower. But in these cases it appears that the question arose whether she was entitled to dower in partnership property, when it was necessary to use the partnership property for partnership purposes and pay partnership debts. But there is a tendency towards the doctrine that such property is personal property and the widow is not entitled to dower in any instance.[38] In a more recent case it was held that real estate property purchased with partnership funds and used for partnership purposes, is thereby equitably converted into personalty, and continues to be such after the death of one of the partners and the discontinuance of the business, and until there has been a complete settlement of the affairs of the firm and final division of assets.[39]

[37] Green vs. Green, 1 O. 535; Sumner vs. Hampson, 8 O. 328; Johns vs. Johns, 1 O. S. 357.

[38] "Thus, the old doctrine seems to have been that there could be no partnership, properly so called, in land, but the contrary doctrine is now universally held; and that a widow of a deceased partner is not dowable in lands which the firm owned and regarded as partnership stock, is settled by numerous decisions, among which are the cases in the 1 O. 535, and 8 O. 328.

[39] Fisher vs. Lang, 19 Bull. 139. This case was one in which an heir brought suit in partition, and the court held such suit could not be brought. Judge Peck in an opinion says, "There is a good deal of conflict in the authorities on this subject of conversion. In the majority of States of the Union the doctrine of conversion out and out does not prevail, but it obtains in England and in the States of Virginia and Kentucky, and as we understand the decisions, it is the law of Ohio. The case of Green vs. Green, 1 O. 535, seems to announce the doctrine of total conversion into personalty, and though there is a case in the 5 O. 264, Green vs. Graham, which seems to look the other way, yet in that case it simply appears that the property was purchased with partnership funds; it does not appear to have been purchased for partnership purposes; and it was there held that the interest of the deceased partner descended to his heirs. But in a case in the 8 O. 364, Sumner vs. Hampson, there is a very clear opinion by Judge Lane, where a widow claimed dower in property which had been purchased and used for partnership purposes, and the Court denied her claim, saying that it continued to be personalty notwithstanding the death of the partner." "Speaking for myself,—I do not know that I should speak for the court on this point — but speaking for myself, the reasoning seems to be in favor of conversion out and out, for that doctrine seems better adapted to the preservation of the business and good will of the firm, whereas if the heirs may come in the moment one of the partners dies and apart the realty upon which the business is situated, the latter may

The courts would probably now hold that the proceeds of partnership real estate after the payment of all debts and liabilities of the firm, are personalty, and as such belong to the administrator. This idea is strengthened by the provisions of the sections of the General Code treated of in this chapter, giving to the administrator the power to sell real estate and receive the proceeds.[40]

§ 439. Form of executor's deed.

Know all Men by these Presents:

That, whereas, on the.....day of.....190..., A. B. was duly appointed and qualified as administrator (or executor)of the estate of C. D., deceased, late of said Clark County, by the Probate Court of said county, and afterwards, to-wit: On the.....day of..... ....., I. J. filed his application in the.....Court, to have an appraisement of the partnership property of the late firm of I. J. & Co.

And whereas, on the.....day of....., said court ordered said property to be appraised, and thereafter, to-wit: On the..... day of....., said I. J. filed his election in the said court to take the interest of the said A. B. in the firm of I. J. & Co., at said appraisement.

And thereafter on the.....day of ....., the court gave its approval to the election made by said I. J. to take the interest of the said C. D., deceased, in the said partnership property; and ordered that upon the payment of the appraised value of said interest and the liabilities of said firm, as the statute provides, that said A. B. should make and deliver to said I. J. a deed for the interest which the said A. B. owned in the

be broken up, destroyed. At any rate, whether the reasons upon which it rests are satisfactory or not, the doctrine is established in Ohio, and for that reason, as well as for the reason that in this case there is an outstanding unsettled claim of large amount against the firm which is not disputed, that is, it is not disputed that there is such a claim, for both those reasons we all agree that the petition of the plaintiff will have to be dismissed." Peck, Judge, in Fisher vs. Long, 19 Bull. 139.

[40] It has been held that partnership capital invested in land for the benefit of the company will be treated as personalty, and not subject to dower or inheritance until it has performed all the functions to the partnership, and thereby ceases to be partnership capital; that the inchoate right of the wife of a partner in the real estate of her husband only attaches to such of the real estate as remains in specie unconverted, after the partnership is terminated by judgment or agreement and its affairs completely wound up and ended.

See § 949, Dower.

Holmes vs. Mudd, (Min. 1894) 27 L. R. A. 340.

When it becomes real estate. Robinson vs. Miller, (Ill. 1894) 27 L. R. A. 449. With extended note.

Surviving partner. Galbraith vs. Tracy, 153 Ill. 54; 28 L. R. A. 129, 161, with extended note.

real estate belonging to said firm. All of which will more fully appear by records of said court, to which reference is made.

Now, therefore, I, the said A. B., administrator (or executor) of the estate of C. D., deceased, aforesaid, by virtue of the said proceedings and of the statute in such cases made and provided, and of the power vested in me and for and in the consideration of the premises in the sum of .....dollars, paid by said I. J., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to said I. J., his heirs and assigns forever, all the right, title and interest that the said A. B. owned in the following real estate, situate in the county of..... .....State of Ohio and in the township of..... and bounded and described as follows:

To have and to hold said premises, with all the privileges and appurtenances thereto belonging to the said I. J., his heirs and assigns forever, as fully and completely as he, the said A. B., as such administrator, by virtue of said order of court and of the statute made and provided for such cases might or should sell and convey the same.

In witness whereof the said A. B., as such administrator, has hereunto set his hand, this.....day of.....A. D. 190....

Signed and acknowledged in presence of

.....

The State of Ohio,

.....County, ss.

Be it remembered, that on this.....day of.....190..., before me, the subscriber, a.....in and for said county, personally came the above named C. D., as administrator of A. B., the grantor in the foregoing deed, and acknowledged the signing of the same to be his voluntary act and deed as such owner for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my.....seal on the day of and year last aforesaid.

.....

Where the administrator or executor is the surviving partner and desires to take over the property, there may be some question as to the propriety of his continuing as administrator or executor, etc.

CHAPTER XXIV.

COLLECTION OF ASSETS.

§ 440 General duty of administrator or executor to collect.
§ 441 Duty to bring suits, etc.
§ 442 Diligence required.
§ 443 Negligence in collecting.
§ 444 Statute of limitations.
§ 445 When more than twelve months allowed to collect assets.
§ 446 Affidavits in such case.
§ 447 When and how application for extension made, etc.
§ 448 When further time not allowed.
§ 448a What further time will be allowed.
§ 449 Office of executor, etc., not to cease.

§ 440. General duty of administrator or executor to collect.

One of the most important functions attaching to the office of an administrator or executor, is the collection of the assets belonging to the estate of the deceased. Such action precedes all manner of distribution, be it the payment of debts, legacies or distribution among heirs. The policy of the law invites and expects a speedy settlement of every estate. It therefore follows that it is incumbent upon the administrator or executor to proceed with diligence to convert the assets into money so that he can further perform the duties of his trust and speedily have it properly executed. Assets that are of a perishable character or known value, he need not wait for an inventory until he proceeds to collect them. It is not the duty of the administrator to wait to ascertain the amount of the debts or liabilities of the deceased. For aught that he may know all may be needed to meet such obligations, he should therefore proceed with diligence, and the law supplies him with the means adequate to that end. He must act at once of his own volition, and not wait for any one to request action on his part.[1] That our statute contemplates prompt, active and energetic action on the part of the administrator or executor, is evidenced by the statute limiting the time for such action, the first section of which is the following:

[1] Schu. on Exrs. 269.

"So far as he is able, the executor or administrator shall collect the assets of the estate, within one year after the date of the administration bond." [R. S. § 6062.][2]

§ 441. Duty to bring suits, etc.

The duty of the executor or administrator to pursue and recover assets, depends upon the means at his command for so doing, and the same may be said with reference to collecting demands due the estate. Whether slender assets shall be used in litigation for procuring personal property adversely held, or in realizing doubtful claims, a rule of prudence must decide; but it is certain that the representative of the estate is not bound to litigate or to undertake the enforcement of doubtful rights on behalf of the estate out of his own means. In such cases those entitled to the benefit of the estate should make an offer to indemnify the administrator if suit is brought. The duty to act depends also upon the character of the claim, whether the person against whom it is held is solvent or insolvent. Likewise it depends upon the administrator's or executor's means of knowledge. Thus an executor or administrator cannot be charged with a right of action of his decedent when knowledge of the right was never brought home to himself, nor does he become chargeable except with reference to the claim, and the condition of the estate when such knowledge reaches him.[3] It is for the administrator to determine what property belongs to the estate in his charge, and bring the necessary suit at law or in equity to recover the same without waiting for an order of the Probate Court to that effect.[4]

2 § 10684 G. C.
See § 702 *et seq.*, 718.
§ 1381, Gdn. collection of debts.
3 Schu. on Exrs., §§ 273, 274, 275.
4 Woerner on Admin. 672.
An administrator or executor is not required to give security for cost in any case in a suit brought in the county where he is appointed, etc. § 11614 G. C.
Collection of assets means reduction of personal property into money. Young vs. Roberts, 7 O. C. C. 105; 3 C. D. 685; affirmed 54 O. S. 622.
It means all property which can be made available to pay debts, etc. Insurance Co. vs. Bank, 173 Fed. 398.
An action lies by an executrix in her representative capacity in an indebtedness due the estate for decedent, notwithstanding the note which now evidences the debt, was given to the executrix individually, in exchange for the original note which was payable to decedent and against which the statute of limitations has run. Schildmeyer vs. Schildmeyer, 27 Dec. 466.

§ 442. Diligence required.

The care, prudence and judgment which a man of fair average capacity and ability exercises in the transaction of his own business furnishes the standard to govern an administrator in the discharge of his trust duties.[5] An administrator must use diligence in the prosecution of actions to collect the assets of the estate, or he will be liable personally or upon his bond for any loss such estate may sustain by such neglect,[6] even though the debtor live in another State.[7] Thus a delay of two years has been held culpable negligence.[8]

If he takes a bond of indemnity from wrong-doers, and neglect to seek redress against them, he will be liable for the amount lost to the estate.[9] If the decedent has paid a debt as surety his administrator must use diligence in collecting the amount paid from the principal.[10] If an administrator permit an attorney to retain money, collected for the estate, during a long period of time, he will be personally liable for the amount retained;[11] and so if he leaves the money in the hands of a commission merchant.[12] So he is liable if he employs an unsuitable person to collect a debt, and a loss is thus occasioned.[13] And the same is true when he employs such person when there is no occasion for such employment, and a loss occurs.[14]

He is not bound, however, to resort to an extraordinary, unusual or hazardous course,[15] nor to prosecute claims of a

[5] Miller vs. Proctor, 20 O. S. 442; Dundas vs. Chrisman, 25 Neb. 495; S. C. 41 N. W. Rep. 449.

[6] Miller vs. Steele, 64 Ind. 79; Condit vs. Winslow, 106 Ind. 142; State vs. Gregory, 88 Ind. 110.

[7] Schultz vs. Pulver, 3 Paige 182; S. C. 11 Wend. 363; Helme vs. Sanders, 3 Hawks 563; Brandon vs. Judah, 7 Ind. 545; Brazeale vs. Brazeale, 9 Ala. 491.

[8] Scarborough vs. Watkins, 9 B. Mon. 540; Charlton's Appeal, 34 Pa. St. 473; Perry vs. Wooton, 5 Humph. 524.

[9] Holmes vs. Bridgman, 37 Vt. 28.

[10] Tuggle vs. Gilbert, 1 Duv. 340; Chambers' Appeal, 11 Pa. St. 436.

[11] Abercrombie vs. Skinner, 42 Ala. 633.

[12] Succession of Stone, 31 La. Ann. 311.

[13] Wakeman vs. Hazleton, 3 Barb. Ch. 148; Earle vs. Earle, 93 N. Y. 104.

[14] McCloskey vs. Gleason, 56 Vt. 264.

[15] Chamners' Appeal, 11 Pa. St. 436.

doubtful character,[16] unless the person demanding their prosecution tenders a bond to indemnify the estate against loss,[17] on the request of the administrator.[18] Nor is he liable if he act in good faith upon the advice of counsel, after disclosing to him all the facts he knows.[19] Nor is he liable for a mistake of law, whereby he delayed the collection until the debt was barred, if he act in good faith.[20]

If a creditor be indulged by the advice and request of a legatee, such legatee cannot complain of such indulgence, if loss be thereby occasioned.[21] Nor is he bound to defend against a just claim.[22] But he is bound to plead the statute of limitations, however meritorious the claim may be, if he desire to escape personal liability.[23] He must account for all the assets received from a foreign State.[24]

It is the duty of a domiciliary executor to collect foreign assets so far as he is able; and he should be charged in his accounting with such assets when they were under his control, and might easily have been transferred to the domestic jurisdiction before the filing of the account.[25]

[16] Torrence vs. Davidson, 92 N. C. 437; Anderson vs. Piercy, 20 W. Va. 282; Smith vs. Collamer, 2 Dem. 147.

[17] Hepburn vs. Hepburn, 2 Bradf. 74; Griswold vs. Chandler, 5 N. H. 492.

[18] Harrington vs. Keteltas, 92 N. Y. 40.

[19] Neff's Appeal, 57 Pa. St. 91. Tanner vs. Bennett, 33 Gratt. 251.

[20] See next section.

King vs. Morrison, 1 Pa. St. 189; Thompson vs. Brown, 4 Johns. Ch. 619; Thomas vs. White, 3 Litt. 177.

[21] Perry vs. Wooton, 5 Humph. 524.

[22] Sheldon vs. Warner, 59 Mich. 444.

[23] See next section.

Wiggins vs. Lovering, 9 Mo. 262; Hodgdon vs. White, 11 N. H. 208; Woods vs. Elliott, 49 Miss. 168; Littlefield vs. Eaton, 74 Me. 516; Preston vs. Cutter, 13 Atl. Rep. (N. H.) 874; Brown vs. Porter, 7 Humph. 373; Langham vs. Baker, 5 Baxt. 701; Emerson vs. Thompson, 16 Mass. 429.

[24] McPike vs. McPike (Ala.), 20 S. W. Rep. 12.

[25] *In re* Ortiz's Estate, 86 Cal. 306; S. C., 24 Pac. Rep. 1034.

See § 385, Choses in action.

An executor who knows of a conversion of property of the estate by the residuary legatee, and of a claim against the estate on which judgment is afterwards recovered, but makes no attempt to recover the value of the property so converted, is liable for the value to the claimant, though he had the belief, based on advice of counsel, that no such judgment would be recovered.

An executor who is liable to the testator for rent at the time of the latter's death cannot on a bill against him for settlement of his account, plead that his liability accrued six years before the filing of the bill, as upon the acceptance of the executorship it was his duty to collect all debts due the estate, as well from himself as others, and his position in relation thereto is that of a trustee.[27] Where an executor takes a judgment in his own name for a debt due the estate, he will not be permitted to question the judgment for the purpose of avoiding personal liability for the purchase price paid at a void sale under the judgment.[28]

§ 443. Negligence in collecting.

An administrator should not be charged for uncollected notes where he does not know that such notes, although belonging to the estate, could, with proper diligence have been collected.[29] He is not chargeable with estimates made by him as to what may be collected, but only with the amounts he collects.[30] Nor is he chargeable with the amount of insurance policies on the lives of debtors of deceased before he has realized on such policies.[31]

The duties of an executor or administrator are active and not passive. He cannot be permitted to neglect to do those

In re McAvoy's Estate, 6 Dem. Sur. 71; S. C., 3 N. Y. Supp. 207.

He is not liable for the loss of property before his qualification, unless he had such property in his possession. Roberts vs. Stewart (Tex.), 15 S. W. Rep. 1108.

It is the duty of an administrator who is, or by the exercise of prudence should be, aware of the pendency of proceedings for the sale of lands in which his intestate had an interest, to intervene therein, so that the proceeds of such interest may come to his hands for the payment of the debts of the estate. Borders vs. People, 31 Ill. App. 483.

[27] Haines vs. Haines (N. J.), 15 Atl. Rep. 839.

In our state such a debt becomes assets upon the executor's qualification.

[28] Jones vs. Blumenstein, 77 Ia. 361; S. C., 42 N. W. Rep. 321.

See § 1603, Duties of assignee: See § 1287, as to Duties of trustee generally.

[29] See § 10828 G. C., § 719.

Cunningham vs. Cauthen, 37 S. C. 123; Miller vs. Steele, 64 Ind. 79; Condit vs. Winslow, 106 Ind. 142.

[30] Fawber vs. Gentry (Va.), 15 S. E. Rep. 899.

[31] *In re* Richardson's Estate, 23 N. Y. Supp. 978; S. C. 2 Misc. Rep. 288.

things which are plainly required at his hands by law or the order of the Court, and when complaint is made of such neglect, excuse himself by alleging that such delay or omission was for the benefit of the estate.[32]

An administrator who has instituted an action to recover insurance on the life of his intestate is not negligent in failing to appear in an action, where the heirs have appeared by their attorneys, asserting their right to the money as against one claiming under an assignment by the intestate in his life-time; and such administrator is not liable for the loss of the money to the estate by reason of the insolvency of the assignee, to whom it was paid under a judgment which was subsequently reversed on appeal.[33]

Where an administrator, though acting in good faith, disposes of stock at an inconsiderable amount, which, with due diligence could have been collected in full, he would be liable to the beneficiary for its value.[34] Where an executor receives as assets the note of a person in another State, owning a farm worth $3,000, mortgaged for $1,200 only, and, instead of trying to collect it by reducing it to judgment or otherwise, he waits until other liens are acquired against the land, and it is sold, he should be charged with the amount of the note.[35]

[32] *In re* Holladay's Estate, 22 Pac. Rep. 750; S. C. 18 Oreg. 168.

[33] Meyeringh vs. Wendt (Iowa), 53 N. W. Rep. 414.

[34] Tayloe vs. Tayloe (N. C.), 12 S. E. Rep. 836.

[35] *In re* Milliard's Estate, 9 N. Y. Supp. 126; S. C. 2 Con. Sur. 91.

Executors were directed by will to collect the debts as soon as it could be done. Among them was a note due after they qualified. They spoke of it to the makers, who asked them to wait awhile. No attempt was made to collect for a year, when all the makers failed and the debt was lost. Up to that time their standing was of the best and their credit beyond all question. They were, in fact, hopelessly insolvent when the note matured; but if payment had been insisted on, it would probably have been paid from the moneys of a bank of which one was president. It was held that the executor was liable for the loss. Powell vs. Hurt, 31 Mo. App. 632.

Where, at the hearing of the final account of the executors of an estate, one of them testifies, as the reason for not collecting a debt, that the debtor "is insolvent," the only fair inference is that the debtor has been insolvent since the death of the testator. Stone vs. Morgan, 3 So. Rep. 580; S. C. 65 Miss. 247.

On settlement of an account it appeared that the executor sold, on

§ 444. Statute of limitations.

It becomes important for an administrator if for any reason a delay is had, in the collection of assets of the estate, to acquaint himself with the statute of limitations. For if the statute has begun to run in the life-time of the deceased it will continue to run.[36] If, however, the statute did not begin to run during the life-time of the deceased, it would not commence until an administrator or executor was appointed.[37] Just what the responsibilities of the administrator or executor might be, where he permitted a debt to become uncollectible by reason of not bringing an action before it had been barred by the statute of limitation may depend upon the circumstances surrounding the case. But it is an exceedingly dangerous matter for the administrator or executor to trifle with. If he

credit certain personal property of the estate to an irresponsible party, who was indebted to him personally, and who failed to furnish security as required by the terms of sale; that the executor took a mortgage back on such property to secure his own debt and allowed the purchaser to retain it for some time, and that his mortgage was afterwards released and the property taken back and resold by the executor at a loss. It was held that the executor must account for the amount of the first sale. *In re* Beach's Estate, 22 N. Y. Supp. 1079; S. C. 1 Misc. Rep. 27.

Where an administrator accepts from his predecessor (a former administrator), a promissory note, executed by the latter, payable to himself for money due from such predecessor to the estate of the decedent, and obtains judgment on such note in his own right, he cannot, as against a third party who purchases the real estate of the debtor, acquired by him after his discharge in bankruptcy, successfully assert that such cause of action was one not barred by the bankrupt's discharge. Donald vs. Kell, 111 Ind. 1.

Where mismanagement of a certain part of the estate is shown, an agreement between the executors that one should attend to the business of that part will not relieve the other from liabilities thereof. Allen vs. Shanks, 90 Tenn. 359; S. C. 13 S. W. Rep. 715.

Where, on the presentation of an invalid claim against an estate, the administrator rejected it but agreed to refer it, and on proceedings before the referee neglected to retain counsel to protect the interests of the estate, did not oppose a confirmation to the report allowing it, and took no appeal from a judgment entered thereon, he was guilty of such negligence as to make him personally liable to the estate for the amount of the claim. *In re* Saunders' Estate, 23 N. Y. Supp. 829; S. C. 4 Misc. Rep. 28.

See § 1603, Assignments.

[36] Granger vs. Granger, 6 O. 35.

[37] See 13 Am. & Eng. Ency. of Law 737.

Where a note becomes due after the death of the payee, the right to enforce the same is in the administrator, and the time begins to run from the date of his appointment. But if it falls due before the payee's death the statute begins to run and will be barred in fifteen years from that time, irrespective of the fact when the administrator was appointed. Tobias vs. Richardson, 5 C. C. (N.S.) 74; 26 O. C. C. 81; affirmed 72 O. S. 626.

has had an opportunity by the use of ordinary care and diligence to have prevented the debt from being barred by the statute of limitation, and did not do so he would be liable. If a claim against the estate has become barred by the statute of limitation the executor has no power by a new promise to revive it or pay such a claim.[38]

§ 445. When more than twelve months allowed to collect assets. "If from the situation of the assets belonging to the estate, more than twelve months from the date of the administration bond is required for their collection, upon motion, and being satisfied thereof by the affidavit of the executor or administrator, the court may extend the time for that purpose." [R. S. § 6063; 102 v. 201.][39]

§ 446. Affidavit in such case. "The affidavit required by the next preceding section shall set forth the grounds of the application, the amount of money in the hands of the executor or administrator applicable on the debts of the deceased, and that he has used due diligence to collect the assets and pay the debts." [R. S. § 6064.][40]

§ 447. When and how application for extension made, etc.

While the statute does not so say, yet no motion for an extension of time ought to be considered unless the administrator or executor has filed an account, for it will be chiefly upon the information gathered from the account that the Court will authorize an extension. It is, therefore, a general practice that when an administrator or executor desires further time in which to administer the estate, no formal motion is made to that effect, but an affidavit containing the statutory requirements are made following the account and the Court in passing on the account makes the order for extension of time. The subsequent sections forbid an extension of time where there is more than one hundred dollars in money in the hands

[38] Drouilliard vs. Wilson, W. L. J., vol. 10, 385.

See § 552, *et seq.*, on Presentation of claims.

[39] § 10685 G. C.

[40] § 10686 G. C.

of the administrator or executor, which is subject to the claims of the creditors. This provision of the statute, practice has demonstrated, is exceedingly difficult to follow. There may be money in the hands of the administrator above one hundred dollars which he is not at liberty to apply on claims against the estate. Probably the application that should be given to this provision of the statute is, that no extension of time should be granted where claims of creditors remain unpaid and the administrator or executor has money in his hands which can be applied to this payment. The form of an affidavit under this section will be found in the form hereafter given for an account. Administrators and executors should be urged to make a speedy settlement of every estate and no application for an extension of time should be granted for a mere asking.[41]

§ 448. **When such further time will not be allowed.** "Further time shall not be allowed to collect the assets of an estate that is solvent, if the executor or administrator at the time of his application has in his hands more than one hundred dollars in money, subject to the claims of creditors." [R. S. § 6065.][42]

§ 448a. **What further time will be allowed.** "Not more than six months from the date of the application shall be granted by the court at one time, for collecting assets of the estate; nor the time therefor be extended beyond three years from the date of the administration bond." [R. S. § 6066; 102 v. 202.][43]

§ 449. **Office of executor, etc., not to cease.** "The office of the executor or administrator shall not cease with the time allowed by law, or the court, for the collection of the assets of the estate." [R. S. § 6067.][44]

Notwithstanding the provisions of sec. 10688, G. C., that the time should not be extended beyond three years from the date of the administration bond, yet so long as the administrator or

41 See § 705, Accounting—time extended.

42 § 6065 R. S., § 10687 G. C.

43 § 10688 G. C.

44 § 6067 R. S., 10689 G. C.

executor has not resigned, died, or been removed and assets remain to be administered, he is still authorized to collect them. It is somewhat difficult to determine just exactly what is meant by the last clause of sec. 10688, G. C. (§ 448a). It probably means that no extension of time shall be granted where it is within the power of the administrator in the proper administration of the estate to complete his trust within three years. No doubt the legislature intended that here should be an end to the trust and that three years was a reasonable time within which to complete it. But what the effect would be if the Probate Court granted an extension or permitted a continuation of the administration, adjudication gives no information. Why the statute should limit the time from the date of the bond is not easily perceived. In one case it was held that where an administrator collected all the assets that were then collectible and more than twenty years thereafter assets became collectible, he was still administrator of the estate and could collect the assets.[45]

In another case it was held that even where an administrator had filed what purported to be a final account, yet this fact did not prevent him from suing and collecting an uncollected note belonging to the estate.[46]

[45] Taylor vs. Thorn, 29 O. S. 569. The settlement in 1854, with the Probate Court, by the administrator, of his account with the estate, and the distribution at that time of the assets in his hands, did not end his powers, nor terminate his duties. The estate was not fully settled. As soon as the right to occupy the premises set apart for a homestead ceased to exist, there would be other assets to be administered. When such would become available is, to some extent, uncertain; for, while the homestead right would certainly end at the becoming of age of all the minor children, it might terminate before by their death; and upon its termination the creditors would be entitled to the further assets to be derived from the sale of the premises which had been so occupied. The administrator had not resigned, nor had he been removed. Neither his functions nor duties would cease until the estate was fully settled. McAffee vs. Phillips, 25 O. S. 374.

[46] Weyer vs. Watt, 48 O. S. 545. See § 231, Termination of trust.

CHAPTER XXV.

ASSETS — COMPOUNDING CLAIMS.

§ 450 How executor, etc., may compound with debtor.
§ 451 Authority to compound.
§ 452 Application for.
§ 453 Hearing, etc.
§ 454 Order of compromise.
§ 455 Arbitration.

§ 450. How executor, etc., may compound with debtor. "When a debtor of a deceased person is unable to pay all his debts, with the approval of the probate court, the personal representative may compound with such debtor, and give him a discharge, upon receiving a fair and just dividend of his estate and effects, or such part of the debts, as the court deems beneficial to those interested in the estate of the decedent." [R. S. § 6073.][47]

§ 451. Authority to compound.

Executors and administrators had not at common law the right to compound and compromise with debtors of the estate; and if they released a debt due the testator, or cancelled or delivered to the obligor a bond, or released a cause of action

[47] § 10696 G. C.

It will be observed that the provisions of the above section are limited to a case where the debtor is unable to pay all of his debts. If it is sought for any other reason to obtain the order of the Court to compromise a claim, it must be by virtue of the provisions of § 10689 G. C., § 456, inserted in the next chapter. § 10689 G. C. in addition to the insolvency of the debtor applies to where the debtor is a bankrupt, or has some legal or equitable defense, or where the claim is small and difficult of collection, etc. The treatment of the matter in this chapter will be intended to apply to any case where the administrator wishes to compromise any claim that he holds as administrator against any debtor, be it for a reason mentioned in the preceding section. or the provision of §§ 10689, 10702, 10703 G. C., made a part of the next chapter. Generally when an administrator seeks authority to compound a claim, he does so with the understanding that the debtor will accept the terms for which he asks authority to make the settlement. See § 1382. Gdns. If claims can not be collected they may be compounded or sold. Weyer vs. Watt, 48 O. S. 545.

founded on a tort accruing to the testator or executor, or in any manner forgave or indulged any part of the testator's or intestate's demand, or the demand of the executor or administrator, they were chargeable with the whole of such debt or demand, with interest.[48]

A compromise with a man who has assets of the estate, so as to get possession of them, will be justified if a judicious man looking alone to his worldly interest would so act.[49] An executrix who has accounted for the full amount received by the compromise of a note belonging to the estate for less than its inventoried value, is not liable for more than is thus

[48] Woerner on Admin. 683. Citing Wms. Ex. 1799.

Another distinguished author inclines to the opinion that executors and administrators had the power to compound with the debtors of their decedent. At common law Redfield in his surrogate practice, says, p. 511: "The common law power of executors and administrator to compound with debtors of their decedent has been confirmed by statute which impowers the surrogate to authorize the executor or administrator to compromise or compound a debt or claim on application and for good cause shown." Another says: "The executor or administrator who compromises a debt so as to receive less than its full amount was still held answerable for the whole; yet, if he could show, in exculpation that he accounted therein for the benefit of the estate, he stood excused. The universal test for modern times should be, whether, in compromising or submitting to arbitration, the representative acted with fidelity and due prudence. Schy. Ex. 386.

In Jeffries vs. Mut. Ins. Co., 110 U. S. 305, the Court says, even where statutes exist providing for compromise with debtors with the approval of a Probate Court, it is held that the right to compromise which before existed is not taken away, but may be exercised subject to the burden of showing that the compromise was beneficial to the estate.

In some states it is held that the administrator cannot bind the estate by compromise without the consent and approval of the Probate Court. Ætna Ins. Co. vs. Swayze, 30 Kans. 118; Yelton vs. R. R., 134 Ind. 414.

In another State it was left undecided. Mulville vs. Ins. Co., 19 Mont. 95.

Generally it may be said that if an administrator compounds or compromises a claim without the sanction of the Probate Court, he will be liable to the estate for the full amount of the claim, unless he can show that the compromise was for the best interest of the estate. Moulton vs. Holmes, 57 Cal. 337.

Wyman's Appeal, 13 N. H. 18; Alexander vs. Kelso, 3 Paxt. 311; Caldwell vs. McVicar, 12 Ark. 746; Potter vs. Cummings, 18 Me. 55; Fridg vs. Buhler, 6 La. Ann. 272.

[49] Kee vs. Kee, 2 Gratt. 116; Wilks vs. Slaughter, 49 Ark. 235.

accounted for where it is shown that the compromise was made in good faith, and that more money was realized thereby than would have been by an attempt to enforce the payment of the note.[50]

The heirs or distributees, if all the debts and costs of administration are paid, can alone take advantage of his failure to procure an order to compromise.[51] To compromise or compound a debt means to accept a part in satisfaction of the whole.[52] If he saves anything by reason of the compromise it is for the benefit of the estate and not for himself.[53] Executors or administrators may not create a new cause of action against the estate whose interests they are charged with, nor revive an old one barred by the statute of limitation; but they may adjust any existing claim by a fair compromise, or arrange the business in their hands so as to make the most of the assets.[54] Whatever the law may be elsewhere, the above statute makes it mandatory upon an administrator or executor to get the approbation of the Probate Court before he could safely act in compounding a claim.

§ 452. Application for.

The application should set out the nature and amount of the debt, the name of the debtor, and a fair statement as to his financial condition as well as other facts that may constitute a defense to the claim. If the authority for the compromise is sought under the provisions of sec. 10696, G. C. (§ 450), it will be sufficient to state the debtor's financial condition, but if the compromise is sought under sec. 10701, G. C. (§ 456), the application should set forth any of the statutory provisions of that section. The following may be used as a form:

(*Title.*)

Now comes A. B. as administrator (or executor) of the estate of C. D., and respectfully represents to the Court that among the assets in his hands belonging to the deceased estate, there is a claim against E. F. for the sum of.....dollars. That said claim is founded on a promissory note (or book account, or contract, etc.) that said E. F. is of doubtful solvency, or said E. F. claims to have a defense to the collection said claim, said defense being the following: (Here

[50] Jacobs vs. Jacobs, 99 Mo. 427; S. C. 12 S. W. Rep. 457.

[51] Delabigarre vs. Second Municipality, 3 La. Ann. 230.

[52] Matter of Loper, 2 Redf. 545.

[53] Woerner on Admin. 685.

[54] Moore vs. O'Brannin, 14 O. S. 177.

state in substance whatever may be the reason for asking the Court for permission to compound the claim), that the said E. F. has offered and agreed to pay in full thereof the sum of.....dollars.

Wherefore the said A. B., as administrator, believing it is for the benefit of the estate and asks for authority to accept the same.

.....

Sworn to and subscribed before me and in my presence this.....day of .....190....[55]

§ 453. Hearing, etc.

The statute does not indicate the course the Court ought to pursue in arriving at its conclusion, whether or not to grant the application. If the claim is large and the Court has some question about granting the application, notice ought to be given to some one interested beneficially in the estate, so that he can be present at the hearing. One author says that if the executor asks leave of the surrogate, he must upon the application give the surrogate the same evidnce to inform his mind as if the compromise had been made and were being attacked upon the accounting.[60]

In the exercise of its discretion the Probate Court shall act exclusively for the interest of the estate. Neither the executor nor the Court can modify an existing obligation, and the Court will never interfere except where the debtor is insolvent or some doubt exists as to the validity of the claim, or there is reason to apprehend that the payment can not be enforced. Even where the will authorizes the settlement of a claim by compromise or otherwise, the executor will be responsible for the compromise of a claim that is not doubtful.[61]

If the ground of authority for granting the compromise comes under the provisions of sec. 10701, G. C. (§ 456), notice must be given as provided in sec. 10702, G. C. (§ 459). Sometimes it is desired to get the Court's sanction to compounding a claim when it is not desired to go to the expense of the notice required by sec. 10702, G. C. In such case the executor is not relieved by the order of the Court, further than to throw the burden of proof

[55] See § 1615, Assignments.

[60] Jessups Surr. Pract. 902, citing *in re* Richardson's Estate, 9 N. Y. Supp. 638.

[61] Buerhaus vs. De Saussure, 41 S. C. 494; Woerner on Admin. 684.

on the person taking exception to the compromise, if the same is attacked in his account.

§ 454. Order of compromise.

The Court being satisfied that the interest of the estate will be best subserved by compounding the claim, an entry should be made to that effect. But whether or not such order of the Court can be attacked in filing exceptions to the administrator's account is not clear. In some States [64] it is provided by statute that such order of the Surrogate Court does not prevent attacking the administrator's actions in his account. If, however, the application had been made and notice given to the parties in interest and a regular hearing had thereon, the question ought to be final, provided the administrator has acted fairly and in good faith. I rather think, however, that such action of the Probate Court will not prevent attacking the settlement in the administrator's account, but it will throw the burden of proving that the settlement was wrong and against the interest of the estate, on the person seeking to attack the account, and if it is shown that the administrator acted as a discreet and prudent man would act if the debt were his own, he should not be held further responsible.[65]

The entry may be in the following form:

(Title.)

This day this matter came on to be heard upon the application of A. B., administrator (or executor) of the estate of C. D., deceased, for authority to compound a claim of.....dollars against E. F.; and it appearing to the Court that the said E. F. is unable to pay his debts in full (or that said claim is doubtful and cannot be collected, etc.) said administrator (or executor is authorized to give a discharge of the debt aforesaid upon receiving thereof.....dollars.[66]

§ 455. Arbitration.

There is no statutory provision authorizing an administrator or executor to submit to arbitration, a claim existing in

[64] New York.

[65] Redf. Surr. 511, citing Leland vs. Manning, 4 Hun 7; Murray vs. Blatchford, 1 Wend. 585.

[66] See § 1615, Assignments.

favor of the estate, as there is in reference to a claim against the estate.[67] But I have no doubt that the rights existing at common law in reference to the submission of such matters to arbitration still exist in Ohio.[68]

Our general statute provides that all persons who have any controversy except when the possession or title of real estate may come in question, may submit such controversy to the arbitrament or umpirage of any person or persons to be mutually agreed upon by the parties, and they may make such submission a rule of record of this State.[69] This would seem to be broad enough to include an administrator or executor.[70]

As incidental to the power to sue and collect, the executor or administrator ought to have a right to arbitrate or compromise any demand of the decedent which he represents, provided he act within the range of a reasonable discretion as to the true interests of the estate. Nevertheless, the responsibility is a perilous one, according to some authorities, unless sanctioned by express statute.[71]

Upon this matter a distinguished author says: "It seems never to have been doubted that executors and administrators have full authority at common law to submit any matter in dispute, relating to the estate of a deceased person in their hands, to arbitration, and thereby bind himself to the extent of assets. But while the award is undoubtedly binding upon the parties, as well as upon those having any interest in the estate, it affords no protection to the executor or administrator, although acting in perfect good faith, against liability as for

[67] § 6093 R. S. See § 594, *et seq.*, on Arbitration of claims.

[68] Child vs. Updyke, 9 O. S. 333.

The award rendered in such common-law arbitration, has no judicial force. It operates neither as a judgment nor as the verdict of a jury. The failure to perform it may constitute a cause of action, or its performance may furnish a good defense in a subsequent suit between the parties on the same subject matter. But no judicial action can be had upon it without pleadings as in other cases.

[69] § 12148 G. C.

[70] The estate of a decedent is a *person* in legal contemplation. Billing vs. State, 107 Ind. 54; Taggart vs. Teianney, 1 Ind. App. 339.

[71] Sch. Ex. 299; 1 Am. & Ency. of Law 653.

devastavit." [72] It is questionable, therefore, whether executors or administrators should submit such claims to arbitration. But if they proceed as is provided by the general statutes, they certainly ought not to be held for any wrong doing.[73]

[72] Woerner on Admin. 685, citing Coffin vs. Cottle, 4 Pick. 454; Chadbourn vs. Chadbourn, 9 Allen 173; Lyle vs. Rodgers, 5 Wheat. 394, 406, *et seq.;* Wood vs. Tunnicliff, 74 N. Y. 38; Strodes vs. Patton, 1 Brock. 228, 231; Eaton vs. Cole, 10 Me. 137; Kendal vs. Bates, 35 Me. 357; Alling vs. Munson, 2 Conn. 691; Merchants' Bank of Macon vs. Taylor, 21 Ga. 334; Wamsley vs. Wamsley, 26 W. Va. 45; Powers vs. Douglass, 53 Vt. 471, 474.

[73] See Woerner 685.

By conferring on courts of Probate jurisdiction to authorize executors or administrators to submit demands in favor of or against estates in their hands to arbitration, or to compromise them, the Legislature intended only to give security and protection to these officers in the exercise of that authority with which they were clothed by common law. Chadburn vs. Chadburn, 9 Allen 173; Chouteau vs. Snydam, 21 N. Y. 179; Chase vs. Bradley, 26 Me. 531.

CHAPTER XXVI.

ASSETS. SALE OF DESPERATE CLAIMS.

§ 456 Disposition of desperate claims.
§ 457 Jurisdiction.
§ 458 Application.
§ 459 When notice of application to court for their sale necessary, publication of notice.
§ 460 Entry ordering notice.
§ 461 Form of notice, etc.
§ 462 Required proof.
§ 463 Public or private sales, terms of compounding to be fixed in order.
§ 464 Entry of public sale.
§ 465 Form of notice and return of sale.
§ 466 Form of private sale, etc.
§ 467 Return of private sale.
§ 468 Effect of order.

§ 456. Disposition of desperate claims. "Upon proper proof by an executor or administrator to the probate court that any claim, debt, or demand belonging to the estate in his hands to be administered and accruing in the lifetime of the deceased, represented by such executor or administrator, is desperate:

1. On account of the doubtful solvency or actual insolvency of the debtor;

2. On account of such debtor having availed him or herself of the bankrupt law of the United States;

3. By reason of some legal or equitable defense which such debtor or debtors allege and make appear against it;

4. On account of the smallness of such claim and difficulty in its collection, either from the remoteness of the debtor's residence, or the ignorance of the executor or administrator, of such residence; the court may order such claim, debt, or demand to be compounded or sold, or to be filed in court for the benefit of such heirs, devisees, or creditors of the decedent as will sue for or recover it, giving the creditors the preference, if they or any of them apply for it before the final settlement of the estate. Such order of the court shall be a sufficient voucher to the executor or administrator." [R. S. § 6077.][1]

1 § 10701 G. C.

The mere fact that an administrator files certain claims with his account as being uncollectible will not confer a right upon the heirs to enforce collection thereon.

No heir can sue to recover on bonds of the intestate unless they have been legally distributed to him, notwithstanding the fact that the administrator has filed his final account. Puder vs. Agler, 242 Fed. 95; 62 Bull. 410.

A claim owed by the executor, even though the executor is insolvent, is not a desperate claim. Sheney vs. Powell, 20 C. C. 398; 11 C. D. 279.

§ 457. Jurisdiction.

As a matter of course the application to be made for the sale of desperate claims must be made in the court making the appointment. But such court has no authority to authorize a sale which is not permitted by law. Thus where an insolvent person who was indebted to the estate, was appointed administrator of the estate, it was held that the court had no power to permit such administrator to sell the claim against himself as a desperate claim. The statute upon his qualification transmuted the claim into money, and if a sale was made, the purchaser received no title.[2]

No administrator has a right to sell either at public or private sale any promissory note or claim, or demand, or right of action which he can collect, unless the Court finds as provided in the above section, that it is what might be termed a desperate claim.[3] The claim or demand being one which accrued or was accruing during the lifetime of the deceased.[3*] An administrator or executor can, however, sell a note and transmit a good title to the purchaser, if the note was taken by him in the usual course of administering the estate.[4]

The validity of the sale as well as the protection afforded the administrator or executor, will depend upon a proper compliance with the provisions of the above and subsequent sections of the General Code. A claim is not presumed to be desperate until a finding of the Court is made to that effect, and the administrator has no authority to sell it, either at public or private sale.

§ 458. Application.

The above section provides four sufficient reasons, the existence of any one of which will be sufficient to authorize the Court to permit a sale. The application, therefore, must contain some one of such statutory causes, and it may be in the following form:

[2] Chaney vs. Powell, 20 C. C. 399; 11 C. D. 279.

[3] See § 6074 R. S. § 470.

[3*] See § 1396 R. S.

[4] Jelke vs. Goldsmith, 52 O. S. 499.

(*Title.*)

Now comes A. B., administrator (or executor) of the estate of C. D., and respectfuly represents to the Court that among the assets in his hands belonging to the deceased's estate and accruing during the lifetime of deceased, there are the following claims. (Here set out in detail each claim, describing it as given in the inventory, and also set out the reason why each claim cannot be collected, being careful to give as a reason for not being able to collect, one of the following:

First, Doubtful or actual insolvency of the person owing the same.

Second, That the debtor is a bankrupt.

Third, That the debtor has some good legal or equitable defense.

Fourth, That the claim is difficult to collect, either from the remoteness of the residence of the debtor or the ignorance of the executor or administrator of such residence.)

Wherefore the said A. B., as administrator, asks that said claim (or claims) may be compounded (or sold or be filed in the Probate Court) as provided by law.

.....

Sworn to and subscribed before me and in my presence this.....day of.....190....

§ 459. When notice of application to court for their sale necessary. Publication of notice. "When a claim or demand exceeds ten dollars, or in the aggregate exceed five hundred dollars, the executor or administrator must give notice of his intended application for such order, at least three consecutive weeks previous to the day on which it is to be made. The notice shall be published in some newspaper having general circulation in such county. When the claims are numerous they need not be described in the notice." [R. S. § 6078.][4*]

§ 460. Entry ordering notice.

If any one of the claims or demands exceed the sum of ten dollars, or if they all in the aggregate exceed five hundred dollars, there must be a notice given as provided in the previous section. Where no notice is required, the Court may at once allow the application upon satisfactory evidence and may order the claims compounded and sold at either public or private sale.

(*Title.*)

On this day came A. B., as administrator (or executor) of the estate of C. D., and filed herein his application, praying for an order of this court authorizing him to sell (compound or file) the claims therein described

[4*] § 10702 G. C.

which he holds among the assets of the estate. And it appearing to the Court that the sum of said claims exceed ten dollars in value, it is ordered that said cause be set for hearing on the.....day of....., at.....o'clock...M., 190.... And that notice thereof be given at least three consecutive weeks previous to said day for hearing, which notice shall be published in some newspaper of general circulation in this county.

§ 461. Form of notice, etc.

If such claims are numerous they need not be described in the notice, otherwise they should be described. The following may be used as a form:

(Title.)
To whom it may concern:
The undersigned, as administrator (or executor) of the estate of C. D., deceased, has this day filed in Probate Court of..... county, Ohio, his application praying for an order authorizing him to sell (or compound or file) the following claims belonging to the estate of C. D., and which have become desperate. (Here insert the name of each debtor, nature of the claim and amount due, if not too numerous, if numerous the principal ones, the others briefly.) Said application will be for hearing on the.....day of....., at ..... o'clock...M., 190....

....
Administrator, etc., of C. D.

§ 462. Required proof.

On the day set for hearing the Court should require a filing of the notice and an affidavit by the publisher, that it has been given as required by law. The statute does not indicate what proof is required, but simply says upon proper proof. By this we are led to believe that some evidence should be adduced and the Court should have a hearing and should find from the evidence that the claims set up in the application are of such a character as to bring them within the purview of the statute, and that some one of the statutory reasons exist for declaring the claims desperate. The Court may order that the claim or claims be sold either at public or private sale or that they be filed in court.

§ 463. **Public or private sales. Terms of compounding to be fixed in order.** "If the court orders a sale of such debts or demands, the executor or administrator must give public notice, as above provided, of the time and place of sale, three

consecutive weeks previous to the day of sale, at which they shall be sold to the highest bidder. The court may order a private sale of such debts and demands, in like manner and for like reasons as provided for the private sale of goods and chattels. If the court authorized the compounding of such claims or any of them, in its order it shall fix the sum for which they may be compounded." [R. S. § 6079.][5]

§ 464. Entry of public sale.

(*Title.*)

This day this cause came on to be heard upon the application of A. B., administrator (or executor) of the estate of C. D., deceased, for an order authorizing him to sell at public sale certain claims therein described belonging to the estate of said decedent. Which said claims were accruing (or had accrued) in the lifetime of the said decedent, and the same was submitted to the Court. Whereupon the Court finds that due and proper notice of said application and the time of hearing the same has been given as provided by law and that the allegations of said application are true and that said claims are desperate. Wherefore it is ordered that said administrator (or executor) proceed to advertise and sell the claims specified in said application at public auction, at (here insert place where sale is to be held) to the highest cash bidder for all of said claims. Notice of such sale shall be given by publication for three consecutive weeks in a newspaper of general circulation in said county.[6]

§ 465. Form of notice and return of sale.

The following may be used as a general form of notice:

The undersigned will sell at public auction at.....on the.....day of....., at.....o'clock ...M., 190..., the following claims belonging to the estate of C. D. (here insert said claims). Said sale to commence at.....o'clock ...M., sharp, terms cash.

.....
Administrator, etc.

After the sale is had, a return should be made to the Probate Court, which may be in the following form:

(*Title.*)

In compliance with the former orders of this court I gave notice of sale by advertisement in....., a weekly newspaper of general circulation of said county, for at least three weeks previous to the day of sale, which was on the.....day of.....at .....o'clock...M., at (here insert the place). I then and there offered the desperate claims heretofore ordered by the court to be sold and belonging to the estate of A. B., with the following result: (Here designate in an itemized manner the claims, with the name of the purchaser and amount paid for each.

With this return of sale, there should also be returned a copy of the notice with an affidavit of its publication.

[5] § 10703 G. C. [6] See § 1615.

§ 466. Form of private sale, etc.

The statute authorizes a private sale in like manner and for like reasons as provided for the private sale of goods and chattels. The statute, however, in the case of a private sale of other goods and chattels stipulates that the sale cannot be made for less than the appraisement.[7] The reason for the sale of the claims in this instance would forbid a sale at their appraisement. Therefore the Court must fix a value at which they can be sold, if they are to be disposed of at private sale. The entry may be in the following form:

This day this cause came on to be heard upon the application of A. B., administrator (or executor) of the estate of C. D., deceased, for an order authorizing him to sell at private sale certain claims therein described belonging to the estate of said decedent. Which said claims are accruing (or had accrued) in the lifetime of the said decedent and the same was submitted to the Court. Whereupon the Court finds that due and proper notice of said application and the time for hearing the same has been given as provided by law; and the court further finds that a just and fair value of said claims are.....dollars, and fixes that sum as a minimum price for which they may be sold at private sale.

§ 467. Return of private sale.

(*Title.*)

In compliance with the former order of the court I have sold the claims heretofore adjudged by this court to be desperate, for the sum of..... .....dollars, the same being not less than the price fixed by the Court, to the following persons. (Here set out in an itemized statement, if sold to several persons; if sold as entirety so state.)

.....

Administrator, etc.

This sale is made according to the statute as a private sale of other goods and chattels, therefore it must have an affidavit as provided in sec. 11213, G. C., which affidavit may be in the following form:

(*Title.*)

A. B., administrator (or executor) of the estate of C. D., being duly sworn, says that in obedience to an order issued from the Probate Court of.....county, he sold the goods and chattels mentioned in the above report of sale. to the persons therein indicated and at the price therein mentioned. Said sums being not less than the price fixed by the court and being the highest he could get, after having made diligent endeavor to obtain the best prices for said property.

.....

Sworn to and subscribed before me and in my presence this.....day of.....190....

.....

[7] § 10700 G. C., §§ 479, 495.

§ 468. Effect of order.

Under the previous chapter it was said that the consent of the Court to the compounding of a claim would not prevent the administrator from having his conduct thereto questioned, by exceptions to his account. The order authorized in this chapter having been made upon a hearing after a notice made in the way provided by statute. Such an order of the Probate Court would be an adjudication of the question and could not be attacked in any other proceeding, and the administrator could not be questioned, or held responsible in any manner for his conduct in making a sale under the provisions of this chapter. If exceptions are to be taken, they must be made in a direct way, and if any one is aggrieved by the decision of the Court, he may prosecute error. Upon the return of an administrator (or executor) of a sale, either public or private, the Court should put an entry on the journal confirming the action of the administrator. It may be in the following form:

(*Title.*)

This day came A. B. and filed herein his report of a public (or private) sale of the desperate claims of the estate of C. D. Upon examination by the court, the same appearing regular and in conformity to law, and the former order of the court is confirmed, and the same with the proceedings herein, is ordered recorded.

It is common practice, where the claims are desperate, and will practically bring nothing, for the administrator to file them as uncollected assets with his final account. Of course no heir could bring an action on them, and if at any time they were worth collection, an administrator would have to bring the action. It might be well in such cases for the administrator to distribute them in kind under order of the court to the persons who would be entitled to whatever might at any time be collectible thereon.

CHAPTER XXVII.

ASSETS. SALE OF PERSONAL PROPERTY.

§ 469 Regulated by statute.
§ 470 What personal property the executor or administrator may sell, and when appraisement, etc., not required.
§ 470a Household goods.
§ 471 Promissory notes, etc.
§ 472 Property taken by the widow, etc.
§ 473 Property specifically bequeathed.
§ 474 How property may be delivered to legatee.
§ 475 Form of redelivery bond.
§ 476 Emblements.
§ 477 Request not to be sold in will.
§ 478 When sale to be made.
§ 479 How to be sold.
§ 480 Notice, etc.
§ 481 Conduct of sale.
§ 482 What credit to be given.
§ 483 Security to be taken.
§ 484 Sufficient surety, etc.
§ 485 When executor or administrator not liable for loss.
§ 486 Payment, etc.
§ 487 Executor or administrator to make out list of articles liable to sale. Duty of clerk of such sale.
§ 488 Construction of preceding section.
§ 489 Sale bill to be signed by clerk, sworn to by the executor or administrator and filed. Returns of private sale.
§ 490 Form of sale bill, etc.
§ 491 How return of sale bill enforced.
§ 492 Purchase by administrator or executor.
§ 493 Warranty of title.
§ 494 Property unsold.

§ 469. Regulated by statute.

Some States have statutory provisions applying the same rule to the personal property as we in this State do to real estate; that is, personalty can only be sold upon a showing made by the administrator or executor that it is necessary to have such sale to pay debts. But in this State the theory of the law is, that all personal property except bonds and stocks and other articles mentioned in sec. 10697-8, G. C. (§ 470),[7] shall be sold and converted into money, and distribution made in that manner among those entitled. If there is any class of property for which the statute does not make provision as to the manner

[7] The statute now seems to contemplate that there may be a sale of bonds, etc. See § 10697 G. C., § 470.

of its sale, as to such property, the common law right of the administrator or executor would attach.[8]

As a general rule, however, it may be said that the common law right of a sale does not exist in Ohio.[9] In order to make a valid sale the administrator must pursue the line marked out by the statute. A sale made in any other manner is invalid.[10] The purchaser may, however, receive a good title.[11] The administrator would not only be liable for a *devastavit*, but the purchaser would receive at best only a voidable title. The administrator has no right to give away the assets, though he considers them worthless.[12]

The statute marks distinctly the course that the administrator should pursue, and any other will make him liable to persons injuriously affected. A number of different methods are provided by statute for a disposal of the personal property. In the two preceding chapters we have considered the question of the disposal of assets of doubtful value by compromise or sale. In this and the subsequent chapters, will be considered the sale of other personal property. In the legislation of the following sections of the General Code it will be seen that the Legislature intended to have a speedy settlement of the estate, where possible. Of course where the will of a decedent makes provision for the manner in which his property shall be disposed of, such testamentary provision takes precedence over the statute.[12a] But where a will makes no provision, the statutes apply to the executor, the same as an administrator.[13]

§ 470. What personal property the executor or administrator may sell and when appraisement, etc., not required. "Within three months after the date of his bond, the executor or administrator shall sell the whole of the personal property belonging to the estate, which is liable for payment of debts and is assets in his hands to be administered, except promissory notes, unless as otherwise provided herein, and claims, demands, and rights in action which can be collected by him, and bonds

[8] Jelke vs. Goldsmith, 58 O. S. 517.

[9] The Indiana statute is somewhat similar to our own. In passing upon that statute, the court said, "the common-law right of the administrator to sell and dispose of personal property does not exist in this State. Sales of such property must be made in the manner prescribed by our statute upon the subject. In the absence of an order from the proper court the sale must be public, and where a sale is made at private sale under the order of the court, it must be made in substantial compliance with the order." Henry, Probate law and Pract. 165; Citizens, etc., Co. vs. Robbins, 128 Ind. 449.

[10] Miller vs. Stark, 61 O. S. 413.

[11] Hicks vs. Stone, 11 Bull. 72.

[12] *In re* Radoviche's Estate, 74 Cal. 536; S. C., 16 Pac. Rep. 321.

[12a] A provision in the will whereby testator gives all his personal property together with certain real property to his wife, shows he does not intend that his debts be paid out of the personal property. Harbeson vs. Millinger, 2 O. App. 75; 18 O. C. C. (N.S.) 504.

[13] See § 470, What need not be sold; § 718, Increase of estates; § 889, Who may become purchaser.

and stocks when the sale thereof is not necessary to pay debts; and also except the following:

1. Such as the widow desires to take at the valuation by the appraisers, she securing payment therefor to the executor or administrator as other purchasers;

2. Property specifically bequeathed, until the residue of the personal estate is sold, and found to be insufficient to pay the debts of the estate;

3. The executor or administrator may defer the sale of the emblements or annual crops raised by labor, not severed from the land of deceased at the time of his death, beyond the three months herein prescribed for the sale of the assets. These may be sold before or after they are severed from the land at his discretion, in the mode prescribed for the sale of other goods and chattels. If by the terms of a last will the testator expresses a wish that no sale of his personal property be made, the court admitting it to probate at its discretion, may direct its omission. At a later period, on application of a party interested, the court may, and for good cause shall require, such sale to be made.

4. The executor or administrator may sell and transfer, without recourse, any promissory notes secured by mortgage and the mortgage securing the same at not less than the face value thereof with accrued interest.

5. The executor or administrator within one year after his appointment, unless for good cause shown further time is granted by the probate court, and unless he has made or is able to make distribution in kind to the parties who are entitled to their respective portions of the estate in his hands, may sell either at public or private sale, any promissory notes, claims, demands, rights in action, bonds and stocks by first obtaining an order of the probate court therefor. The probate court may order said executor or administrator to sell at public or private sale and shall fix the price for which any of said property may be sold, and the same shall not be sold for less than the price so fixed. Provided, further, that if said property shall not be sold on the first application, the executor or administrator shall report his proceedings to the probate court, and the court may make such further orders as he in his judgment may deem best." [108 v. 703.] [14]

§ 470a. **Household goods.** "When by the terms of a last will the testator expresses a wish that no appraisement of his household goods and furniture be made, the court admitting it to probate may direct the omission of such appraisement, but thereafter may require it on the application of any party interested therein." [R. S. § 6074.][14*]

[14] § 10697 G. C.

[14*] § 10698 G. C.

[15] See § 363, *et seq.*, as to Assets generally. § 469 as to Sale of personal property.

Property set off to widow and children can not be sold. Only such property as constitutes assets of the estate can be sold.[15]

§ 471. Promissory notes, etc.[15*]

It will be observed that in the general provisions as to the sale of personal property in the above sections, that some kinds of personal property are excepted; the first of which is promissory notes and all claims, demands, and rights in action which can be collected by the administrator, and bonds and stocks when it is not necessary that they be sold to pay debts. It is the expectation of the law, that as to promissory notes and other demands and claims, that the administrator will collect them. If they are not collectible, then he may sell them as desperate claims, or compound them as provided in the two preceding chapters. Bonds and stocks are not to be sold unless it is found necessary for the purpose of paying debts or distribution. Administrators and executors sometimes in order to have a speedy settlement of the estate, assign notes held by them, but it seems they have no power so to do.[16] The statute now authorizes their sale without recourse at face value and accrued interest.

If the note be given to the administrator in the management of the estate, he might transfer it.[17] The practice of some Probate Courts is, that where a note or demand is not yet due, upon the application of the administrator or executor, an order is made for him to assign or sell it at its full value. It often becomes very necessary and proper to make such a sale. Especially is this true where the demand bears a low rate of interest, and other outstanding debts carry a high rate of interest. It is palpable that the interest of the estate will be highly subserved by such a course, and such a proceeding ought to be sustained by the courts.[18] There is a provision [18*]

[15*] Cited National Surety Co. vs. Haughton, 32 O. C. C. 138.

See § 10704 G. C. (§ 502).

[16] Miller vs. Stark, 61 O. S. 413.

[17] Jelke vs. Goldsmith, 52 O. S. 517.

[18] When the author occupied the position of Probate Judge, he assumed jurisdiction in such cases on the theory that the Court had a right to make an order which was evidently beneficial to the estate, and there being no specific statutory provision on the subject, it followed as one of the incidental powers attaching to the Court in its general jurisdiction over the settlement of estates.

Statute has been amended and now authorizes the administrator to sell promissory notes by first getting an order of the Probate Court authorizing the same—see § 502. This order of court, I should think, is proper under § 470 as now amended.

[18*] §§ 10804-5-6 G. C., § 890.

An executor has no power as such before final settlement to turn over to a creditor of the estate notes held by the estate without an order of the Probate Court, and a person holding notes so turned over does not have a valid title to them upon which to sue the maker. Surety Co. vs. Haughton, 32 O. C. C. 138.

There is some doubt, from the language of § 10704 G. C., whether it is meant to absolutely forbid the sale of stocks and bonds where not necessary to pay debts, or whether it means merely that they

that where in the sale of real estate notes are taken for deferred payments, they may be sold by order of the court for not less than their face value.

§ 472. Property taken by the widow, etc.

The statute gives to the widow the privilege of taking any of the property at its appraised value, she to secure the payment therefore as other purchasers. Where the widow has had set apart to her the statutory allowance for her year's maintenance, the executor or administrator is generally safe in allowing her to take property equal to such allowance and taking an assignment of her right to the allowance as a security for the property.[19] For such statutory allowance is entitled to priority of payment over every other claim against the estate, except funeral expenses, those of last sickness and expenses of administration.[20]

The right of the widow to take personal property at the appraisement is not limited to the time of making the appraisement, but may be exercised at any time before the property is put up for sale, within the three months allowed to the administrator for selling the property; and her right is not affected by the changes that may, in the meantime, have taken place in the market value of the property.[21]

§ 473. Property specifically bequeathed.

The third exception is, that such property as is specifically bequeathed, shall not be sold until it is found by the administrator or executor that the residue of the personal property will not be sufficient to pay the debts of the deceased. The inference from the reading of this exception is, that in all cases where the remainder of the personal property is not sufficient to pay debts, the property specifically devised might be sold. If the deceased owned nothing but personal property this statement would be true, but if he owned real estate it would not always be true. As a general rule personal property must al-

are not required to be sold in three months. I was formerly rather of the opinion that it meant that they were not to be sold but distributed in kind, but upon further consideration of the question I have come to the conclusion that they are not required to be sold within three months, but that at any time the administrator may sell them.

[19] See White vs. Moe, 19 O. S. 37.

[20] See § 10714-5 G. C., § 647.

[21] Overturf vs. Wear, 26 O. S. 538.

In the opinion of the author the widow has no right against objections to take the property at the appraisement after the expiration of three months, even if the property remains unsold.

ways be first exhausted in the payment of debts before real estate can be used for that purpose. But the testator can change this rule, and it may now be taken as the established law, that the personal fund will be exempted if the intention of the testator in its favor can be collected from a sound interpretation put upon the whole will.[21*] It is only necessary, that from the whole testamentary disposition taken together, there should appear on the part of the testator an intention so expressed as to convince a judicial mind that it was meant to charge the real estate so as to exempt the personal, or to make them both abate and contribute ratably.[22] Thus, if a person give away all his personal property and leave sufficient real estate undisposed of, this would exonerate the personal property until after the real estate was exhausted.[23]

Likewise it has been held, that if all the personal property be specifically bequeathed and the remainder left be real estate devised to a residuary legatee, such real estate would have to be consumed for the payment of the debts before the personal property specifically devised.[24] So where the payment of debts is made a general charge on the real estate, personal property cannot be used until the real estate is applied to that purpose.[25]

§ 474. How property may be delivered to legatee. "The property specifically bequeathed may be delivered over to the legatee entitled thereto, he securing its redelivery on demand, to the executor or administrator. Otherwise, it must remain in the hands of the executor or administrator, to be distributed or sold, as required by law, and the condition of the estate." [R. S. § 6075.][26]

[21*] Skinner vs. Blackburn, 4 C. C., 325; 2 C. D. 574.

[22] Woerner on Admin., 1104, per Wagner, J., in Brant's Will, 40 Mo. 266, 279; Marsh vs. Marsh, 10 B. Mon. 360; Hancock vs. Minot, 8 Pick. 29, 37; Bane vs. Wick, 14 O. S. 505, 515; Whitehead vs. Gibbons, 10 N. J. Eq. 230; Reid vs. Corrigan, 143 Ill. 402.

[23] McCullon vs. Chidester, 63 Ill. 477.

[24] Reid vs. Corrigan, 143 Ill. 402.

[25] Alexander vs. Miller, 7 Heisk. 65, 77, *et seq.;* Lightfoot vs. Lightfoot, 27 Ala. 351, 358; Lee, Appellant, 18 Pick. 285, 288; Spraker vs. Van Alstyne, 18 Wend. 200, 204, *et seq.;* Wallace vs Wallace, 23 N. H. 149, 155.

[26] § 10699 G. C.

§ 475. Form of redelivery bond.

Know all men by these presents, that we, A. B., C. D. and E. F., are held and firmly bound to G. H., executor of the last will and testament (or administrator with the will annexed) of the estate of I. J., deceased, in the sum of (double the value of the property) for the payment of which we do jointly and severally bind ourselves.

The condition of the above obligation is such that, whereas, A. B. has received from the said G. H. the following property specifically bequeathed to him by the last will of said I. J. (Here describe the property.) Now, therefore, if the said A. B. shall redeliver said property in as good order and condition as the same was in when received, in case such property shall be required for the payment of the debts of said decedent, then this obligation to be void, otherwise to remain in full force.

.....Sign.

Executed in presence of.....

If the executor is also residuary legatee, he could dispense with a sale of not only the property specifically devised, but that which is generally devised, by giving a bond, as provided in § 58.[27]

§ 476. Emblements.

The next exception to the property which the executor or administrator is required to sell within three months from the date of his bond are emblements or annual crops which were not severed at the death of the decedent. Whether or not the same shall be sold before they are severed rests in the discretion of the administrator or executor. No rule can be laid down to guide the administrator or executor in the exercise of this discretion. It seems, however, unless it appears clearly to him that it would not be for the benefit of the estate to sell them before they are severed, he ought to sell them with the remainder of the property. To keep them means, in a great many instances, that he must sever them and get them to the market, all of which involves an expense. Usually at public sale, property brings its fair value, especially of that character. But it sometimes appears that it will be to the advantage of the estate to first sever the crops. A very common practice in such cases is for the administrator to make a memorandum on his sale bill of such emblements and annual crops as remain unsold, and as the articles are of such a kind that the market price can always be easily ascertained, the administrator or executor, with-

[27] §§ 10608-9 G. C.

out any order of Court, sells the same at the market price and returns the same in his account. The statute, however, contemplates that after the emblements or annual crops have been severed, that the administrator sell them at public sale, or make an application to the Probate Court to sell them at private sale. As to what are emblements, see sec. 369.

§ 477. Request not to be sold, in will.

The remaining exception to the general rule, that all personal property be sold, is that, if the testator expresses a wish that there be no sale of his personal property, the court admitting the will to probate may direct omission thereof; and the Court may also at any subsequent time, upon the application of any party interested, require the property to be sold. The general practice in such cases is for the executor to simply follow the requests of the will and make no sale of the personal property unless directed by the Court to do so. Other personal property which is generally not sold by the administrator is the clothing of the deceased. These are generally of very little value. A family feeling justifies the administrator in turning them over to relatives for mutual distribution. The application for an order of the Court directing the executor to sell in such cases may be in the following form:

(*Title.*)

A. B. respectfully represents that C. D. is the duly qualified executor of the estate of E. F. That the said E. F. in his will expressed the wish that there be no sale of his personal property. That A. B. is interested in said estate in the following manner: (Here describe how interested.) And states that unless said personal property be sold his rights thereto will be effected as follows: (Here state how affected.) Wherefore he asks that the court may make an order requiring the said executor to proceed to sell said property as the law requires.

.....

The granting of such an order rests in the discretion of the Court, and should not be allowed unless there is good cause shown, and the wish of the testator should be followed. The entry may be in the following form:

(*Title.*)

This day this matter came on to be heard upon the application of A. B. to require C. D. to proceed and sell the personal property belonging to the estate of E. F.; and the same was submitted to the court. Whereupon the court finds that the interest of the estate of said E. F. requires said personal property to be sold and hereby orders C. D., executor thereof, to proceed and sell the same as required by law.[27a]

§ 478. When sale to be made.

The sale is to be made within three months after the date of the administrator's or executor's bond,[28] unless the Court may for good cause extend the time for sale.[29]

If a sale is made after three months and without an extension of time, I apprehend it will not be void, but if the estate suffered any loss the administrator or executor would be liable.[30]

As a general rule, the time ought not to be extended, and the statute means that it shall not be extended unless there is a good cause for it — that is, such a cause as will result beneficially to the welfare of the estate. For, generally, an expeditious settlement of an estate is more beneficial to those interested than one delayed. It should not be granted for the mere asking. The application may be in the following form:

(*Title.*)

A. B., executor (or administrator) of the estate of C. D., deceased, respectfully represents to the court that three months' time has about elapsed from the date of his giving bond, and that he has not sold the personal property belonging to the estate of said C. D., for the following reasons: (Here state reasons.) And that he believes, for the following reasons (here state reasons) that he should have an additional time of..... months in which to make such sale. Wherefore he prays the court that such extentsion may be granted to him.

.....

FORM OF ENTRY.

(*Title.*)

This day this matter come on to be heard upon the application of A. B., executor of C. D., for an order of the court extending the time for making the sale of the personal property belonging to said estate; and the same was submitted to the court. Whereupon the court finds that there is good cause for granting such extension and it is hereby ordered that this time be extended.....days or months from this date.

.....

§ 479. How to be sold. "The sale of personal property shall be made at public auction after at least fifteen days' notice has been given in some newspaper in general circulation throughout the county, or by advertisement set up in at least five public places in the county where such sale is to take place, though for good cause the court may extend the time for sale. When, on sufficient proof, it is satisfied that it would be for the advantage of the estate to sell any part of the personalty

[27a] If this be an order to sell notes, bonds, stocks, etc., that have neither been collected or distributed in kind, the Court must fix the price, and the same can not be sold for a less price, and this should be in the entry. See § 10697 G. C., § 470.

[28] §§ 10697-8 G. C., § 470.

[29] § 10700 G. C., § 475.

[30] Hicks vs. Stone, 11 Bull. 67.

not taken by the widow at the appraisers' valuation at private sale, the court may authorize the executor or administrator so to sell any part thereof, either for cash or on such other terms as in its discretion, it directs, but not at less than its appraised value, unless by the affidavit of at least three disinterested persons the court is satisfied that such property can not be sold at its appraised value, and that it will be for the best interest of the estate to sell it at a less price, in which case it may authorize its sale for a less amount. Should any property thus ordered to be sold at private sale not be sold within six months from the time of such order, or within such other time as is fixed therefor, the court may order it to be sold at public auction in the same manner as though a private sale had not been ordered. [R. S. § 6076.] [31]

§ 480. Notice, etc.

No order of court is necessary for an administrator or executor to sell at public sale. The statute gives him all the order he needs. As to the exact time, manner, and place of the sale the administrator will often find it very much to his advantage if he consults those who are beneficially interested. "A little oil upon troubled waters often prevents a storm." [32]

The first essential matter in proceeding to have a public sale is giving public notice. There is no statutory requirement of what the notice shall contain, but it must be given for at least fifteen days in a newspaper of general circulation throughout the county, or set up in at least five public places.[34]

The substantial compliance with this is all that is required. The administrator, however, should use his best endeavor to give the sale a wide degree of publicity, and should exercise the same judgment that a careful and prudent man would if he were offering his own property for public sale. The notice or *sale bill* may be in the following form:

[31] § 10700 G. C. See § 1609, in part, § 495 for remainder of section.

[32] The judgment of residuary legatees or distributees may be of importance in aiding the representative's discretion as to the time, place, and manner of sale. He is not bound to act upon the judgment of one or all of such parties; but to ascertain and act upon the wishes of the majority of beneficiaries in interest may often be convenient where the fiduciary's own responsibility is a delicate one. See Marsden vs. Kent, 25 W. R. 522; Sch. Extr. 348.

[34] "Executors could only sell at public auction after due advertisement of the property, and the purchaser at a forced sale did not acquire a good title unless the formalities prescribed by law for the alienation of property were observed."

Per Davis, J., in Gaines vs. De La Croix, 6 Wall. 719.

See Kaiser's Succession, 48 La. Ann. 973, where the executors were held justified in selling at private sale in the interest of the estate, apparently without an order of court. Wynns vs. Alexander, 2 Dev. & B. Eq. 58; McDaniel vs. Johns, 8 Jones L. 414; Hicks vs. Stone, 11 Bull. 72.

An executor, acting in good faith and, as he believes, for the best interests of the estate, and applies the proceeds to paying the debts of the estate, unless it is shown the estate suffered, is entitled to full credit in his account. Hunter vs. Yocum, 18 N. P. (N.S.) 14.

ADMINISTRATOR'S OR EXECUTOR'S SALE.

The undersigned will offer for sale at public auction, at he late residence of....., deceased, in..... county, Ohio, on the.....day of.....A. D. 190..., the personal property of the said....., deceased, consisting in part of..... ..... Sale to commence at.....o'clock, ...M.

TERMS.—Purchases amounting to three dollars or less to be paid in cash, above that sum, notes on.....months time, with two or more approved sureties, will be taken.

.....

.....190...[34a]

.....[35]

§ 481. Conduct of sale.

In the conduct of the sale, the administrator is authorized to secure such services and incur such obligations as is proper to make an effective sale.

The sale must be made pursuant to the terms of the statute; and in the absence of an order of the Court, the sale must be public.[36]

Before selling the property must be appraised.[37]

The purchaser acquires the same title as the decedent held in his lifetime, although the sale may be wholly unnecessary; and such sale can only be avoided for fraud or collusion practiced by the executor or administrator and the purchaser.[38]

Mortgaged property is sold subject to the mortgage.[39]

Any one bidding off property must pay for it; and if he do not, and it is resold for less than his bid, he will be liable for the difference between his bid and the amount of the sale.[40]

The administrator cannot purchase at the sale.[40*] He may employ an auctioneer.[41]

The estate is not liable for the fraudulent representations of

[34a] One insertion if made fifteen days before the time of sale, would be a sufficient compliance with the statute.

[35] See § 1609, Assignments.

[36] Citizens' St. Ry. Co. vs. Robbins, 128 Ind. 449; Weyer vs. Second Nat. Bank, 57 Ind. 198.

[37] Ramey vs. McCain, 51 Ind. 496.

[38] Weyer vs. Second Nat. Bank, 57 Ind. 198.

[39] *In re* Haig's Estate, 6 Dem. 454; S. C. 3 N. Y. Supp. 285; 14 Civil Proc. Rep. 357.

Not in this State, as here the mortgagor's rights merely follow the fund, see § 364.

[40] Meek vs. Spencer, 8 Ind. 118.

[40*] See subsequent § 492. Martin vs. Wyncoop, 12 Ind. 266.

[41] Lewis vs. Reed, 11 Ind. 239; Sch. Ex. § 341.

the administrator whereby the sale was induced; nor for his warranty.[42] But the administrator may by certain acts of his make himself liable.[42a]

To show good title in the purchaser, there being no question of fraud, it need not be shown positively that the executor assumed to sell the property as executor.[43]

§ 482. What credit to be given. "In all sales of personal property when the amount bought exceeds three dollars, a credit shall be given by the executor or administrator, of not less than three and not more than six months, unless otherwise ordered by the court." [R. S. § 6081; 102 v. 202.] [44]

§ 483. Security to be taken. "Notes or bonds, with two or more approved sureties, in all cases of sale on credit, must be taken by the executor or administrator." [R. S. § 6082.] [45]

§ 484. Sufficient surety, etc.

Sec. 10219, G. C., provides for the qualifications of sureties, which is as follows: "Sureties must be residents of this State, and worth, in the aggregate, double the sum to be secured, beyond the amount of their debts, and have property liable to execution in this State equal to the sum to be secured." * This applies to sureties given on a note at an administrator's sale.[46]

An administrator or executor has not an absolute right to decline a note if the surety thereon is sufficient under the statute; and at his pleasure reject the notes tendered him. But if his decision as to the qualification of the sureties is made in good faith, and with due caution, it should stand.[47]

[42] Huffman vs. Hendry, 9 Ind. App. 324; S. C. 36 N. E. Rep. 727. See Lockwood vs. Gilson, 12 O. S. 526; Dunlap vs. Robinson, 12 O. S. 531.

He might be personally liable, see § 493.

[42a] Fisher vs. Fisher, 33 O. C. C. 325.

[43] Harvey vs. Van Cott, 71 Hun 394; S. C. 25 N. Y. Supp. 25.

See § 1609, Assignments.

[44] § 10705 G. C.

[45] § 10706 G. C. See § 1606.

[46] Hamilton vs. Bonham, 20 C. C. 252; 10 C. D. 834.

* § 240.

[47] The vital question then in the case is, whether the administrator can arbitrarily, and not in good faith, reject notes tendered to him, when the sureties in fact have all of the qualifications required by the statute. We think that such ought not to be, and is not the law. It is true that the use of the words "approved sureties" in § 6082 R. S., gives some color to this idea, but we are of the opinion that the meaning

When surety is to be given, if the administrator accept only the personal obligation of the purchaser, such administrator will be liable personally for the amount of the sale.[48]

If he accepts insufficient surety, he will be liable on his bond for both principal and interest, but he is entitled to have the notes turned over to him.[49]

The omission to take surety does not vitiate the sale.[50]

If the surety is good when taken, a subsequent failure or insolvency of the surety will not render the administrator liable, but the loss will fall on the estate.[51]

Where an administrator sold upon a few days' time, considered in the vicinity as a cash sale, and the purchaser failed before the time fixed for payment, it was held that this was equivalent to a cash sale and that he was not liable.[52]

§ 485. When executor or administrator not liable for loss. "An executor or administrator shall not be responsible for loss happening by the insolvency of the purchaser at such sale, or his sureties, if satisfactory evidence is adduced, that the executor or administrator proceeded with due caution in taking

of these words is to be ascertained by reference to the language used in the other section of the statute to which we have referred—that it was not intended to confer upon the administrator the power, at his pleasure, to deprive the person to whom the goods were struck off, of his right to the property, if he fully and clearly complied with the other provisions of the statute, for then he furnishes sureties approved by the law, and which should be approved by the administrator. Hamilton vs. Bonham, 20 C. C. 254; 10 C. D. 834.

But the purchaser could not maintain an action of replevin. Bonham vs. Hamilton, 66 O. S. 82.

[48] Parkham vs. Stith, 56 Miss. 465.

[49] White vs. Moe, 19 O. S. 37; Lindley vs. State, 116 Ind. 235; Sherrell vs. Shepard, 19 Fla. 300; Bowen vs. Shay, 105 Ill. 132; Hasbrouck vs. Hasbrouck, 27 N. Y. 182; Peay vs. Fleming, 2 Hill (S. C.) Ch. 97.

The administrator is liable if he does not take proper security. White vs. Moe, 19 O. S. 37.

[50] Lay vs. Lawson, 23 Ala. 377.

But in Indiana, where an order to sell stock at private sale required good security, and the sale was made on the purchaser's individual note, on ten years' credit, the statute permitting but twelve months, the sale was held void and to pass no title. Citizens R. Co. vs. Robbins, 128 Ind. 449.

[51] §§ 719, 485.

Gordon vs. Gibbs, 3 Sm. & M. 473; Davis vs. Marcum, 4 Jones' Eq. 189.

[52] Taveau vs. Ball, 1 McCord Ch. 456.

The administrator ought not permit the property to pass out of his possession until the terms prescribed by statute have been complied with.

security, and has used due diligence to collect such notes and bonds." [R. S. § 6083.][53]

§ 486. Payment, etc.

The administrator can, as a general rule, receive nothing in payment except money.[54]

The administrator cannot accept his own debt in payment and if he do, he will be liable on his bond, or the sale may be set aside; or, if the purchaser have knowledge of the misapplication of the proceeds of his purchase by the administrator at the time, the purchase money may be recovered from him.[55]

An administrator, if every element of fraud be absent and it be assigned to the administrator with the consent of all the parties to the transaction, may receive in satisfaction of a note payable to him as such administrator an account due the maker of the note from a third party.[56]

If he accepts payment in depreciated currency, he will be liable for the difference between its actual value at the time of acceptance and the amount for which he accepted it.[57]

If sold on credit, he is liable for the scaled value of the money for which it was sold at the time of the sale, and not at the expiration of the credit.[58]

The value of a decedent's personalty at the time of granting

[53] § 10707 G. C.

See § 711, Sale bill; § 719, Bad debts; § 1616, Assignments.

[54] Chandler vs. Schoonover, 14 Ind. 324; Bevis vs. Heflin, 63 Ind. 129; Alvord vs. Marsh, 12 Allen 603; Woerner, admin. 698.

[55] Id.; Austin vs. Willson, 21 Ind. 252; Weir vs. Tate, 4 Ired. Eq. 264; Wallace vs. Brown, 41 Ind. 436; Bass vs. Chambliss, 9 La. Ann. 376.

[56] Hancock vs. Morgan, 34 Ind. 524; Morris vs. Whitmore, 27 Ind. 418.

[57] Glenn vs. Glenn, 41 Ala. 571; Anderson vs. Wynne, 62 Ala. 329; Jones vs. Graham, 36 Ark. 383; Campbell vs. Miller, 38 Ga. 304; Succession of Herron, 32 La. Ann. 835; Williams vs. Campbell, 46 Miss. 57; Currie vs. McNeill, 83 N. C. 176; Koon vs. Munro, 11 S. C. 139; Rockhold vs. Blevins, 6 Baxt. 115; Staples vs. Staples, 24 Gratt. 225; Jackson vs. Chase, 98 Mass. 280.

[58] Depriest vs. Patterson, 92 N. C. 399; Granberry vs. Granberry (Va.), 1 Wash. 246.

Our statute allows a credit of nine months; he would only be liable for a longer time.

the letters of administration cannot be shown by the price it was sold for years afterwards by the administrator.[59]

If the sale is on time, yet the administrator may accept cash down.[60]

A creditor of the estate cannot deduct from the price of the property sold to him by the administrator the amount of his demand against the estate, unless his claim has been adjudicated, and the amount to which he is entitled from the estate ascertained, in which case the smaller sum may be deducted from the larger.[61]

§ 487. Executor or administrator to make out list of articles liable to sale. Duty of clerk of such sale. "Before a public sale, the executor or administrator shall make out a list of all the articles mentioned in the inventory, which are liable to sale, in the order they are set down in the inventory, whether they are destroyed, taken by the widow at the appraisement, or otherwise forthcoming or not. A suitable clerk, who is not interested in the estate, at the time of sale shall place opposite to each item upon the list the names of the purchaser or purchasers, and the amount for which the item mentioned, or any part of it was sold. If there be any article on the list not sold, the clerk must enter opposite to it the words 'not sold' or the words 'taken by the widow at the appraisement', or other statement, according to the fact. If articles are sold, which are not mentioned in the inventory, they shall be so designated on the sale bill by the clerk." [R. S. § 6084.][62]

§ 488. Construction of preceding section. "Nothing contained in the next preceding section shall require the executor or administrator to sell each article in the order in which it is stated in the list taken from the inventory, nor require articles, which are mentioned in the list, under a single item, to be put up and sold together. The articles mentioned in the sale bill must be

[59] Read vs. Patterson, 55 Hun 608; S. C. 8 N. Y. Supp. 826.

[60] Gwynn vs. Dorsey, 4 Gill & J. 453.

As our statute allows a sale to be made on nine months' credit, where the payment is made in cash a proper discount is allowed.

This can not be done where there is no need for the money, and as a rule should not be done without the sanction of the court, as the statute makes no provision for it. It seems, however, if the same is a public sale and the custom of the community sanctions a discount on cash payments, the administrator should not be made liable for such discount, etc. A better way is to make all the notes draw interest from day of sale. Experience has demonstrated that the articles bring just as good a price as where time without interest is allowed.

[61] Woerner on Admin. 698.

If the estate is known to be solvent and the claim is known to be correct, such might with safety be done.

[62] § 10708 G. C.

stated in the same order in which they are entered upon the inventory." [R. S. § 6085.][63]

§ 489. **Sale bill to be signed by clerk, sworn to by the executor or administrator and filed. Returns of private sale.** "The sale-bill shall be signed by the clerk, and the executor or administrator must make oath before an officer, authorized to administer oaths, that it is, in all respects, correct, to the best of his knowledge and belief. With a certificate of such oath annexed thereto, the sale-bill must be filed by the executor or administrator, in the probate court, within six weeks from the time of sale. All returns of private sales shall be sworn to by the executor or administrator." [R. S. § 6086.][64]

§ 490. Form of sale bill, etc.

The clerk of the sale should, in making out his sale bill, comply with the provisions of sec. 10710, G. C., and it should be returned at as early a time as convenient, and must be within six weeks from the time of sale. Practice has demonstrated that it is almost impossible to return the articles sold in the same order in which they were inventoried; and it is usual, while not complying with the statute, to make an ordinary report of each article sold, the name of the purchaser, and the price. It would also be advisable for the administrator to file, merely as an exhibit, a copy of the notice put up advertising the sale. To comply with the statute, the form should be somewhat in the following:

....., A. D. 190....

Sale bill of the personal property belonging to the estate of A. B., deceased, sold at public auction by C. D., administrator of the estate (or executor of the last will and testament) of said decedent, on the.....day of....., A. D. 190....

NO. OF ITEM.	PROPERTY AS INVENTORIED.	VALUE AS INVENTORIED.	PURCHASER.	PRICE.
		$ | Cts		$ | Cts

I hereby certify the foregoing sale bill to be correct.

....., Clerk of sale.

[63] § 10709 G. C.

[64] § 10710 G. C.

There is great difficulty experienced in getting all the articles in the sale bill in the order in which they are sold, and stating therein the inventory value, and it is perhaps oftener observed in its breach than observance and the court generally accepts the sale bill if it states the name of the purchaser and the price paid.

State of Ohio,.....County, ss.
Personally appeared before me, the undersigned, judge of the Probate Court of said county, C. D., administrator of the estate (or executor of the last will and testament) of A. B., deceased, who being sworn says that the foregoing sale bill of the personal property of the said deceased is in all respects correct according to the best of his knowledge and belief.

.....

Sworn to and subscribed before me this.....day of....., 190....

.....Probate Judge.[65]

§ 491. How return of sale bill enforced. "If an executor or administrator refuses or neglects to return the sale-bill, or fails to make return of a private sale, within six weeks after the sale, the same proceedings may be had against him and his sureties, as are provided in cases of neglect or refusal to return an inventory." [R. S. § 6087.][66]

§ 492. Purchase by administrator or executor.

"It is an ancient and very familiar doctrine," says Woerner,[67] "that the sale by an executor or administrator of property of the estate to himself, either directly or indirectly, whether at private or public auction, no matter how honest and fair, may be avoided at the option of the beneficial owner, or *cestui que* trust."

While there does not appear to be any reported case upon the question in Ohio, as to personalty, the above rule has been unqualifiedly followed as to real estate,[68] and the reasoning used in these cases makes the doctrine applicable to personal property as well as real estate.[69]

[65] See § 1614, Assignments.

[66] § 10711 G. C.

See § 303, Compulsory return of Inventory.

[67] Woerner on Admin. 700.

[68] Barrington vs. Alexander, 6 O. S. 198; Sheldon vs. Newton, 3 O. S. 494; Piatt vs. Longworth, 27 O. S. 196; Caldwell vs. Caldwell, 45 O. S. 512.

[69] Chancellor Kent arrives at this conclusion, which he lays down as the true rule to be observed, that, "However innocent the purchase may be in the given case, it is poisonous in its consequences. The *cestui que* trust is not bound to prove, nor is the Court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power, distinctly and clearly to show it. There may be fraud, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the *cestui que* trust to come, at his own option, and

Woerner seems to criticise the doctrine, but admits that the rule is too well settled to be cast aside.[70]

The title acquired by the administrator is not absolutely void, but voidable.[71] If all persons beneficially interested in the estate consent to such a sale it would be valid.[72] But such persons, in order to make their consent valid, must not be under a disability. Whether the mere acquiescence of the parties in interest would give a good title is a matter upon which the authorities do not agree. The majority of courts, however, hold that if all parties beneficially interested acquiesce, and are not under a disability, for a reasonable length of time, they would be estopped thereafter from attacking the sale.[73]

Schouler concludes his investigation on this subject with the following: "In fine, according to the better authorities, a purchase by the executor or administrator at his own sale, either directly or indirectly, will, though not absolutely void, be set aside, upon the timely application of any party interested in the estate; and this rule is of general application to sales of trust property."[74]

It is provided by statute that a purchase made by an officer making a sale of land under execution, shall be considered fraudulent and void.[75]

§ 493. Warranty of title.

In the sale of personal property there is no implied warranty of title.[76]

without showing actual injury, and insist upon having the experiment of another sale. This is a remedy which goes deep, and touches the very root of the evil."

Cited in Barrington vs. Alexander, 6 O. S. 198.

[70] Woerner on Admin., note 700.

[71] Dunlap vs. Mitchell, 10 O. 117.

[72] Dunlap vs. Mitchell, 10 O. 117.

[73] Woerner 703, citing Fuller vs. Little, 59 Ga. 338 (citing as holding the same doctrine, Fleming vs. Foran, 12 Ga. 594; Mercer vs. Newsom, 23 Ga. 151; Flanders vs. Flanders, 23 Ga. 249); Boerum vs. Schenck, 41 N. Y. 182; Williams vs. Marshall, 4 Gill & J. 376; Todd vs. Moore, 1 Leigh 457; Lyon vs. Lyon, 8 Ired Eq. 201.

[74] Schu. Exrs. § 359. § 1616, Assignments. See § 810, Sale and Distribution.

[75] § 11696 G. C.

[76] § 902, Real Estate.

Chapman vs. Speller, 14 Q. B.

The administrator sells only such title as his decedent had in the property sold; and the purchaser takes the title at his own risk, not being released from payment of the purchase price if the title proves defective.[77] If, however, the title wholly fails, the purchaser may compel the administrator to refund so much of the purchase price as he has in his hands when demand for its return is made.[78]

But the administrator may render himself personally liable by an express warranty of the title,[79] although he cannot thus bind the estate.[80]

If a fraud has been practiced upon the purchaser, he may be relieved from payment of the purchase price, on the principle that the estate cannot be allowed to profit by an unconscientious advantage.[81] He may have the contract rescinded or the price abated.[82]

In such an instance the administrator practicing the fraud is personally liable.[83]

By making the sale the person selling represents that he has authority to sell; and if it prove otherwise, the purchaser will be relieved of his liability as purchaser.[84]

§ 494. Property unsold.

The question often arises, What shall be done with the property that is returned unsold? As a usual thing, it is not of sufficient value to justify another public sale; very often it

621; Blood vs. French, 9 Gray 197; Bingham vs. Maxcy, 15 Ill. 295.

77 Cogan vs. Frisby, 36 Miss. 178.

78 Mockbee vs. Gordon, 2 Har. & G. 176.

79 Id.; Summer vs. Williams, 8 Mass. 162; Buckels vs. Cunningham, 14 Miss. 358.

80 Dunlap vs. Robinson, 12 O. S. 530; Ramsey vs. Blalock, 32 Ga. 376; Lynch vs. Baxter, 4 Tex. 431.

81 Williamson vs. Walker, 24 Ga. 257; Crayton vs. Munger, 9 Tex. 285.

82 Able vs. Chandler, 12 Tex. 88.

83 Id.; Mockbee vs. Gordon, 2 Har. & G. 176; Buckels vs. Cunningham, 14 Miss. 358. See West vs. Wright, 98 Ind. 335.

See Fisher vs. Fisher, 33 O. C. C. 525.

84 Wood vs. North, 6 Humph. 309; Crisman vs. Beasley, Sm. & M. Ch. 561; Succession of Michel, 20 La. Ann. 233; Beene vs. Collenberger, 38 Ala. 647.

See § 810, § 1616.

Where in the sale of land it was advertised as dry land when it in fact was wet, the purchaser was held. Mechanes' S. & B. Assn. vs. O'Connor, 29 O. S. 652.

does not justify expenses attaching to an order of private sale. If the property is of very much value, the administrator ought to get an order to sell it at private sale. If of little value, he might sell it for the best price attainable and return it in his account. There are always a great many details surrounding the administration of the estate that a literal compliance with the statute will not beneficially affect the estate. In such cases the administrator should use his discretion, which, if fairly exercised, the Court will uphold.

CHAPTER XXVIII.

PRIVATE SALE OF PERSONAL PROPERTY.

§ 495 Statutory provision.
§ 496 Application. Essentials.
§ 497 Form of application for less than appraised value.
§ 498 Entries, etc.
§ 499 When property is not sold within six months.
§ 500 Return of private sale.
§ 501 Confirmation of sale
§ 502 How notes, claims, stocks, etc., sold.
§ 503 Forms of application, etc.
§ 504 Sale without order, etc.
§ 505 Sale of perishable property.

§ 495. Statutory provision. "When on sufficient proof, it is satisfied that it would be for the advantage of the estate to sell any part of the personalty not taken by the widow at the appraisers' valuation at private sale, the court may authorize the executor or administrator so to sell any part thereof, either for cash or on such other terms as in its discretion, it directs, but not at less than its appraised value, unless by the affidavit of at least three disinterested persons the court is satisfied that such property can not be sold at its appraised value, and that it will be for the best interest of the estate to sell it at a less price, in which case it may authorize its sale for a less amount. Should any property thus ordered to be sold at private sale not be sold within six months from the time of such order, or within such other time as is fixed therefor, the court may order it to be sold at public auction in the same manner as though a private sale had not been ordered." [R. S. § 6076.][1]

§ 496. Application. Essentials.

It will be observed in the above section (§ 10700), that there are several essentials existing to authorize a private sale. First,

[1] § 10700 G. C. in part. See § 479 for other part of section.

See § 450, Compounding claims; § 456, Sale—desperate claims.

the Court must be satisfied, upon good and sufficient proof, that it will be for the advantage of the estate; second, the property cannot be sold for less than its appraisal, unless the Court is satisfied by affidavits of at least three disinterested persons, that such property cannot be sold at its appraised value; and a further provision is made that an order for private sale lasts six months, and then the property can be sold at public auction. The ordinary application may be in the following form:

(*Title.*)

The undersigned A. B. administrator (or executor) of the estate of C. D., deceased, respectfully represents to the court that it would be for the best interest of said estate to sell at private sale as provided by law, the following described property belonging to the estate of said deceased: (Here describe as mentioned in the inventory.) He further asks the court for an order authorizing him to sell at private sale for cash (deferred payments) at the appraised value, the property above described.

Sworn to before me and in my presence this.....day of.....
.....190....

.....

§ 497. Form of application for less than appraised value.

(*Title.*)

The undersigned, A. B., administrator (or executor) of the estate of C. D., deceased, respectfully represents to the court, that it would be for the best advantage of said estate to sell at private sale at a price fixed by the Court, the following described articles belonging to the estate of the deceased: (Here describe.) He further represents to the court that in his judgment the sum of.....dollars would be a fair price, and that he has filed herewith the affidavits of three disinterested persons, who say that such property cannot be sold at its appraised value, and that it would be for the best interest to sell the same at a less price. Wherefore he asks the Court for an order authorizing him to sell said property for a price to be fixed by the Court.

.....

Sworn to and subscribed before me and in my presence this.....day of .....190....

The affidavits required to be filed with the foregoing petition may be in the following form:

G. H., being duly sworn, says that he is familiar with the property described in the application filed by A. B., administrator of C. D., for a sale of personal property at less than its appraised value, and that in his opinion, said property cannot be sold for its appraised value, and that he has no interest whatever in the matters thereto referred, and that he

believes it will be for the interest of the estate to sell the same at a less price than their appraisement.

.....

Sworn to and subscribed before me and in my presence this.....day of ....190....[2]

§ 498. Entries, etc.

The statute does not direct what the nature of proof shall be, but it must be sufficient to satisfy the Court. Neither does it say that notice should be given to any interested party. There may be cases when those beneficially interested should be notified. The form of entry for a private sale at its appraised value may be as follows:

(*Title.*)

This day this matter came on to be heard, upon the application of A. B., administrator (or executor) of C. D., deceased, for an order authorizing said administrator (or executor) to sell at private sale the property therein described, for not less than its appraised value, and the same was submitted to the Court. Whereupon the Court finds and is satisfied, upon good and sufficient proof, that it would be for the advantage of the estate of the decedent to sell the property in said application described at private sale at not less than its appraised value. Wherefore it is ordered that said A. B., administrator (or executor), be ordered to sell the property therein described at not less than its appraised value for cash (or other terms as the Court may fix) and the said administrator make return of his proceedings hereunder within.....months from this date.

.....

ENTRY FOR LESS THAN APPRAISED VALUE.

(*Title.*)

This day this matter came on to be heard upon the application of A. B., administrator (or executor) of C. D., deceased, for an order authorizing said administrator (or executor) to sell at private sale property therein described, for less than its appraised value, who at the same time filed in this court the affidavits of G. H., I. J. and K. L., three disinterested persons, that said property could not be sold at its appraised value, and the same was submitted to the Court upon said affidavits and the application. Whereupon the Court finds and is satisfied, upon good and sufficient proof, that it will be for the advantage of the estate of said decedent to sell the said property at less than its appraised value, and the Court further finds that a reasonable value for said property is as follows: (Here insert price fixed by the court upon each article.) And orders the same to be sold for not less than the price so fixed by the court; and that said administrator be ordered to return within.....months from this date his proceedings herein.

.....

§ 499. When property is not sold within six months.

This matter may be brought to the attention of the Court by a report or motion.

[2] See § 1614.

(*Title.*)
Now comes A. B., administrator (or executor) of C. D., deceased, and represents to the Court that the following property (here describe) of the deceased has not been sold as heretofore ordered by the Court and more than six months has elapsed since said order was made. Wherefore he asks that said property may be sold at public auction (or if the administrator wants to continue the order for a certain length of time let the application so state).

.....

Sworn to and subscribed before me and in my presence this.....day of .....190....

The entry authorizing sale of such property may be in the following form:

(*Title.*)
It appearing from the application filed herein by the administrator (or executor) of the estate of C. D., deceased, that certain personal property of said decedent designated in said motion and ordered sold at private sale more than six months ago has not been sold; and it is now ordered that the same may be sold at public auction as though no private sale had been ordered (here state, if such was the application, "that said order of private sale be extended.....months.")

.....

§ 500. Return of private sale.

As soon as a sale is made, a return thereof should be filed in Probate Court, and might be in the following form:

(*Title.*)
Now comes A. B., administrator (or executor) of the estate of C. D., and respectfully represents to the Court that in pursuance of the order of said court made on the.....day of ....., he has sold at private sale at not less than its appraised value (here insert if the order be to sell at a price fixed by the court at "not less than the price fixed by the Court,") the following property: (Here insert property sold and the price of each.) Wherefore he asks the Court to confirm said sale.

.....

All private sales of property must have an affidavit attached to them.

State of Ohio,.....County, ss.
In Probate Court, A. B., administrator of the estate (or executor of the last will and testament) of C. D., deceased, being duly sworn, says that in obedience to the foregoing order, he sold said goods and chattels, commencing on the.....day of....., A. D. 190..., and closing on the.....day of....., A. D. 190..., for the sum of.....dollars, said sum being the appraised value of the same, and the highest price he could get after having made diligent endeavor to obtain the best price for said property.
A detailed schedule and list of said sale is herewith returned and filed.

.....

Sworn to and subscribed before me and in my presence this.....day of .....190....

.....Probate Judge.[3]

§ 501. Confirmation of sale.

When a report of a private sale has been filed, as well as a report of a public sale, it should be examined by the Court, and if found to be irregular, the administrator's or executor's attention ought to be called to such irregular matter and corrected, if possible. The Court should then confirm the sale. A confirmation of an irregular sale might act retroactively and make good that which was before deficient.[4]

§ 502. How notes, claims, stocks, etc., may be sold. "The executor or administrator of an estate may sell either at public or private sale promissory notes, claims, demands, rights in action, bonds and stocks by first obtaining an order of the probate court therefor, but if he sells at private sale, it must be for not less than an amount previously fixed by the probate court." [R. S. § 6080; 103 v. 265.] [5]

§ 503. Form of application, etc.

(*Title.*)	Probate Court, Clark county, Ohio.
In the Matter of the Estate of J. W. P., deceased.	Application for an order to sell Bank Stock at Private Sale.

The undersigned, L. A. and W. H. P., executors of the estate of J. W. P., deceased, respectfully represent that it will be necessary to sell the bank

[3] See § 1614.

[4] Hicks vs. Stone, 11 Bull. 67, citing Schu. Ex. 316; 10 Vt. 120; 42 N. Y. 146.

Williams vs. Campbell, 46 Miss. 57, 62. A decree confirming the sale of personalty by the Probate Court is final. Bland vs. Muncaster, 24 Miss. 62; and can be set aside for fraud in the Chancery Court only. Smith vs. Chew, 35 Miss. 153. The Probate Court may set aside a sale which has never been confirmed, at any time before final settlement, even after the lapse of twenty-one years; and until the Probate Court has acted upon such sale a chancery court has no jurisdiction to set it aside. Hart vs. Hart, 39 Miss. 221, 224. But the Probate Court can not set aside its decree upon a report of sale after the term at which it was rendered. Williams vs. Campbell, *supra*, citing numerous Mississippi cases to the same effect. In Indiana, and other States where the order of court to sell at private sale does not require a confirmation of the same, the title passes to the purchaser at once upon his compliance with the terms of sale. Citizens R. Co. vs. Robbins, 128 Ind. 449, 457. See confirmation of sale of real estate § 892.

[5] § 10704 G. C.

Court may order stocks sold and proceeds reinvested. Guthrie vs. Electric Co., 2 N. P. (N.S.) 117; 15 Dec. 23. An order to sell for not less than the market price means the market price on the day the sale is made. Busch vs. Busch, 22 Dec. 1; 12 N. P. (N.S.) 186; 33 O. C. C. 358; 14 C. C. (N.S.) 346. See also, § 10697 G. C., § 470.

stock of the said deceased, for the purpose of paying debts of said deceased and making distribution of the assets thereof as provided in the will of said deceased.

They further represent to the Court that the said deceased was the owner of six (6) shares of stock in the First National Bank of Springfield, Ohio, of the face value of six hundred dollars ($600), and that the market value thereof is nine hundred dollars ($900).

Wherefore they ask that the Court may fix the price at which they may be sold and authorize them to sell them at not less than the price so fixed by the Court.

.....

.....

Sworn to and subscribed before me and in my presence this 6th day of September, 19—.

.....

.....

ENTRY AUTHORIZING SALE OF BANK STOCK AND FIXING VALUE.

(*Title.*)

This day come I. A. and W. H. P., executors of the estate of J. W. P., deceased, and filed herein their application to sell certain bank stock belonging to the deceased; and the same was submitted to the Court.

Whereupon the Court finds that it is necessary to sell said bank stock and fixes the value thereof to be nine hundred dollars ($900) and authorizes and directs said executors to sell and transfer to the purchaser said stock at not less than the sum fixed by the Court, at private sale.[6]

§ 504. Sale without order, etc.[6*]

Whether or not a sale of stocks and bonds can be made by an executor or administrator in the absence of authority directing so to do in a will, when it is not necessary to sell such stocks and bonds to pay debts of the decedent, may be questionable. When sec. 10704, G. C., was first passed, the exceptions provided by sec. 10697-8, G. C., were not in that section, but after the passage of sec. 10704, G. C., sec. 10697, G. C. (§ 470), was changed, and now has an exception that bonds and stocks are not to be sold unless it is necessary for the payment of debts. This provision of sec. 10697, G. C., being passed subsequently to sec. 10704, G. C., and not being inconsistent therewith, it may now be said that bonds and stocks may be sold only when necessary to pay debts, except as now provided by sec. 10697, G. C. (§ 470), he may, when the same has not been disposed of within one year by distribution in land sell them under order of court. It has, however, been held that an administrator or executor may sell such bonds or stocks and give a legal title without an order of court.[7] If there was a loss, however, he might be liable to the estate.

[6] A regular way would be for the administrator to file a report of sale and ask its confirmation. Frequently, however, no further report is made except in the accounts. See Distribution in kind, § 750, *et seq.*

[6*] Statute now provides notes may be sold by first getting order of court. See note 18, § 471.

[7] The title of personal property of a deceased person, when not otherwise specifically bequeathed by will,

Evidently the intention of the legislature was that, if it was not necessary to have a sale of bonds and stocks for the payment of debts of the deceased, that such bonds and stocks should be distributed in kind to those entitled to the estate. Where it is found proper that a sale should be made of stocks, those beneficially interested should consent to such sale. If, however, it is impossible to procure the consent of all beneficially interested, and the nature of the distribution required is such that they can not be distributed in kind, an application should be made to the Probate Court setting forth such fact and other reasons, that a distribution can not be made in kind. The application should also state that it is necessary to sell such stocks or bonds to pay debts, if the order is asked for that reason. The application and entries heretofore given may be made applicable to the sale of stocks and bonds. It might be advisable to notify those beneficially interested before an application is granted. Especially is this true where it is not necessary to sell such stocks and bonds to pay debts of the deceased.

vests in the personal representative. The statute directing that it may be sold under direction and order of the Probate Court, does not divest this title of the representative. What liability may attach to him personally or arise upon his bond if he sells without the direction and order of the court, behind which the statute is designed to furnish him protection if he will avail himself thereof, we need not now inquire. It can not be the failing of the law to embarrass executors and administrators in making sales of personal property of their decedents, by exposing purchasers from them to liability thereafter of being called so to account for the property purchased and paid for, because of some failure of the executor to follow the prescribed statutory steps in the sale. If this were so, no one could safely deal with an administrator or executor in the purchase of any of the personal estate, without first assuring himself that all these preliminary steps had been carefully followed, as prescribed. Such a rule of law, rendering such sales wholly void for failure to follow the statutory forms by the executor, would render either public or private sales if not practically impossible, at least extremely difficult and disadvantageous to the estate. Hicks vs. Stone, 11 Bull. 72.

The decisions of the courts are not in accord as to the effect of a sale made by an administrator or executor without an order of the Probate Court. Some of them hold that the sale is void and no title passes. But generally it is held that where the purchaser is innocent he gets a good title, if the estate suffers any loss by reason of a wrong sale, the administrator or executor is held responsible.

See Discussion of cases in Woerner 692, 697, and see Discussion in previous chapter; Sch., Ex. § 362. Also Distribution in kind 750 *et seq.*

An order of the Probate Court authorizing an executor to dispose of certain shares of the corporate stock at its market value for cash, complies with § 10704 G. C., and it is not essential that the stock should not be sold for less than the specified price. Busch vs. Busch, 22 Dec. 6; 12 N. P. (N.S.) 86. This case further holds a copy of the order of the court is sufficient protection for the corporation to transfer the stock. Affirmed, 33 O. C. C. 358; 14 O. C. C. (N.S.) 358. Such proceedings are defective but do not impair the title to the stock.

§ 505. Sale of perishable property.

Our statute makes no provision as to the sale of perishable property.[8] This is a kind of property that very often cannot be held until a sale can be had as provided by statute. Usually it is not safe to keep it until an appraisement of the estate is had. The administrator or executor must make some kind of a disposition of it; if he did not, he might be liable. In the absence of any particular statute, the provisions of this chapter in reference to private sales should be used as far as applicable.[9]

If the property which is of a perishable nature is of small value — that is, twenty-five or fifty dollars — the administrator or executor might proceed to sell it without any formal order. But if it is of considerable value, he should file his petition in the Probate Court, setting forth the facts of the existence of such property, its perishable nature and its probable value. If an administrator acts in good faith for the best interest of the estate in his opinion, without violating the law or order of the court having jurisdiction, and even permits property to remain unsold which is not likely to depreciate in value, he will not be held responsible for an unforseen loss arising. But he must act with diligence, and if he neglect to act within due time and there is a loss, he will be held responsible.[10]

The forms and entries heretofore given in this chapter can easily be adopted to suit the application for a sale of perishable property.

While in an unreported case Judge Dempsey of the Cincinnati Superior Court held that bonds and stocks were not to be sold unless necessary to pay debts, the matter has been in considerable doubt in the mind of the author, see note to § 471 for later opinion, etc.

[8] Perishable goods are those which are lessened in value and become worse by being kept. Bouviers Dict.

[9] "The statute authorizing the private sale of personal property of the decedent by an administrator is most useful where the property is of a perishable nature, such as can best be disposed of in the public market, or such as would probably be sacrificed at a public sale."

Citizens, etc., Co. vs. Robbins, 128 Ind. 449.

[10] See Woerner on Admin. 330. See Sch. Extrs. 327, 349.

CHAPTER XXIX.

ASSETS. CARE AND MANAGEMENT.

§ 506 Preservation of property.
§ 507 Notes, etc., given by administrator.
§ 508 Employment of attorney.
§ 509 What counsel allowed.
§ 510 Amount of counsel fees allowed.
§ 511 Taxation.
§ 512 Custody of funds.
§ 513 Failure of bank where deposited.
§ 514 How executor, etc., guardian and trustees may invest funds.
§ 515 When investment to be made.
§ 516 Application to invest, etc.
§ 517 Insurance.
§ 518 Carrying on business of the deceased.
§ 519 Carrying out contract of deceased.
§ 520 Contracts not binding, etc.
§ 521 Duty as to mortgages, etc.
§ 522 Stocks.
§ 523 Action by executor, etc., to complete contract for sale of land.
§ 524 Nature of proceedings.
§ 525 Parties.
§ 526 Petition.
§ 527 Notice, etc.
§ 528 When court may order conveyance. Deed.
§ 529 Hearing, etc.
§ 530 Entry.
§ 531 Form of deed.
§ 532 Heirs of deceased purchaser may enforce specific performance.[1]

§ 506. Preservation of property.

The title of personal property, and sometimes real estate, devolves upon the administrator or executor. From the time that it goes into his hands he will be held to a reasonable degree of care with respect to such property, and he should adopt such precautions against loss by fire, flood, or waste of any kind, and exercise such forethought for the security of such property as prudent men are accustomed to employ in reference to their own property.[2]

[1] See § 363, *et seq.*, Assets generally. § 62, for acts done before qualifying.

[2] Miller vs. Proctor, 22 O. S. 442; Rubottom vs. Morrow, 24 Ind. 202.

Where executors held an estate under a will for a term of years to pay taxes, etc. They are owners, and a notice of an assessment should be served on them. Roberts vs. St. Bernard, 8 C. C. (N.S.) 422; 29 O. C. C. 725.

Acquiescence on the part of a *cestui que trust*, in a wrongful conversion of trust funds, will operate as a release of the trustee as such, and his bondsmen from liability. *In re* Koehnken, 6 C. C. (N.S.) 359; 27 O. C. C. 840.

An executor having the control and management of real estate has no right to make expensive permanent improvements. *In re* Uhlman, 19 Dec. 803.

As for the simple care and custody of the personal property reduced to his corporeal possession and control, whether it be of things literally corporeal or of securities which represent incorporeal money

It becomes necessary in many cases, in order to avoid material loss and injury to the estate, to employ additional labor to take care of horses or other stock requiring attention, to tend and gather crops to protect property in danger of being lost, and to complete work in an unfinished state, or contracts binding upon the personal representative.[3]

As to some of these matters the administrator or executor should get the authority of the Probate Court, but there are other duties that are so incidental to the proper management of the estate that they necessarily follow with the proper administration of the estate, and no particular order of the Court is necessary.[4]

The care of real estate does not usually devolve upon an administrator, but when it is thrown into his cutody it is his duty to take proper care of it. However, it must be understood that while the administrator or executor is under obligation to take care of the property, yet any contract that he may make with any person in reference to furnishing such care, is but the personal contract of the administrator or executor. And such person has no right of action against the estate, although the administrator or executor would be allowed for the

rights, the executor or administrator is certainly bound like a bailee in point of responsibility, according to the current of modern opinion. Thus, if personal property belonging to the estate be destroyed or captured by a public enemy, or perish, or deteriorate from some internal defect, or through the operation of natural causes, or in general because of inevitable accident, the executor or administrator who has honestly exercised ordinary care and diligence in averting or lessening the mischief escapes personal liability for the loss. He is himself no insurer against accidents, though average prudence as to certain kinds of property might perhaps have required him to keep the property insured against loss by fire. Schu. Exrs. 314.

[3] Woerner on Admin. 690.

[4] So it was held that it is the administrator's duty to employ a physician to attend upon a slave belonging to the estate during his illness. Bomford vs. Grimes, 17 Ark. 567; Belfour vs. Raney, 8 Ark. 479, 482; and to retain hands employed in agricultural pursuits until the crop is gathered., Percival vs. Herbemont 1 McMull. 59. Where an executrix carried on a brickyard after her intestate's death, and sold all the bricks made before and after his death indiscriminately, she was held liable for the proceeds and entitled to credit for the expenses. Newton vs. Poole, 12 Leigh 112, 144.

See § 801, as to administrator's right to mortgage, § 645, debts due estate. § 471, notes 502, Stocks.

same in his settlement of the estate. It has therefore been held that if an administrator buy in property mortgaged for the benefit of the estate, and make a promise in his capacity as administrator to pay the purchase money, no action could be maintained thereon against the estate.[5]

If an executor or administrator permit a third person to manage and control the estate, he adopts him as agent, and he is responsible for the agent's conduct, and is liable for losses occasioned by his improper or negligent management of the affairs of the estate.[6]

He cannot avoid liability for a loss of the fund, through the misconduct of the agent, on the ground that his co-executors were mainly active in the administration of the estate, and mainly instrumental in passing the fund into the hands of such agent, if he tacitly assented thereto when he had opportunity and reasonable cause to reject.

It will be the object and purpose of this chapter to treat of several specific instances of an administrator's care and responsibility in reference to the property placed in his charge.[7]

[5] Smith vs. Hayward, 5 N. P. 501, affirmed by Sup. Ct.; West vs. Dean, 15 C. C. 261; 8 C. D. 797.

"Contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors, and do not bind the estate, notwithstanding the services rendered or goods or property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets and been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator." Austin vs. Monroe, 47 N. Y. 360; Lucht vs. Behrens, 28 O. S. 237.

[6] Earle vs. Earle, 93 N. Y. 104; affi'g in part 16 J. & S. 18. See Clark vs. Clark, 8 Paige 152; Mesick vs. Mesick, 7 Barb. 120; Douglass vs. Satterlee, 11 Johns. 16; Whitney vs. Phoenix, 4 Redf. 180; Johnson vs. Corbett, 11 Paige 265.

[7] He is bound to exercise that degree of diligence and prudence in the care and management of the estate which men of discretion and intelligence in such matters ordinarily employ in their own like affairs. Matter of Butler, 1 Connoly 58. See §§ 435, 436, 653, 718, 1361, 1378, 889, 1640, 1578.

§ 507. Notes, etc., given by administrator.[7a]

In consonance with what has been said in the previous section, Courts have held that promissory notes given by an administrator for services rendered to the estate, or for property purchased for the benefit of the estate, are personal obligations of the administrator or executor, and cannot be collected against the estate.[7*] Thus, in Curtis vs. Bank,[8] an administrator bought a monument for the grave of his intestate and gave his negotiable note as administrator. This note was sold before due to an innocent purchaser. In the meantime, the administrator had filed his account and filed a receipt showing payment for the monument. It was said in this case "that the giving of a negotiable note as administrator is such a departure from his authority, as to relieve the estate, and hence his sureties from liability, is a proposition so firmly established both upon principle and authority as to leave no excuse for controversy." [9]

In a more recent case it was held that an action at law cannot be maintained against an administrator as such by an attorney upon an account for services rendered such administrator at his request in and about the settlement of the estate so as to bind the estate for the payment thereof.[10] And in another case it was held that executors and administrators are personally liable for the services of attorneys employed by them, but their contracts therefore do not bind the estate, although the services are rendered for the benefit of the estate, and are such as the executor or administrator may properly pay for, and receive credit for the expenditure in the settlement of his account.[11]

In such cases the law contemplates that the administrator or executor will himself pay the value of such services and be re-

[7a] Cited Payne vs. Recht, 38 O. C. C. 260.

[7*] Mellen vs. West, C. C. 89; 3 C. D. 46.

But the Probate Court may make an order to pay a claim for services, see § 645.

See § 471: notes due estate, § 502, Stocks and Bonds.

[8] 39 O. S. 579.

[9] Citing King vs. Thom, 1 Term Rep. 487; Cornthwaite vs. First Nat. Bank, 57 Ind. 268; Rittenhouse vs. Ammerman, 64 Mo. 197; Christian vs. Morris, 50 Ala. 585; Kessler vs. Hall, 64 N. C. 60; 1 Edwards on Bills and Notes, § 75; Gregory vs. Leigh, 33 Texas 813. See also Ferrin vs. Myrick, 41 N. Y. 315; Austin vs. Munro, 47 N. Y. 360.

[10] McBride vs. Brucker, 5 C. C. 12; 3 C. D. 7.

[11] Thomas vs. Moore, 52 O. S. 201.

If the administrator refuses to pay and the estate received the benefit of his services, an application before the estate is settled, the court might direct its payment out of funds belonging to the estate.

imbursed by receiving credit for the amount paid in the settlement of his account.

In a case cited in 15 C. C. 265, a suit was brought against the administrator for twenty-five barrels of corn which she had furnished at the request of the administrator after his appointment, to feed the swine belonging to the deceased at the time of his death. In such case it was held that the agreement is but a personal contract of the administrator and is no charge on the estate when demanded by the creditor.[12]

§ 508. Employment of attorney.[12*]

It is undoubtedly the right and in most cases the duty of the administrator or executor to employ counsel to advise and assist him in the performance of his official duty.[13] But, as stated in the previous section, no matter how necessary such services may have been, the attorney cannot sue the estate to recover for them, but must enforce his demand through the administrator or executor. But a claim for attorney fees cannot be allowed for settling matters which involve no liability.[14]

Likewise it is not proper to allow an attorney fees for drawing and insertion of a notice of the appointment of an administrator, nor the listing of property. But the advice in the making of a proper inventory or settlement of partnership interest, or adjusting of a claim against the estate, or in settling a claim against the estate on which the deceased was surety, or giving advice about a question of descent, or investigating settlement and disposition of a large number of bills, or by arranging to continue a loan, or making a partial distribution of an estate, or preparing an account, are all proper cases for the employment of an attorney.[15]

But an executor has no power to employ an attorney to defend a will where a suit is brought to set the same aside,[16] for litiga-

[12] Dailey vs. Dailey, 66 Ala. 266; Burgher vs. Wright, 22 Bull. 381.

[12*] Cited, 79 O. S. 110.

[13] Thomas vs. Moore, 52 O. S. 205; Miller vs. Proctor, 22 O. S. 442.

[14] *In re* Estate of McAlpin, 8 Dec. 655; 38 Bull. 231.

In sale of real estate, attorneys' fees are not prior to mortgage claim. Sherman vs. Millard, 6 C. C. (N.S.) 338; 27 C. C. 177.

See §§ 645, 660 (1905).

Where beneficiaries employed counsel whose services were very valuable to the estate, such fees were allowed by the court on equitable principle. *In re* Oskamp, 1 N. P. (N.S.) 197; 49 Bull. 568; Cin. Sup. Ct. (1904).

[15] *In re* McAlpin, 8 Dec. 655; 38 Bull 231.

[16] *In re* Johnson, 4 N. P. 156; 7 Dec. 1.

tion of that kind is not necessarily in the interest of the estate. It was even held that attorney's fees would not be allowed where such a case was amicably settled without trial, especially when the settlement did not govern the distribution of the decedent's property in accordance with the provisions of the will.[17]

The same doctrine was announced by the Supreme Court, where it was held that the executor is not bound to assume the burden of a defense of the contest of a will by the heirs at law, that he is not entitled when the will is adjudged invalid to charge the estate, in his settlement of accounts, with the expense of maintaining such defense.[17*] However, if the executor is successful in having the will sustained, counsel fees may be allowed.[18] If a suit was brought to construe a will, this would be a necessary matter for the employment of an attorney.[18*]

The services of an attorney at law are extraordinary services, and where the proper administration of the estate require such services, the executor or administrator may themselves perform such necessary services as attorneys and be entitled to a reasonable compensation therefor.[19]

[17] *In re* Seegar, 1 Dec. 113.

[17*] Andrews vs. Andrews, 7 O. S. 143.

See Estate of Currey, 20 N. P. (N.S.) 219; 27 Dec. 485, where the court refused to make payment of attorney fees for defending a will, even when successful, a charge on the estate.

[18] *In re* Estate of Daniel Laws, 17 Bull. 80; 18 Bull. 198.

[18*] *In re* Wolfe, 7 Dec. 220; 4 N. P. 336.

[19] Chatfield vs. Swing, 7 Am. L. Rec. 326.

In this case it was held that the preparation of the necessary papers for the application to the court in a proper case to sell specific chattels at private sale, and the procuring an order for such sale is an extra service so far as this duty requires the aid of an attorney; and also that it would be proper to make an allowance for an attorney to assist an administrator of a large estate in taking out letters and giving instruction in regard to his duty at the appraisement, and also making out accounts of administration.

But such fees only become a claim against the estate on settlement of the account. McMahon vs. Ambach, 79 O. S. 103.

See § 659, Extra compensation.

The following is a syllabus of the case of *In re* McAlpin, as found in 8 Dec. 655. See 38 Bull. 231:

Whenever the services of an attorney are required in the settlement of an estate, in order to give the administrator advice upon questions of law, or to perform legal services, which the administrator could not perform himself, it is the duty of the Court to allow him for such services. The burden of proof is upon the administrator to show that the services rendered him by the attorney were such services as the law makes an extra allowance for. The drawing and insertion of the notice of the appointment of the administrator in a newspaper is not a matter which, inasmuch as blanks are

As to the matter of the employment of counsel, experience has demonstrated the wisdom of employing counsel to assist an administrator in almost every instance. Usually administra-

furnished and directions given by the Probate Court, requires the assistance of an attorney. The service of the notice of the making of the inventory upon the proper parties does not alone require the assistance of an attorney, but the making of the inventory and taking account of the different assets, in the manner in which they are to be inventoried, and the proper preparation of the inventory, is a matter in which the administrator is entitled to the services of an attorney. The amount which should be allowed for such services must be determined by the character of the estate and the assets. In case at bar, an estate valued at about $500,000.00, not complicated and in excellent condition, the Court allowed $100.00. The settlement of partnership interests, three in number, held by deceased, was a service requiring an attorney. And where there appeared to have been little difficulty and very little litigation involved in settling such interests, that it was largely a matter of detail, and that the amount of money involved in such interests was small, a fee of $250 was allowed. The settlement of a claim of $1,350, without suit, by payment of money and offsetting indebtedness due from deceased, was a matter in which the administrator was entitled to an attorney. A fee of $135.00 allowed. Concerning matters relative to which there could be no legal questions or liability, such as subscriptions made by deceased to a church or to the Y. M. C. A., not questioned or disputed by the heirs, the administrator was not entitled to the services of an attorney. The transfer of securities held by deceased as trustee, and to which no claim was made by the heirs and all that the administrator was required to do was to require identification of the successor in trust, was not a matter requiring the services of an attorney. The listing of the property, consisting of shares of stock in a corporation, bills and notes and real estate, for taxation, was not a matter about which the administrator required any attorney. Services of the attorney in advising the administrator as to the latter's charges for administering, were for his own benefit and are not a proper charge upon the estate administered. In the settlement of a claim against deceased, as a surety upon a note, the administrator was entitled to an attorney. The sum of $100 allowed. Concerning a question of descent, occasioned by the death of one of the heirs, though not complicated, was a matter entitling administrator to an attorney. The sum of $100 allowed. In the matter of the settlement or disposition of bills receivable, aggregating $12,712, which were investigated and, as nothing could be made on them, distributed to heirs of the estates, there was reason why the administrator might have employed an attorney and a fee of $100 is allowed. In the arranging for the continuance of a deposit of money with the company in which deceased was principally interested, for a longer time than the strict rules of law might have permitted, and for the reason that to have required payment would have embar-

tors or executors are not persons skilled in legal matters, and a very small mistake very often causes complication in the end, costing the estate far more than the employment of a competent counsel would have from the very beginning. If the administrator or executor is not a lawyer, except in the simplest cases of administration, he should in the very beginning of the administration of his trust seek the employment of competent counsel.[20]

§ 509. What counsel allowed.

If the services were rendered in part to the executor and in part to the widow, he can be allowed only to the extent of the services to the estate.[21]

A charge for services in the settlement between some of the heirs and the administrator, which services were for the benefit of the heirs, will be allowed the administrator.[22]

Where an attorney has, under the employment of an executor, rendered professional service for the estate represented by such executor, and afterwards the will has been set aside and another person has been appointed to represent the estate as administrator, he will be entitled to pay for such services out of the estate.[23]

rassed the company, the administrator was entitled in order to have matters arranged so as to protect his bondsmen, to the services of an attorney, and a fee of $250 is allowed therefor. In making a partial distribution of the estate prior to the statutory time, at the request of some of the heirs, the administrator was entitled to the services of an attorney. The sum of $500 allowed. In filing a final account the administrator was entitled to the services of an attorney, and $100 is allowed. For general counsel in settling an estate amounting to about $500,000, which was in excellent shape, and was settled without litigation except in relation to partnership interests, the administrator was allowed the sum of $365.

[20] See §§ 653, 659, 660, 1644.

Where the agreement between the administrator and counsel was that funds coming into the counsel's hands were to be held until fees were paid, etc., it was held that while the administrator could not pledge funds of the estate for his individual debts, yet where no creditor appeared to be injured such agreement would be sustained. Burgher vs. Wright, 22 Bull. 381.

[21] *In re* Smith's Estate, 22 N. Y. Supp. 1067; S. C., 1 Misc. Rep. 269.

[22] *In re* Baker, 47 Bull. 559; Appeal of Barton, 131 Pa. St. 359; S. C., 18 Atl. Rep. 902.

[23] Nave vs. Salmon, 51 Ind. 159.

Where one litigant bears the burden and expenses of litigation for the benefit of others as well as himself, and they share in the benefits, they should bear a fair share of the expenses, and attorney's fees will be allowed out of their share. Harris vs. Harris, 5 N. P. (N.S.) 239; 17 Dec. 599.

Fees are allowed for counsel to defend an administrator's final report,[24] even though a part of the items are disallowed.[25]

So an executrix is entitled to counsel fees for services rendered upon a final accounting by the other executors.[26]

Fees for watching over the interests of heirs or legatees cannot be allowed,[27] nor for resisting an application to compel him to give additional security if he is not successful,[28] nor for procuring an action to secure the widow's rights,[29] nor for representing a minor distributee as guardian *ad litem*.[30]

If an heir employ an attorney to contest the settlement, or hasten a settlement, he is not entitled to pay for his attorney out of the estate, even though successful.[31]

He is not entitled to an allowance for fees and costs incurred in prosecuting his own personal interests as heir.[32]

But a fee for securing the appointment of the administrator is a proper charge.[33]

The administrator will not be allowed a fee for his attorney if the employment was occasioned by his own fault, neglect or gross ignorance.[34] Such an instance is where he does not follow the advice of his counsel, and fails to show a satisfactory reason for not doing so.[35]

So if he brings an action where a prudent man would not do

The fees of counsel are a part of the expenses of administration and are a preferred claim. *In re* Malcolm, 51 Bull. 209.

But they cannot be finally allowed in advance of the adjudication on the administrator's account. McMahon vs. Ambach, 79 O. S. 103.

[24] Jacobs vs. Jacobs, 99 Mo. 427; S. C., 12 S. W. Rep. 457.

[25] *In re* Meeker's Estate, 45 Mo. App. 186.

[26] *In re* Kenworthy's Estate, 63 Hun 165; S. C., 17 N. Y. Supp. 655.

[27] Kingsland vs. Scudder, 36 N. J. Eq. 284; Succession of Hughes, 14 La. Ann. 863; Estate of Marrey, 65 Cal. 287; Miller vs. Simpson (Ky.) 2 S. W. Rep. 171; Brandon vs Hoggatt, 32 Miss. 335; *In re* Jessup's Estate, 80 Cal. 625; S. C., 22 Pac. Rep. 260.

[28] *In re* O'Brien's Estate, 25 N. Y. Supp. 704; S. C., 5 Misc. Rep. 136.

[29] Pinckard vs. Pinckard, 24 Ala. 250; Sill vs. Sill, 39 Kan. 189.

[30] Pinckard vs. Pinckard, 24 Ala. 250.

[31] *In re* Stuttmeister's Estate, 75 Cal. 346; S. C., 17 Pac. Rep. 223.

See *In re* Baker, 47 Bull., 559; where fee allowed out of estate.

[32] Wakefield vs. Gilleland (Ky.), 18 S. W. Rep. 768.

[33] *In re* Van Nostrand's Estate, 24 N. Y. Supp. 850; S. C., 3 Misc. Rep. 396.

[34] O'Reilly vs. Meyer, 4 Dem. 161; Fagan vs. Fagan, 15 Ala. 335; Aldridge vs. McClelland, 36 N. J. Eq. 288; Robbins vs. Wolcott, 27 Conn. 234; Estate of Bradley, 11 Phila. 87; Morrow vs. Allison, 39 Ala. 70.

[35] Munden vs. Bailey, 70 Ala. 63.

so, he may not recover for his attorney's fees paid in such an instance.[36]

He will not be allowed for counsel fees in resisting a proper charge brought against himself,[37] nor will he be allowed for attorney's fees paid for services he ought to have rendered in person,[38] such as searching for a will.[39]

He will not be allowed for attorney's fees in a suit brought against himself for a settlement of his accounts,[40] nor in trying to uphold an improper settlement.[41]

Where the contestants, by writing, authorized an executor to pay their attorney a certain fee, the executor is not entitled to credit for a further sum paid the attorney more than five years thereafter, for the payment of which no other authority is shown.[42]

The administrator has no right to use the funds of the estate to prosecute his intestate's murderer,[43] nor for vindicating his intestate's good name on the trial of a person who had killed him for alleged dishonorable conduct,[44] nor to maintain ejectment for the benefit of the heirs.[45]

Where an executor, in good faith, has employed counsel in

[36] Anderson vs. Piercy, 20 W. Va. 282.

[37] Anderson vs. Anderson, 37 Ala. 683; Moses vs. Moses, 50 Ga. 9; Beatty vs. Trustees, 39 N. J. Eq. 452; Lilly vs. Griffin, 71 Ga. 535; *Ex parte* Allen, 89 Ill. 474; Estate of Stott, Myr. 168; Heister's Appeal, 7 Pa. St. 455; May vs. Green, 75 Ala. 162.

[38] Edmonds vs. Crenshaw, Harp. Eq. 224; Estate of Ballentine, Myr. 86; Pullman vs. Willets, 4 Dem. 536; Hurlburt vs. Hutton, 44 N. J. Eq. 302; S. C., 15 Atl. Rep. 417.

[39] *In re* Van Nostrand's Estate, 24 N. Y. Supp. 850; S. C., 3 Misc. Rep. 396.

[40] Robbins vs. Robbins (Ky.), 1 S. W. Rep. 152.

[41] Taylor vs. Minor (Ky.), 14 S. W. Rep. 544.

[42] *In re* Butler's Estate, 1 Con. Sur. 58; S. C., 9 N. Y. Supp. 641.

[43] Lush vs. Anderson, 1 Metc. (Ky.) 426.

[44] Woodward vs. Woodward (S. C.), 15 S. E. Rep. 355.

[45] Reynolds vs. Canal Co., 30 Ark. 520.

Attorneys of creditors of an estate appearing and assisting the administrator in defending actions against the estate, are not entitled to receive compensation out of the estate, unless the administrator recognized their services and right to compensation by employing them or agreeing to pay them for such services. Moor's Estate, 8 Pa. Co. Ct. Rep. 447.

litigation concerning the probate of the will, and it appears that such employment was necessary for the protection of the estate, the executor will be allowed his counsel's fees.[46]

Where an administrator acts in good faith, and with the exercise of a sound judgment, in bringing suit for the purpose of collecting supposed assets of the estate, the estate, and not himself, is liable for the necessary counsel fees, although the suit is unsuccessful.[47]

An administrator should be allowed counsel fees and expenses incurred in good faith and under the advice of counsel in resisting appeals by distributees from orders auditing his accounts.[48]

Co-executors and co-trustees will not be allowed fees for separate counsel, when it does not appear that the employment of additional counsel was beneficial to the estate.[49]

[46] Douglas vs. Yost, 18 N. Y. Supp 830; S. C., 28 Abb. N. C. 370.

[47] *In re* Smith's Estate, 11 Pa. Co. Ct. Rep. 448.

[48] *In re* Rose's Estate, 80 Cal. 156; S. C., 22 Pac. Rep. 86.

Charges for legal services contained in a bill filed by counsel on application for a rehearing in regard to fixing his fees in a partition proceeding, and which was considered by the Court as being included in the fee allowed him, will not be again allowed the executors in their account. Appeal of Barton, 131 Pa. St. 359; S. C., 18 Atl. Rep. 902.

Where, in a contest over a claim against the estate, the administrator has employed an able attorney, who has not asked assistance, the administrator will not be allowed payments made to an assistant attorney of but few years practice, who has become indirectly employed in the case, except for services that would otherwise have been necessarily performed and charged for by the attorney. *In re* Collyer's Estate, 1 Con. Sur. 546. Where, in a legal proceeding, executors are fully represented by counsel, who are paid by the estate for their services, and the executors seek to charge the estate for fees paid other counsel in such proceeding, the burden of proof is on the executors to show what services were rendered by such other counsel, and also that such services were necessary for the proper protection of the estate. *In re* Archer's Estate, 23 N. Y. Supp. 1041.

[49] McDaniel's Estate, 9 Pa. Co. Ct. R. 232.

Where two executors honestly differ as to the manner of executing the will, and each employs a careful and able attorney to assist him, each is entitled to be reimbursed for the amount paid his attorney, which appears to have been fully earned, whether the services of either or both the attorneys were beneficial to the estate, and it is immaterial that one executor qualified and engaged his counsel before the other. *In re* Dellaplain's Estate, 1 Con. Sur. 1; S. C., 3 N. Y. Supp. 202. See §§ 653, 1402, 1644.

But where the services are valuable they may be allowed, although

§ 510. Amount of counsel fees allowed.

The determination of the amount of counsel fees that should be allowed is always a question of more or less difficulty to the Court. It is so for several reasons. In the first place, it is one of great delicacy for one member of the bar to sit in judgment as to what his brother member of the profession should charge for his work. Secondly, no one is so able and competent to determine what should be charged as the man who makes the charges. In the settlement of an estate there are innumerable questions of various kinds upon which the advice of an attorney is sought, and which may afterwards appear to have been of little importance, but which in fact were of much importance to a proper administration of the estate. Where the attorney is one whose standing and ability is unquestioned, the Court will hesitate to reduce or disallow the bill as paid or presented by the administrator.

In one case it was said the amount of compensation for legal services rendered by the executor or administrator is to be determined by ascertaining what a prudent administrator would feel authorized to pay an attorney under all the circumstances of the case.[50]

In another case it was said "in determining the amount to be allowed I consider as the first and most important element, the work actually performed; second, the amount involved; third, the standing and reputation and learning of the lawyer; fourth, the result of the services."[51]

not employed by the administrator. *In re* Baker, 47 Bull. 559.

The court does not determine the fees which an executor may pay, but will allow him to charge the estate with attorney's fees for such services as were necessary and proper in the settlement of the estate. *In re* Ullman, 19 Dec. 803.

[50] Harris vs. Martin, 9 Ala. 895, 899; aff. in Teague vs. Corbitt, 57 Ala. 529, 544; Clark vs. Knox, 70 Ala. 607, 617.

[51] In the matter of Arkenburgh, 13 Misc. Rep. (N. Y.) 744.

In Gross vs. Moore, 14 N. Y. App. Div. 353, the Court said: "In judging of the value of legal services it is proper to consider the time occupied by them, the difficulty of the questions involved; the nature of the services rendered; the amount involved in the litigation; the professional standing of the counsel who claim pay for services, and to some extent, the result which has been reached. It is apparent that the last consideration can bear little, if any, upon the amount of work which has been done, but yet it is always accepted as a proper element to be considered in reaching the value of the services which have

However delicate a matter it may be for the Court to pass upon such fees, nevertheless it should be fearlessly done; for sometimes counsel, as well as administrators and executors, seem to forget their proper duty in the just administration of the estate, and proceed upon the theory that it is to be administered for *their benefit* instead of those entitled thereto by law.

If the administrator pay the attorney more than his services are worth, he will be chargeable with the excess.[52] But it is evident that, where the matter is not regulated by statute, justice requires that counsel fees actually paid in good faith should be allowed, although in excess of amounts allowed by law, if the excess be not of such magnitude as to show negligence in the administrator.[53]

A charge of $15 for preparing and having the administrator's bond approved is excessive.[54]

An allowance of $300 for settling an estate of $8,000, where there is little or no litigation, is sufficient.[55]

So is an allowance of $1,150 where the estate is of the value of $95,000, and consists largely of judgments and mortgages.[56]

A fee of $5,000 in an estate where the effects amount to $62,000, is not excessive when important and valuable services have been rendered by the attorney in litigation and in the general management of the estate, which devolve exclusively upon him in consequence of the continued illness of the executor.[57]

A charge of $110 as counsel fee, in preparing two returns of sale by the executors, and obtaining the necessary orders therein, is excessive.[58]

been rendered; and for that reason, while it is entitled to but little weight, yet it must not be forgotten."

[52] *In re* Bradley's Estate, 1 Con. Sur. 106; S. C., 2 N. Y. Supp. 751; Hurlbut vs. Hulton, 44 N. J. Eq. 302; S. C., 15 Atl. Rep. 417.

[53] Lindsay vs. Howerton, 2 Hen. & M. 9; Noel vs. Harvey, 29 Miss. 72, 78; Wilson vs. Bates, 28 Vt. 765, 769.

[54] Appeal of Barton, 131 Pa. St. 359; S. C., 18 Atl. Rep. 902.

[55] Succession of Osborn, 40 La. Ann. 615; S. C., 4 So. Rep. 580.

[56] Appeal of St. Clair, 15 Atl. Rep. 914.

[57] Succession of Henry, 12 So. Rep. 365; S. C., 45 La. Ann. 156.

[58] Appeal of Barton, 131 Pa. St. 359; S. C., 18 Atl. Rep. 902.

A charge of $45 as counsel fees for drawing a petition to change the terms of a sale by the executors, will be disallowed, on motion.[59]

No necessity being shown for the attendance of counsel at sales of land by the executors, a charge of $100 therefor will be disallowed; as also a charge of $10 in procuring purchasers; but $50 will be allowed for instructions and general advice in regard to the sales.[60]

Where the settlement of an estate, amounting to over $23,000, extends over four years, during which time counsel gives advice, brings suit to sell real estate in Probate Court, also suit in Common Pleas to construe will, makes abstract of title, files accounts, a fee of $550 is not excessive.[61]

Where the services rendered were on the contest of a will which involved the testamentary capacity of the testatrix, whose estate amounted to $100,000, and the proceedings occupied twenty-two days in taking testimony and two or three in oral arguments, a fee of $5,000 was allowed.[62]

A fee of twenty-five per cent. for the collection of an estate consisting only of the savings bank deposit of $1,600, with no debts, was unreasonably large.[63]

Where an attorney was employed to collect a doubtful claim of $30,000, enter a contract that, if successful, he should be paid a liberal fee, but if unsuccessful only his actual expenses, should be paid, and the amount collected was $10,000, a fee of $2,000 was held to be reasonable.[64]

The following items have been held excessive: Fifteen dollars for preparing the official bond and having it approved; $60 in preparing a return of sale and obtaining two orders of sale therein; and $25 for preparing a petition and obtaining an order amending a return.[65]

[59] Appeal of Barton, 131 Pa. St. 359; S. C. 18, Atl. Rep. 902.

[60] Appeal of Barton, 131 Pa. St. 359; S. C., 18 Atl. Rep. 902.

[61] *In re* Wolfe, 4 N. P. 336.

[62] Gross vs. Moore, 14 N. Y. App. Div. 353.

[63] *In re* Barber, 12 N. Y. Supp. 538.

[64] McCullough's Estate, 31 Oregon 86.

[65] McGregor's Estate, 131 Pa. St. 359.

A charge of $20 a day for attending sessions of a reference at which nothing was done but to adjourn was held excessive, and the charge was reduced to $10 per day for such days.[66]

The payment of a salary of $5,000 a year was considered reasonable and proper where the estate, amounting to $500,000, was largely in debt, and its affairs were so complicated as to occupy nearly the entire time of the attorney.[67]

§ 511. Taxation.

All taxes that were due at the time of the death of the deceased are to be paid by the administrator or executor. It is therefore his duty to attend to that matter, and this applies to real and personal property. It is the duty of each administrator or executor having control of personal property to list it for taxation; and his title to such property by relation dates back to the time of the decedent's death,[68] and this property must be listed for taxation at the residence of the administrator.[69]

Unless the administrator or executor has control over the real estate, taxes that accrue after the death of the decedent must be paid by the heirs.[70]

If an executor or administrator refuses to either list or pay the taxes, he would be liable for any damage which might be occasioned from such neglect.[71]

Taxes must be paid on the funds of an insolvent estate in the hands of an administrator unlike an assignee.[72]

The assessment of taxes is so far complete by the second Monday of July that the name of the person assessed for the year cannot be changed; hence, having died testate on July 12, the taxes are properly chargeable against his estate.[73]

[66] *In re* Colyer, 1 Con. (N. Y.) 546.

[67] Steel vs. Holladay, 20 Or. 462. See §§ 653, 1402, 1644. See previous section, the case of *In re* McAlpin, syllabus of which is given as a note.

[68] Sommers vs. Boyd, 48 O. S. 648. See § 663.

See § 1292 as to taxes between executor and trustee.

[69] Brown vs. Noble, 42 O. S. 405.

[70] For listing of property where there are several administrators. See § 205.

[71] § 5685 G. C.

[72] Robb's Estate, 5 Dec. 227, 381; 5 N. P. 52.

[73] Morrison vs. Bruce, 1 Dec. 190. See §§ 663, 1292, 1392.

The fact that the decedent at the time of his death was a resident of another State will not relieve the administrator from returning the same for taxation where he resides. This applies to bonds. Tafel vs. Lewis, 75 O. S. 182.

Even though all the beneficiaries are nonresidents, personal property of the decedent who died in 1900, which was omitted from taxation from 1894 to 1899, is properly listed in the name of the decedent. State vs. Gilfillan, 3 N. P. (N.S) 153; 15 Dec. 756.

Taxes become a lien on real estate on the day preceding the second Monday in April, and all taxes due and unpaid at the time of the death of the testator must be paid by the executor. Loomis vs. Phul, 2 N. P. (N.S.) 423; 15 Dec. 37.

A testamentary trustee is not liable only when he has charge of the property at the time the taxes become a lien. Id.

All funds in the hands of the administrator are liable to taxes and must be listed. This is true even though there is an order of

§ 512. Custody of funds.

Necessarily, the administrator or executor has control of the funds belonging to the estate, and the Probate Court has no authority directing him where and how he shall keep them.[74]

In the proper control and safety of funds held in a trust capacity, the Courts require from the trustee absolute honesty and good faith. But if the trustee acts in good faith within the requirements of the law, he will be treated by the Court with liberality and tenderness. He will not be held responsible for losses in the absence of wilful misconduct or fraud, especially when acting under advice of counsel,[75] and the executor or administrator will not in such cases be held responsible for losses occasioned by mere error of judgment. And where he has acted with what men of sense and experience would deem reasonable discretion in their own affairs, his acts or omissions in good faith will not render him liable for losses arising in consequence, especially during a period of doubts and difficulties.[76]

An administrator cannot make a profit out of the estate; and if he invest the assets, it is at his own risk. In such an instance he will be liable for all the profits derived from the investment; and if he lose the assets he will be liable for their value.[77]

He should keep the assets and their proceeds separate and apart from his own, so that they can be readily traced.[78]

If he loses money of the estate, together with his own, and only a portion be recovered, he must first return out of the part

the court that it should be paid on a certain claim. The same rule does not apply as in assignments. Gregg vs. Hammon, 4 N. P. (N.S.) 214; 16 Dec. 549. Affirmed, etc.

There may be several tenements in the same building. Cin. vs. Yeatman, 30 O. S. 276.

If an executor, agent, or guardian is put to any trouble in listing the property, he has a lien on the land for his services. § 5687 G. C.

[74] *In re* Welch, 110 Cal. 605; DeGreayer vs. Super Ct., 117 Cal. 640.

[75] Woerner on Admin. 707, citing Thompson vs. Brown, 4 John. Ch. 619, 629; Calhoun's Estate, 6 Watts. 185; Watkins vs. Stewart, 78 Va. 111, 114; Merritt vs. Merritt, 62 Mo. 150, 157; Perrine vs. Vreeland, 33 N. J. Eq. 102; affirmed, Ib. 596.

[76] Woerner on Admin. 708, citing LeGrand vs. Fitch, 79 Va. 635, 638; Torrence vs. Davidson, 92 N. C. 437; Perry vs. Smoot, 23 Gratt. 241; Pope vs. Mathews, 18 S. C. 444; Loomis vs. Armstrong, 63 Mich. 355; Dundas vs. Chrisman, 25 Neb. 495.

See Willis vs. Brancher, 79 O. S. 290.

[77] Gilbert vs. Welsch, 75 Ind. 557; *In re* Essex's Estate, 20 N. Y. Supp. 62.

[78] Hagthorp vs. Hooks, 1 G. & J. 270; Marvel vs. Babbitt, 143 Mass. 226.

recovered the estate's portion, although by so doing he lose his own.[79]

If he deposit the money in a bank, crediting it to his own account, this will be a conversion,[80] and if the bank fails, he loses it, even though the officers knew part were trust funds.[81]

If he convert assets of the estate to his own use, by investing them in his business, he will be liable either for the highest rate of interest or for the profits, at the option of the beneficiaries or creditors entitled to call for an accounting.[82]

If he knows he cannot close the estate for a considerable period, it is his duty to place the money at interest, although no statute requires him to do so.[83]

But our statute provides that if money remains in the hands of an executor or administrator for probably a greater length of time than six months it should be invested.[84]

§ 513. Failure of bank where deposited.

It is negligence in an administrator to keep money of the estate in his house,[85] unless the circumstances make it as safe there as anywhere else.[86] Consequently the funds of the estate ought to be kept in a safe place of deposit. He may therefore deposit them in a bank having at the time of deposit a good reputation for solvency; and if loss subsequently occurs, without his neglect, he will not be liable,[87] even though it be a bank of which he is a director.[88]

[79] Kirkman vs. Benham, 28 Ala. 501.

[80] Shaw vs. Baerman, 24 O. S. 25; Union Bank vs. Smith, 4 Cr. C. C. 509; Ivey vs. Coleman, 42 Ala. 409.

[81] Harward vs. Robinson, 14 Ill. App. 560; Summers vs. Reynolds, 95 N. C. 404; Williams vs. Williams, 55 Wis. 300; Ditmar vs. Bogle, 53 Ala. 169.

[82] Norris' Appeal, 71 Pa. St. 106; Estate of Brown 8 Phila. 197; Dowling vs. Feely, 72 Ga. 557; Cannon vs. Apperson, 14 Lea 553.

[83] Perkins vs. Hollister, 59 Vt. 348.

[84] § 10746 G. C., § 514. See § 389. See subsequent sections.

[85] Cornell vs. Deck, 8 Hun 122.

[86] Fudge vs. Durn, 51 Mo. 264.

[87] Odd Fellows Ben. Asso. vs. Ferson, 3 C. C. 84; Ramsey vs. McGregor, 1 C. S. C. 327; Norwood vs. Harness, 98 Ind. 134; Jacobus vs. Jacobus, 37 N. J. Eq. 17; Cox vs. Roome, 38 N. J. Eq. 259; Twitty vs. Houser, 7 S. C. 153.

[88] *In re* Maxwell's Estate, 23 Abb. N. C. 23; S. C. 3 N. Y. Supp. 425; 1 Con. Sur. 230.

But if he deposit the money in his own name, or with his own account, he will be liable for the full amount should the bank fail; for by such deposit he is guilty of a conversion.[89]

And so he will be liable if he deposit the money and take out a certificate of deposit payable with interest; for the transaction is a loan without security.[90]

If the deposit be made under an agreement that it shall remain for a time, thus rendering the transaction a loan and not a deposit, or if a deposit originally made with prudence, is continued for such an unreasonable length of time as to involve a breach of duty, the representative is responsible for loss arising from the insolvency of the bank.[91]

§ 514. How executors, etc., guardians and trustees may invest funds. "When they have funds belonging to the trust which are to be invested, executors, administrators, guardians, and trustees, may invest them in certificates of the indebtedness of this state, of the United States, or in such other securities as the court having control of the administration of the trust approves. When money coming into the hands of an executor, administrator, trustee, agent, assignee, attorney, or officer is stopped therein by reason of litigation or other lawful cause, and if it will probably be so detained for more than six months, he may invest it during such detention in the manner that trust funds are now authorized by law to be invested, or as the probate or other court having jurisdiction of the pending litigation, or person aforesaid, directs." [R. S. § 6413.][92]

[89] Shaw vs. Baerman, 34 O. S. 25; Corya vs. Corya, 119 Ind 593; Naltner vs. Dolan, 108 Ind. 500; Fletcher vs. Sharpe, 108 Ind. 276; Harward vs. Robinson, 14 Ill. App. 560; Summers vs. Reynolds, 95 N. C. 404; Ditmar vs. Bogle, 53 Ala. 169.

[90] Appeal of Baer., 127 Pa. St. 360; S. C. 24 W. N. C. 299; 18 Atl. Rep. 1.

[91] Redf. Sur. Prac. 499.

See §§ 718, 1389.

[92] § 11214 G. C.

If a trustee invests funds and does not designate that the fund is in trust, leaving it open so he might claim it as his own, he will be charged with it as if it was his own. Brown vs. Williams, 9 C. C. (N.S.) 307; 29 O. C. C. 25; affirmed 78 O. S. 424.

Where shares of corporate stock are in danger of loss or depreciation the Probate Court, under §§ 524, 6080 and 6413 has power to order them sold and reinvested. Ordinary prudence is as to investment. The Probate Court has full and complete jurisdiction over investments and reinvestments. Guthrie vs. Gas & Elec. Co., 2 N. P. (N.S.) 117; 15 Dec. 23.

When the will authorizes the executor to make investments he will not be liable in the absence of negligence. Willis vs. Brancher, 79 O. S. 289.

See Bonding Co. vs. Bank, 22 C. C. (N.S.) 177, where it was held that the approval of an account, in which the investment was stated, operated to approve the investment.

§ 515. When investment to be made.

The above section of the General Code is a combination of two distinct acts of the legislature, placed together by the Codifying Commission. The first part of the section applies generally, that investments may be made in United States bonds, and the second is intended to apply when an executor or administrator or trustee ought to invest the funds in his hands, when for some reason the same could not be distributed or otherwise disposed of, as a proper administration of the trust might require. Sec. 10843-4-5, G. C., (§ 786) makes provision for money that may remain in the hands of the administrator or executor after he has been directed by order of court to distribute. Under that section it is held to be compulsory to make an investment.[93]

And sec. 10933 G. C. (§ 1367) provides how permanent investments should be made by guardians. Generally, it is not expected that an administrator or executor will have any funds to invest, for it is his duty to collect the assets and distribute them as rapidly as possible. But if for any reason, such as litigation, etc., he should be prevented from making a distribution, then it is the purpose of the section above that some investment may be made. Generally, an administrator is not chargeable with interest on money belonging to the estate unless it was shown that the money was used by him, or that he has held it such a length of time as would make it inequitable not to allow interest on it.[94]

The rule is very well stated by a distinguished author as follows: "The rule is, that during the period of getting in the estate, paying the debts, etc., preliminary to final distribution or a permanent investment, under the will, whether the period be long or short, the representative is held to the same degree of care which a man of ordinary prudence would exercise, under the same circumstances, with respect to placing his own money so that it might earn interest. If the Court can determine that,

[93] *In re* Thornton, 5 Dec. 151; 7 N. P. 335.

[94] *In re* Thornton's Estate, 7 N. P. 335; 5 Dec. 151.

Money in the hands of an administrator which has yielded him no profit, and which he has not been ordered to pay out, or which is tied up by litigation in good faith, does not bear interest; and this rule is applicable to debts which the administrator owes to the estate, and which is chargeable against him as money in his hands. James vs. West, 47 Bull. 750; Sup. Ct.

under the circumstances of the particular case, it was a breach of duty for the representative to let the money lie idle, he may be charged, on his accounting, for the amount of interest which, with reasonable diligence, he might have received. If distribution is unreasonably delayed, he is chargeable with interest on the funds, the same as an executor or trustee would be for an unreasonable delay in making a permanent investment under the will. The reasonableness of the delay depends, of course, upon the circumstances of the particular case. He may keep in hand such sums as the distributees may call for at any time; if kept ready to be paid over, on demand, a delay of demand is no ground for charging interest." [95]

In making investments, if the administrator or executor wishes to escape responsibility, he should keep himself strictly within the limits of the law. If, by the exercise of reasonable diligence no investments can be made, such as the law contemplates, he would not be chargeable with interest for allowing it to remain idle. In making investments, the administrator or executor is only required to use common prudence and skill of competent men, and not that of the most cautious and money-making men.[96]

It is negligence to loan the funds of the estate without security, though the borrower is amply solvent at the time.[97] Personal security is not sufficient.[98] Nor is a second mortgage, as a rule.[99]

An investment, without an order of Court, in stocks or bonds of a corporation has been held not to protect the administrator.[100] Government bonds, however, are good investments.[101]

[95] Redf. Sur. Law and Prac. 500.

[96] Miller vs. Proctor, 22 O. S. 442; Spencer's Appeal, 2 W. L. M. 408.

See also Armstrong vs. Miller, W. 562; 6 O. 118.

[97] Probate Judge vs. Mathes, 60 N. H. 433; Sherman vs. Lanier, 39 N. J. Eq. 249.

[98] Lefever vs. Hasbrouck, 2 Dem. 567; Bogart vs. Van Velsor, 4 Edw. Ch. 718.

[99] Wilson vs. Staats, 33 N. J. Eq. 524; Perrine vs. Petty, 34 N. J. Eq. 193.

[100] Tucker vs. Tucker 33 N. J. Eq. 235; Garesche vs. Priest, 78 Mo. 126.

[101] Ormiston vs. Olcott, 84 N. Y. 339; Tucker vs. Tucker, *supra*.

He may not invest in mortgages in another State,[102] although a mortgage taken to secure the purchase money of land sold there will protect him.[103]

As a rule, investments made by the decedent may be continued without liability for loss; but even here the administrator must exercise care and convert them into money if he has information, or could have obtained it with reasonable diligence, that the investment was likely to prove unsafe and loss occur to the estate.[104]

This subject will be again treated of in subsequent chapters, on guardians and testamentary trustee.[105]

§ 516. Application to invest, etc.

It might be well for an administrator or executor, if he has any reason to believe that the funds in his hands cannot be distributed for more than six months, to make application to the Probate Court setting out such fact and asking the Court for authority to invest the money in some proper manner. The order might be made by some other Court than the Probate, if there was a pending litigation in the other Court, and such other Court had jurisdiction of the fund. The Court might authorize the money to be invested in security other than that prescribed by the statute, and if the funds were invested as directed by the Court, the administrator or executor would not be responsible. The application might be in the following form:

(*Title.*)

Now comes A. B., administrator (or executor) of the estate of C. D., and represents to the Court that he has in his hands, belonging to the said estate, the sum of.....dollars, and that by reason of pending litigation (here describe or give other reasons), he will be unable to distribute said money for more than six months from this date. That he can invest said money (here describe and state security in full). Wherefore he asks that the Court may make an order authorizing him to invest said money in his hands in the said security.

.....

Sworn to and subscribed before me and in my presence this.....day of .....190....

[102] Ormiston vs. Olcott, *supra.*

[103] Denton vs. Sanford, 103 N. Y. 607.

[104] Bowker vs. Pierce, 130 Mass. 262; Marsden vs. Kent, L. R. 5 Ch. Div. 596; Appeal of Stewart, 110 Pa. St. 410; *In re* Weston, 91 N. Y. 502; Harvard College vs. Amory, 9 Pick. 446.

[105] See § 1369, § 1287.

ENTRY.

(*Title.*)

This day this matter came on to be heard, upon the application of A. B., administrator (or executor) of C. D., for an order of the Court authorizing him to invest certain moneys in his hands belonging to said estate, in the following security (here describe). And it appearing to the Court that it would be more than six months before such administrator (or executor) can distribute said money that the security purposed for said investment is sufficient. It is therefore ordered that said A. B. proceed to invest said funds as in application prayed for.[106]

§ 517. Insurance.

An executor or administrator has an insurable interest in the property of the estate, and he must exercise the same precautions against loss by fire as prudent men adopt to protect themselves.[107]

And he may also, where he has authority over real estate or has the reason to believe that the estate is insolvent, insure it.[108]

And he may become chargeable for neglect to insure where the house is destroyed by fire. The statute specifically provides that when a will is contested, the executor or administrator shall insure the property.[109]

§ 518. Carrying on business of the deceased.[109a]

To carry on the business of a deceased person is not within the scope of the powers of an ordinary administrator. Neither can an executor conduct such a business unless expressly authorized by the will.[110] He might, however, continue the business so

[106] See § 1287.

[107] Tuttle vs. Robinson, 33 N. H. 104; Rubottom vs. Morrow, 24 Ind. 202.

But if he has a mere naked power of sale he is not bound to insure, for in such cases the fee is in the heir until sale is made. Reed vs. Brown, 10 C. C. 57; 6 C. D. 15.

See § 1292.

See § 379, Fire insurance.

[108] Redf. Law and Prac. 497.

[109] § 10633 G. C., § 95.

[109a] See § 435, Executor continuing business; see § 436, Administrator continuing business. An executrix, who is carrying on the business of her testator may maintain an action in her representative capacity, for injuries caused to personal property which the defendant, under agreement with her as such executrix, was transmitting to her place of business. Levitt vs. Scholes (N. Y.), 59 Bull. —.

[110] It is equally well settled that executors, in the absence of power conferred by the will, have no authority to carry on the trade or business of their testator, and that: "The employment of the trust funds in trade, or any speculative undertaking, without an express authority, will, a *fortiori* be treated as a breach of trust; and whatever may be the apparent advantages of such a course, and however well-intentioned the conduct of the trustee, there is no question but that the court will visit upon him any loss resulting from such a step, while he will have to account for any profit thus made." Williams on Ex'rs, 1274; Hill on Trustees, 379; Perry

far as is reasonably necessary for its proper preservation and profitable disposition of the money and property invested therein.[111]

It is not meant, generally speaking, that the administrator or executor is bound, immediately upon the decedent's death, to convert into cash the assets employed in his trade; on the contrary, where the best interests of the estate require it, he may, within reasonable limits, make purchases which will bind the estate.[112] However, an administrator or executor, conducting the business of a deceased person, always does so with great risk to himself. If there is no authority in the will, and he conducts the business for such a length of time that it may be considered that he continues the business, instead of merely preserving it until a purchaser can be found, if successful, he must account for the profits; if unsuccessful, he must bear the losses. Even where the will authorizes the executor to conduct the business, the executor will be personally liable for all debts incurred. To this rule there is said to be two exceptions; first, that when the will authorizes the expenditure of assets for a particular purpose, which expenditure is necessary for the protection, reparation and safety of the estate, and the executor has no funds and is not willing to make himself personally liable, he may, by express agreement, make the expenditure a charge upon the estate. The other exception is the insolvency of the executor who continued the business and contracted the debt. In

on Trusts, § 429. So rigid is this rule, and so careful have the Courts always been to guard against the perilous consequences resulting from embarking the assets in trade, that, even when the will authorizes the executor to carry on the business, he can not in so doing create liabilities against the general estate, but the creditor of such new business must look either to the business itself or to the executor individually for his pay.

Lucht vs. Behrens, 28 O. S. 238.

[111] Redf. Sur. Prac. 491, citing Hannahs vs. Hannahs, 68 N. Y. 610; Thompson vs. Brown, 4 Johns. Ch. 619; Johnson vs. Kellogg, 8 N. Y. St. Rep. 413; Ames vs. Downing, 1 Bradf. 321; Hooley vs. Gieve, 9 Daly, 104; 9 Abb. N. Cas. 8, and note.

Compare Luers vs. Brunjes, 5 Redf. 32; Boulle vs. Tompkins, Id. 472; Gilman vs. Wilber, 1 Dem. 547.

[112] Redf. Sur. Prac. 491, citing Matter of Sharp, 5 Dem. 516.

such case, the general assets may be made liable, in equity, for the debts incurred in such continued business.[113]

In Lucht vs. Behrens,[114] where the executor of an estate, who is not authorized to do so, takes the personal assets of his testator and uses them in carrying on the former trade and business of the testator for a series of years, for the purpose of making money to be used in paying the debts and supporting the family of the testator, consisting of a widow and minor children, and also for the purpose of keeping up the business for the minor sons when they should be old enough to take charge of it, and in so doing pays off all the debts of the testator, it was held that the general assets of the testator in the hands of an administrator *de bonis non,* is not liable for money borrowed by the executor for and used in carrying on such trade and business, though the executor acted in good faith.[115]

Where the will directs that the whole personal estate should be used in carrying on a business, such direction is subject to the law that the personal estate must first pay the personal debts of the testator, and only the personal estate remaining after payment of such personal debts can be used by the trustee to carry on the business.[116]

Where the executor or administrator carries on business of the deceased in good faith at the request of heirs, distributees or legatees they will not be heard to object to credits in his account, or loss incurred in consequence thereof. But the burden lies on him to show that the losses were incurred with the full understanding of all the parties.[117]

Only by the clear and unmistakable intention of the testator can assets other than those employed in the business be held liable for the debts of a going concern.[118]

113 Redf. Sur. Prac. 492.

114 28 O. S. 231.

115 Lucht vs. Behrens, 28 O. S. 231.

116 P. C. & St. L. Ry. Co. vs. Schmidt, 8 C. C. 355.

117 Poole vs. Munday, 103 Mass. 174; Ward vs. Tinkham, 65 Mich. 695.

118 See Discussion of subject, Woerner on Admin. 688, 689.

See also article in 13 Bull. 31.

If an administrator conducts the business of the deceased, such as operating a newspaper, payments made by him to the employees in such business, in accordance with the general policy of the deceased during his lifetime, these are *prima facie* reasonable and proper. *In re* Kohanzi, 16 N. P. (N.S.) 337.

In this case Judge Haddin discusses a number of interesting questions.

Schouler says (Sch. on Exrs. 325): "Chancery protects the executor who can show his testator's express sanction, but scarcely beyond this, and chiefly so as to keep the hazardous investment under its

As before observed, a wider latitude is allowed an administrator or executor in closing out the business than in continuing one. In order to preserve a business until it could be disposed of, would not be a continuation of the business. In such a matter the executor or administrator must exercise the judgment of an ordinary prudent and careful man, and endeavor to dispose of the business at the very earliest possible time. Sometimes it would be very detrimental to close up a business at once, but as a general rule, it will be more profitable to the estate than to continue it, even for a short time. If it can be disposed of for a slight loss, it will generally be more profitable to the estate than to hold it.[119]

That part of the estate not invested in such business is not liable to subsequent creditors.[120] But where a testatrix directed her executor to carry on a mercantile business for the benefit of her son, and empowered the executor " to sell or make such other disposition of my real and personal estate as the safe conduct of such business shall seem to require," it was held that a purchase of goods by the executor on credit, in the course of carrying on such business, subjected the general assets of the estate to the payment of the price.[121]

prudent direction. To employ trust funds in trade on the representative's own responsibility has always been treated as essentially a breach of trust; and the Courts have resisted much pressure to relax the rule. And the executor or administrator so employing funds of the estate has the disadvantage of incurring all the risks while he must account for all the profits."

[119] But it has been held that, though an administrator is not authorized to carry on his intestate's business, and should not blend the expenses and disbursements connected therewith with the legitimate item of his accounts, where he charges himself with the gross profits of the business, and the Court debits him with the amount thereof, he should be allowed money paid out in the course of the business.

In re Rose's Estate, 80 Cal. 166; S. C. 22 Pac. Rep. 86; Poole vs. Munday, 103 Mass. 174; Ward vs. Tinkham, 32 N. W. Rep. 901.

If an administrator continue the business under the will, all losses by said debts, costs of personal property purchased to replace similar articles worn out or consumed in conducting the business, expenses of repairs on the real estate used, are properly chargeable against the estate.

Accounting of Jones, 103 N. Y. 621; Cline's Appeal, 106 Pa. St. 617.

[120] Brasfield vs. French, 59 Miss. 632; Jones vs. Walker, 103 U. S. 444; Morrow vs. Morrow, 2 Tenn. Ch. 549; Delaware, etc., R. R. Co. vs. Gilbert, 44 Hun 201.

[121] Willis vs. Sharp, 113 N. Y. 586; S. C. 21 N. E. Rep. 705.

Special legatees or creditors can compel the closing up of the business after the time fixed in the will; but if the residuary legatee continued the business as executor after the time so fixed in the will, he cannot defeat subsequent creditors.[122]

It would seem that an executor carrying on business under the will is personally liable to all persons with whom he deals as such, though they have a right to resort for the payment of their debts to the assets of the estate.[123]

In seeking to charge an administrator for profits made by the use of the assets of the estate in his business, the burden of proving such profits lies upon him asserting that such were made.[124]

§ 519. Carrying out contracts of deceased.

Except contracts of a personal nature, executors or administrators are bound to the extent of the assets coming into their hands by the contracts of their decedents, and they must answer any damages for breach, whether it occurred before or after the decedent's death. The statute specifically confers upon administrators or executors of decedent owners, under the Mechanics' Lien act, the same rights and the same liabilities as the owners would have had if they were alive.[125]

As between the administrator or executor and the heir, the former may, as a general rule, exercise his discretion whether to perform or rescind any contract of the decedent imposing any liability or duty upon himself for the best interest of the estate, subject, however, to the approval of the Court.[126]

[122] Brasfield vs. French, 59 Miss. 632.

[123] Liable vs. Ferry, 32 N. J. Eq. 791; Willis vs. Sharp, 43 Hun 434.

Where an executor is managing an estate and a person is injured on an elevator, the estate cannot be sued; the estate of a deceased is not liable for the torts of the executor. Deschler vs. Franklin, 20 C. C. 56.

[124] *In re* Munzor' Estate, 25 N. Y. Supp. 818; S. C. 4 Misc. Rep. 374.

For discussion of executor or administrator carrying on business in a partnership. See §§ 433, 434, 435, 436.

See §§ 1379, 1588.

[125] See § 8322 G. C.

[126] Gray vs. Hawkins, 8 O. S. 455.

See § 523, as to carrying out contracts relating to real estate.

Upon a contract for the sale of growing timber, a right of action for damages or rescission being a personal right, belongs to the administrator. Isham vs. Brucker Stave Co., 2 C. C. (N.S.) 1; 25 O. C. C. 167; affirmed 72 O. S. 167.

Where in direct proceedings the parties agree that a certain amount shall be paid by the husband to the wife during her natural lifetime, this contract must be carried out by the administrator of the husband. Hassenek vs. Markbreit, 68 O. S. 554.

Our statute provides,[127] that by permission of Court, an executor may complete a sale of lands, and where the decedent has entered into a contract to purchase real estate, and dies before it is conveyed to him and before he has paid for it, his heir or legatee is entitled to have his executor or administrator pay for the realty out of the personal estate.[128]

Where it is within the power of an administrator or executor to rescind a contract, he cannot, after ratifying it, disavow his act; having made his election, he is bound by it; and likewise those beneficially interested in the estate are bound by the administrator's or executor's acts.

Woerner says:[129] "That if the executor or administrator decides to enforce or carry out the contract, he is liable at common law for the loss that may occur to the estate and consequences thereof, while any profits arising become assets of the estate. In equity, however, and under the statutes of most American States, the administrator, acting in good faith, will be protected for the execution of the contract, the breach of which would result in damages, although the estate is insolvent. The loss for carrying out the contract would be greater than the damages or breach would have been."[130]

Where the deceased agreed to convey to the plaintiff a certain tract of land and did not do so, whether the payment was to be made in money or services, the executors were compelled to carry out the agreement.[131]

The plea of usury may be made against an administrator as well as it could have been made against his testator.[132]

But an executor or administrator cannot set aside a conveyance made by a debtor with the intent to hinder and delay his creditors, unless the property so conveyed is actually required for payment of debts.[133]

A contract that is indefinite and uncertain need not be carried out. *In re* Stewart, 1 N. P. (N.S.) 413; 49 Bull. 103.

In this case the Probate Court assumed jurisdiction to try that question and instruct the administrator.

[127] § 11928 G. C.

[128] Chamberlain vs. Dunlap, 126 N. Y. 45.

[129] Woerner on Admin. 686.

[130] See Schu. on Exrs. § 254.

[131] Crabill vs. Marsh, 38 O. S. 331. See Howard vs. Brower, 37 O. S. 403.

[132] Ausdal vs. Potterf, 41 O. S. 677.

[133] McCall vs. Pixley, 48 O. S. 379; Doney vs. Clark, 55 O. S. 294.

§ 520. Contracts not binding, etc.[134*]

There are certain contracts which, although binding upon the deceased during his lifetime, are not binding upon his legal representatives. These are contracts of a personal nature depending upon personal skill, or taste of the obligee, such, for instance, as the obligation of an author to prepare a book for publication, or a master to instruct an apprentice.[134] The contract to marry or an obligation to be performed by the contracting party in person.[135] Thus a contract for combination for mutual profit of the business ability of B. as manager, and the musical talent of S. as director, in the organization and touring of a band, the compensation to be paid S. to be a proportion of the profits, is dissolved by the death of B.[136]

If the contract of a deceased be personal, and the performance of the deceased himself be the essence thereof, his executor will not be liable, except only so far as the contract was broken during his lifetime.[137]

So a contract to sell all the lumber manufactured by one party during five years, to average a certain number of feet per year, but stipulating no fixed quantity for any year, was declared a personal contract, dissolved by death of either party.[138] And was also held in the case of a contract to manufacture a certain patented article and push the sale in a certain manner requiring personal skill.[139]

[134] Baxter vs. Burfield, 2 Strange, 1266.

[134*] Cited Stewart vs. Herron, 77 O. S. 142.

[135] Siler vs. Gray, 86 N. Car. 566.

[136] Blakely vs. Sousa, 197 Pa. St. 305, 335.

[137] Dickinson vs. Callahan, 19 Pa. St. 227.

The duty of the survivor to a contract of a strictly personal nature to perform his covenants terminates with the death of the other party to it, for the reason that neither of the contracting parties contemplated attempted performance by a substitute. Where distinctly personal services, requiring peculiar skill, are to be rendered by each of the contracting parties as inducements to the contract, there is mutuality, and the death of either of the parties is the death of the contract. In such a case the personal representative of the deceased cannot call upon the survivor to perform, and the latter cannot require the obligations to him to be assumed, and discharged by another. Blakely vs. Sousa, 197 Pa. St. 305-335.

[138] Dickinson vs. Calahan, 19 Pa. St. 231.

[139] Smith vs. Preston, 170 Ill. 179.

Contract for personal services cannot be specifically enforced. Hagmen vs. Campbell, 15 Dec. 221.

And the contract between a firm and agent to employ him in their business for a term of years was held discharged by death of a member of the firm.[140]

The death of one party to a contract does not operate as a revocation or discharge of his part of the agreement, where his obligation is such that it can be performed by his personal representative.[141]

If the contract is for the performance of personal services, requiring particular ability and skill, there is the implied condition that the contractor shall be alive and physically able to perform them.[142]

[140] Tasker vs. Shepard, 6 H. & N. 575.

[141] Hawkins vs. Bael, 18 B. Mon. (Ky.) 816; 68 Am. Dec. 755.

[142] Marvel vs. Phillips, 162 Mass. 399; 44 Am. St. Rep. 370.

A written contract between a sewing machine company and W. recited the fact of a sale by the former to the latter of one hundred Howe machines for the price of which W. had given a series of notes, the company stipulating to accept on or before maturity of the amount due thereon, notes of subpurchasers, drawn to the order of W. and guaranteed by him. The company was to ship to W. a specified number of machines monthly, and W. agreed to sell them within a specified territory, at the regular retail prices established by the company, and deal only in its machines. After machines were delivered, W. died. It was held that the contract was personal to W., and the further performance did not devolve on the administratrix of his estate. Howe Sewing Co. vs. Rosensteel, 24 Fed. Rep. 583, citing Robson vs. Drummond, 2 Barn. & Adol. 303; Dickinson vs. Calahan, 19 Pa. St. 227.

In compromise and settlement of criminal and civil proceedings for fornication and bastardy, and breach of promise of marriage, A agreed to deliver her child to C. to discontinue both actions and release B from all claims and demands, in consideration of which B agreed to pay all costs in said cases, "to relieve A from any cost or expenses in the support and maintenance of said child, and see that it was well taken care of." Held, the contract was not personal to B, but could be enforced against his executors. Stumpt's Appeal, 116 Pa. St. 33; 8 Atl. Rep. 866.

Contracts for personal services are subject to the implied condition that the party contracting to perform shall continue in health, and such contracts are revocable by his incapacity to perform. Powell vs. Newell, 59 Minn. 406; 61 N. W. Rep. 335.

The above was where a note was given to a physician for future services and the physician became ill, held the giver of the note was released from payment. When J agreed to furnish S with "six successive crops of hemp of his own raising, embracing each year all the hemp he can raise upon not less than one hundred, nor more than one hundred and sixty acres of land

§ 521. Duty as to mortgages, etc.

It will be the duty of the administrator or executor to keep alive chattel mortgages by refiling them, as required by law; and if the security should be lost by failure to refile such a mortgage, the administrator or executor would be liable. It must be refiled within thirty days from the expiration of three years from its date. Likewise it would be the duty of an administrator to keep alive judgments, and exercise proper care to prevent any claim from being barred by the statute of limitations. As to keeping down interests on mortgages or other incumbrances upon the property, it is culpable negligence for the executor or trustee to fail to do so,[143] when he has funds on hand sufficient for that purpose.

In West vs. Dean,[144] it was held that an administrator had no right to bid in property which was sold at foreclosure, even though he may think it will turn out to the advantage of the estate. While this may have been the law applicable to that case, in which it was sought to hold the estate responsible on the contracts of the administrator, yet it occurs to me that it is not good law. It rather seems to me that the law is, as Redfield expresses it:[145]

"The representative has a right, and it may be his duty, in the foreclosure of a mortgage belonging to the estate, to bid in the premises, on the sale thereof, and he may take a deed therefor in his own name, individually. The premises thus purchased are to be regarded as personal property of the estate, and it is the duty of the representative to convert them into money, to be accounted for by him as part of such estate."[146]

He is, therefore, authorized to enter into a contract for the recovery of such as is to be accounted for by him as part of such estate."[147]

each year," it was held a personal contract and could not be enforced against J's executor. Schultz vs. Johnson's Ex., 5 B. Mon. 497, citing Chitty Pldgs., vol. 1, 58; Chitty on Contr. 98.

A suit for slander does not abate by the death of the plaintiff. Alpin vs. Morton, 21 O. S. 536.

143 Redf. Sur. Prac. 497.

144 15 C. C. 261; 8 C. D. 797.

145 Redf. Sur. Prac. 497.

146 Matter of Butler, 1 Connoly, 58.

147 Valentine vs. Belden, 20 Hun 537.

See Cook vs. Ryan, 29 Id. 249; Clark vs. Clark, 8 Paige, 152.

If a mortgagor dies in possession of mortgaged property, it cannot be replevined from the administrator. It is the duty of the administrator to sell the property in due administration of the estate, the claim of the mortgagee being transferred to the fund. It would make no difference if the condition was broken or not at the time of the mortgagor's

There is, however, no absolute obligation resting on an executor to buy in the equity of redemption at such a foreclosure sale. It rests with him to exercise a sound judgment whether or not that course is necessary to prevent loss to the estate.[148]

In such cases it would be proper for the administrator or executor to file an application in the Probate Court for authority to buy in the property. There is no statute directing such a course, but Courts of Probate have entertained jurisdiction on such application. The petition should set out all the facts, and pray for authority to purchase the property at not to exceed a certain price.[149]

§ 522. Stocks.

Executors and administrators are to vote the stock held by their testators. It matters not in this respect whether the stock was held in their own right or in trust, nor whether transfer thereof had been made on the company's books. If there are several executors and they cannot agree, the stocks cannot be voted.[150]

Administrators should not contribute voluntarily to make up losses of incorporated companies in which the estate owns stock, if they are of little or no value; but if they are valuable, they should pay assessments to which they are liable, and which constitute a lien on the share held by them, in order to prevent their forfeiture.*[150]

§ 523. Action by executor, etc., to complete contract for sale of land. "When a person who has entered into a written contract for the sale and conveyance of an interest in land dies

death. Linghler vs. Kraft, 3 N. P. (N.S.) 653; 16 Dec. 474; affirmed 79 O. S. 225.

148 Matter of Quinn, 1 Connoly, 381, see note on executors, guardians, etc., buying in, 17 Abb. N. Cas. 429.

149 See Woerner on Admin. 1065. See § 386.

A mortgage not recorded until after the death of the mortgagor is not for that reason void as to general creditors. Gill vs. Pumey, 12 O. S. 38.

150 Woerner on Admin. 690, citing Market St. Co. vs. Hellman, 109 Cal. 571; Matter of North Shore Co., 63 Barb. 556; Matter of Cape May & D. .B M. Co., 16 Atl. R. 191.

150* Woerner on Admin. 691. See § 1289 as to Dividends.

A proxy given by an administrator or executor, in order to be valid in the casting of votes, must specify for whom the votes shall be cast. This is a discretion lodged in the administrator or executor and can be exercised by him alone. State *ex rel.* Voight, 2 O. App. 147; 35 O. C. C. 255.

before its completion, and his executor, administrator, or other legal representative, desires to complete it, he may file a petition therefor in the common pleas or probate court of the county in which the land, or any part thereof, is situated. If the petition be filed in the probate court, service may be made therein as in civil actions. The heirs at law, devisees, or other legal representatives of the deceased vendor, when not plaintiffs, must be made defendants." [R. S. § 5800.][160]

§ 524. Nature of proceedings.

The above section is a part of an act that was originally passed permitting co-partners, joint tenants, or tenants in common, to enforce a contract for the sale of lands that had been agreed to be sold before one of the joint tenants died, as well as a provision that executors might complete such a contract. It seems that the prime object of the above section is to grant to the executor or administrator the power to make the conveyance and not to provide for a method in which the administrator or executor could compel an unwilling purchaser to comply with his contract. It rather goes on the assumption that the purchaser is willing to complete his contract; and if the administrator or executor is of the opinion that the interest of the estate required its completion, and the purchaser is unwilling, I have no doubt that he could file a suit for that purpose. But whether or not he could ask that kind of a remedy in the Probate Court is certainly a serious question, and it would be advisable in such cases to file a petition in the Court of Common Pleas. While the statute does not in so many words say that the action is a civil action, and one which would be so held under the Code, yet for all practical purposes it would be advisable to consider the action as a civil action.[161]

§ 525. Parties.

Following the idea that the object of sec. 11922, G. C., was only to authorize the executor or administrator to complete the con-

[160] § 11922 G. C. See § 1398.

[161] If the contract is void the order of the Court would be of no effect. Murdock vs. Lantz, 34 O. S. 599.

See § 519, Contract of deceased. It seems that action depends on the administrator's desires, and that the Probate Court cannot compel him to act. Jones vs. Green, 11 C. D. 548; 21 O. C. C. 96.

tract where the purchaser was willing to accept the same, the statute provides that the heirs at law, devisee, or other legal representative of the decedent, must be made parties. In sec. 11920, G. C., it is provided that all the contracting parties must be set forth in the petition. So it would eb well, in a case of this kind, to make not only the devisee and heir at law parties, but also all the contracting parties, as well as the widow of the deceased. The action must be brought in the Court of Common Pleas or the Probate Court of the county in which the land, or any part thereof, is situated. If the widow was unwilling to release her dower in the premises, it would be of no use for the executor to file his petition under sec. 11922, unless the purchaser was willing to take the property with the incumbrance of a widow's dower, for the court would not compel a purchaser to take a title of that kind.[162]

§ 526. Petition.

Under the provisions of sec. 11920 G. C. it is said "that the petition must set forth the names of all contracting parties, describe the lands contracted for, state the time the contract was made, that the contract has been fully performed by the purchaser, and have annexed a copy of the contract." This may not be entirely applicable to the petition in this case, for if only the power to make the conveyance is considered, it should state the purchaser is willing to comply with the contract. The petition may be in the following form:

Probate Court,.....County, Ohio.
....., as executor of the last will of (or administrator of the estate of)....., deceased, and .....and....., heirs-at-law of..... ....., deceased, plaintiffs, vs.....and ....., as the legal guardians of..... ....., an infant and heir-at-law of said....., deceased.
Plaintiffs say that on or about the.....day of....., 190..., the said....., late of the county of..... ....., died testate (or if he left no will, intestate), leaving the plaintiffs,.....and....., and defendant....., who is an infant aged about..... years, and whose legal guardian is the defendant.....,

[162] In a suit to compel the execution of a contract to convey, it is necessary to make the administrator a party. Massie's heirs vs. Donaldson, 8 O. 377.

his sole heirs-at-law; that plaintiff....., is the duly qualified and acting executor (or administrator) of....., deceased, a duly certified copy of his letters of executorship (or administration) as hereto attached, marked exhibit..... Plaintiffs say that .....died possessed of the legal title in fee simple to the following described lands, to-wit: (Describe them.) Plaintiffs further say that, the said.....in his lifetime, on the .....day of....., 190..., contracted in writing with said....., to sell and convey to said..... .....in fee simple, by deed of general warranty, the said premises, with the appurtenances..... ....., which contract was in substance as follows: (State substance of contract). a copy of which contract is hereto attached, marked exhibit.....; and that said contract was not completed by said .....in his lifetime, and the plaintiffs are desirous of completing the same according to its terms. Wherefore plaintiffs pray that said....., as executor of the last will and testament of....., deceased, may be authorized to complete said contract, and to execute deeds of general warranty for and on behalf of the heirs-at-law to the said....., which shall be as binding on said heirs-at-law as if the same had been made by said....., deceased, in his lifetime, and for all other proper relief.

.....

(*Verification.*) Attorney for plaintiff.[163]

§ 527. Notice, etc.

The original statute provided that the notice should be personally made on the parties interested, or published three consecutive weeks in some newspaper of circulation in the county in which the action was pending. The law now provides that service may be had as in civil actions — that is, service should be had by summons or by publication, and the rule applying to civil actions would generally apply.[164]

§ 528. **When Court may order conveyance. Deed.** "After causing to be secured to and for the benefit of the estate of the deceased its just part of the consideration of the contract, the court may authorize the executor, administrator, or other legal representative to complete it and to execute a deed for and on behalf of the heirs at law to the purchaser; which shall recite the order and be as binding on the heirs at law, and other persons interested, as if made by the deceased in his lifetime." [R. S. § 5801.][165]

[163] Ohio Probate Code.
The heirs at law, devisees or other legal representatives of deceased must be either party defendant or plaintiff, § 11922 G. C., § 523.

[164] See Kinkead's Pract. 109 *et seq.* See §§ 837 to 845, as to service, etc.

[165] § 11923 G. C.

§ 529. Hearing, etc.

After the time has expired which is necessary to bring the matter to an issue, the cause may be heard as any other cause is tried by the Court; and, in addition to ascertaining whether or not the contract was a valid one, and whether all persons have been legally served with summons, the Court must ascertain that the portion of the consideration of the contract remaining unpaid must be paid or secured. After finding of these facts, together with those of a formal nature, the Court may make the entry authorizing the sale.

§ 530. Entry.

(*Title.*)

This day this cause came on to be heard upon the petition of A. B., administrator (or executor) of C. D., for authority to complete a contract made by C. D. during his lifetime, to convey certain real estate; and the same was submitted to the Court, upon the petition and evidence. Whereupon Court finds, after due consideration, that all the parties in interest have been served with process as required by law, and that the allegations and statements contained in said petition are true. Wherefore it is ordered by the Court that said A. B., as administrator (or executor) of the estate of C. D., be, and is hereby authorized to complete said contract, and execute and deliver a proper deed of general warranty for and in behalf of the heirs at law of said C. D., deceased, to the purchaser E. F., for the real estate in the petition described.

§ 531. Form of deed.

Know all Men by these Presents:

That, whereas, on the.....day of....., 190..., A. B. was duly appointed and qualified as administrator (or executor) of the estate of C. D., deceased, late of said.....County, by the Probate Court of said county, and afterwards, to-wit: On the.....day of..... ....., A. B. filed his petition in the Court of..... County for an order of said Court, authorizing him to complete a contract made by the said C. D. to convey certain real estate hereinafter described.

And whereas afterwards, on the.....day of....., said petition came on to be heard, and the Court ordered that said A. B. complete said contract and make, execute and deliver to the said E. F. a warranty deed in fee simple, for said premises, upon payment of the purchase money remaining unpaid. Which order is in the words as follows, to-wit: (Here copy order in full, designating it by quotation marks.) All of which will more fully appear by the records of said Court, to which reference is hereby made.

Now, therefore, I, A. B., administrator (or executor) of the estate of C. D., deceased, aforesaid, by virtue of said proceedings and of the statute in such cases made and provided, and of the power vested in me and for and in the consideration of.....dollars, paid by said E. F., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to said E. F., his heirs and assigns, forever, all the right, title and interest that the said A. B. owned in the following real estate, situate in the county of....., State of Ohio, and in the township of....., bounded and described as follows:

To have and to hold said premises, with all the privileges and appurtenances thereto belonging to the said E. F., his heirs and assigns forever, as fully and completely that the said A. B., as such administrator, by virtue of said order of Court and of the statute made and provided for such cases, might or should sell and convey the same.

In witness whereof the said A. B., as such administrator, has hereunto set his hand, this.....day of....., A. D. 190....

Signed and acknowledged in the presence of

.....
.....
.....

.....
.....
.....

State of Ohio,.....County, ss.

Be it remembered, that on this.....day of..... 190..., before me, the subscriber, a.....in and for said county, personally came the above named A. B., as administrator of C. D., the grantor in the foregoing deed, and acknowledged the signing of the same to be his voluntary act and deed as such owner, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my official seal on the day of and year last aforesaid.

.....[166]

§ 532. Heirs of deceased purchaser, may enforce specific performance. "The heirs at law, or devisees, of a person who purchased an interest in land by written contract and died before conveyance thereof to him, may compel such conveyance as the deceased might have done." [R. S. § 5802.][167]

[166] § 11924 G. C.

[167] § 11924 G. C. See § 1591.

Where administrators make a beneficial arrangement to rescind an unexecuted contract of the intestate, chancery will not aid the heir to set it up. Howard vs. Babcock, 7 O. (2p.) 74.

CHAPTER XXX.

ACTION FOR INJURY BY WRONGFUL DEATH.

§ 533 Did not exist at common law, etc.
§ 534 Right of action for causing death.
§ 535 Right by statute of other state, territory or country, enforced.
§ 536 By whom and for whose benefit the action may be brought.
§ 537 Settlement, etc.
§ 538 Application.
§ 539 Entry allowing.
§ 540 Report of settlement.
§ 541 Apportionment.
§ 542 Entry of apportionment.

§ 533. Did not exist at common law, etc.

Actions for injuries resulting in death did not exist at common law.[1] Statutes giving such right have been passed by almost all of the States of our Union. In some States, action may be brought by the widow, husband, parent or other person entitled to proceeds, but in our State it must be brought by the administrator or executor.[1*]

As an action of this kind cannot be brought in the Probate Court, but must be brought in a Court of general jurisdiction, it will not be within the scope of this work to discuss the matter except so far as it comes within the practice of the Probate Court. The administrator bringing the suit must be regularly appointed, and he is accountable for the proper distribution of the proceeds. He is only a trustee for the beneficiaries and has no interest in the case for himself, or the estate he represents. The statute does not even say that he shall bring the action, but says that it shall be brought in his name for the exclusive benefit of the beneficiaries.[2]

For law and forms relating to the bringing of an action of this character, the reader is referred to Kinkead's Pleadings, 833, Whittaker's Code Forms, 491 and Bates, 1433-1449.[3]

[1] Woerner on Admin. 615, 626.

However, if the deceased had other relatives within the statute, the decision would have been otherwise. Garrard vs. Mahoning Val. Ry., 100 O. S. 212.

[1*] § 10772 G. C., § 536; Woerner on Admin. 627.

Where the widow, there being no children, dies during the pendency of the suit, the action abates, and should be dismissed. Doyle vs. Ry. Co., 81 O. S. 184; Davis vs. Justice, 31 O. S. 363.

A guardian can now make a settlement of a claim for wrongful death of his ward, § 10933 G. C., § 1367, § 1381.

[2] Wolf vs. Ry. Co., 55 O. S. 517.

While the proceeds of a judgment recovered in an action under this statute are directed to be distributed to the beneficiaries of the judgment in the proportion provided by

§ 534. Right of action for causing death. "When the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances which make it in law murder in the first or second degree, or manslaughter. When the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person.
* * *

"The same remedy shall apply to any such cause of action now existing and to any such action heretofore commenced or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall be construed to prevent the maintenance thereof." [R. S. § 6134; 103 v. 116.][4]

§ 535. Right by statute of other State, territory or country, enforced. "When death is caused by a wrongful act,

law in relation to the distribution of personal estates left by persons dying intestate, the money realized is not to be treated as part of the general estate of the intestate. The personal representative in whose name the action is brought is a trustee of the funds and must distribute the proceeds of the judgment to those to whom the general personal estate would descend according to the course of the statute of descents and distribution. Steel vs. Kurtz, 28 O. S. 191; Weidner vs. Rankin, 26 O. S. 524.

[3] It is not competent to prove that some of the next of kin for whose benefit the action is prosecuted, were guilty of contributory negligence. C. C. & C. Ry. vs. Crawford, 24 O. S. 632.

As to when declarations of deceased may be admitted. C. C. & C. Ry. vs. Mara, 26 O. S. 185. See annuity tables, etc.

[4] § 10770 G. C. See § 1557.

An action for damages for wrongful death of a person employed in a mine by negligent though not wilful acts on the part of his employer, such as would have entitled him to recover if living, may be maintained by his administrator. Rankine vs. Coal Co., 33 O. C. C. 349.

neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state. Every such action brought under this act shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory or foreign country." [R. S. § 6134; 103 v. 116.][5]

§ 536. Such actions shall benefit whom. "Such actions shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death was so caused.

In whose name action shall be brought and when commenced. "It must be brought in the name of the personal representative of the deceased person and the jury may give such damages as it may think proportioned to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought. Every such action must be commenced within two years after the death of such deceased person, except as provided in section 10773-1 of the General Code.

Representative may settle with defendant. "Such personal representative, if he was appointed in this state, with the consent of the court making such appointment, may, at any time,

[5] § 10770 G. C.

The action must be brought within two years, and if no administrator is appointed within that time the action is barred. The beneficiaries have the appointment or non-appointment within their control. Archdeacon vs. Gas Co., 15 Dec. 585; 16 Dec. 775; reversed, 76 O. S. 97.

Query: Suppose the beneficiaries are all minors, then what? 3 N. P. (N.S.) 606.

The general rule that the due qualification of an administrator relates back to the time of his appointment as regards acts done by him in the interim, which are for the benefit of the estate, applies. See 80 O. S. 27, for further matter affecting this case.

The mere fact that the beneficiary is a nonresident does not affect the right of the administrator to bring action. Railroad vs. Taylor, 73 O. S. 115.

The limitation providing that the action must be brought within two years is a part of the right of action itself and not part of the remedy and is not within the saving clause of § 11233 G. C. Collins vs. Ry., 22 Dec. 245.

before or after the commencement of the suit, settle with the defendant the amount to be paid.

Apportionment among beneficiaries. "The amount received by such personal representative, whether by settlement, or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment, in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying in this state." [R. S. § 6135; 103 v. 116.][6]

§ 537. Settlement, etc.

It will be observed from the preceding section, that the administrator must bring the action, and that he must bring it for the exclusive benefit of the wife, husband and children, etc., and, therefore, generally speaking, whatever he may recover, is not assets of the estate.[7]

But the administrator is liable for the misapplication of such funds to the person for whose benefit the suit was brought.[8]

It is further to be observed that the jury can not give damages to exceed $10,000. Some have thought, and the wording of the statute gives support to such idea, that the jury should apportion the damages among those entitled to the same. But the

[6] § 10772 G. C.

The action can not be maintained by any one but an administrator. Weidner vs. Rankin, 26 O. S. 522.

May include parent. Burnett vs. Coal Mine, 21 O. C. C. (N.S.) 492; 3 App. 469.

Does not include adopting parents, if they are neither heirs nor distributees. Boswell vs. L. S. Elec. R. R., 22 O. C. C. (N.S.) 251; 35 O. C. C. 522.

Held to mean adopting parents and adopted children. Ransom vs. N. Y. C. & St. L. R. R., 99 O. S. 223.

[7] Steel vs. Kurtz, 28 O. S. 191.

[8] Perry vs. Carmichael, 95 Ill. 519.

[9] Whittaker's Code Forms, 493; Wolf vs. Ry. Co., 55 O. S. 517.

At arriving at the total, the jury should consider the pecuniary injury to each separate beneficiary. B. & O. Ry. vs. Hottman, 1 C. C. (N.S.) 17; 15 Cir. D. 140; 25 O. C. C. 140; affirmed, 70 O. S. 475.

The Probate Court has plenary powers to determine all matters relating to distribution. Cin. Tract. Co. vs. Roam, 16 Dec. 101; 3 O. L. R. 36.

Where an action is commenced in time, the mere fact that by amendment of pleadings, etc., it is not tried until after, is no defense. Archdeacon vs. Gas Co., 3 N. P. (N.S.) 45; 15 Low. D. 585; 1 Hosea, 262; affirmed, 3 N. P. (N.S.) 606; 16 Low. D. 775; reversed, 76 O. S. 97.

better opinion seems to be that the verdict should be in gross.[9]

The action must also be brought within two years from the death of the party, and it further provides that if the appointment was made in this State, the court making the appointment may authorize a settlement of the claim, either before or after the suit. The object and purpose of having the court to authorize a settlement may be two-fold. First, it is to protect the representatives from what might be considered an injudicious settlement. The second, and the one which seems ought to be the most important, but I fear is least followed, is that the court should not permit a settlement to be made unless, under all the circumstances, it is one which will result to the best interest of those beneficially interested. I fear the practice is too common among Probate Judges to grant an application for settlement in a *pro forma* manner. Where the parties beneficially interested are all adults and able and competent to judge for themselves, the court would be justified in following their desire. But too often weak widows, minors, and persons in distress, may be influenced by powerful corporations to accept compromises which the court ought not to allow.[10]

Shortly after the issue of the first edition the author received a letter complaining that this might be construed as an unjust reflection upon corporations, etc. It was not particularly so intended, but sometimes it has been a race between the ambulance chaser and the corporation as to which could get the ear of the parties in interest, and make the best settlement possible for themselves. In justice to many corporations it is but proper to say they are always ready to make fair and just settlements. Yet if the rule is to hold, that the judge can not vacate an order

10 Where suit is brought, and settlement made without the consent of the attorney bringing the suit, where the R. R. is notified that the attorney has a lien on the amount recovered, suit might be maintained by the attorney against the administrator in her individual capacity, but not in her representative capacity, and the R. R. Hurd vs. P. Ry., 4 N. P. 404; 6 Dec. 545.

A settlement made by either an administrator or beneficiary will not be binding upon other beneficiaries, unless approved by the Probate Court. Where the deceased was thirty-three years old, in full vigor of manhood, and able to earn from $75 to $100 per month as a locomotive fireman, a verdict of $5,500 is not an excessive verdict. B. & O. R. R. vs. Hottman, 1 C. C. (N.S.) 17; 15 Cir. D. 140; 25 O. C. C. 140; affirmed, 70 O. S. 475.

after it is made, it will be seen how important it is that the judge fully investigates the matter before the order is approved.[10a]

[10a] *Example of damages allowed.* $9,000 is not excessive for a student of mining engineering, twenty-two years old, permanently injured in the spine, leg and ankle crushed, knee injured, nervous system shattered, and he will be prevented from following his chosen vocation (affirmed, no report, 84 O. S. 443, the errors alleged not being prejudicial). Lake Shore Elec. Ry. vs. Mills, 16 C. C. (N.S.) 62.

$3,500 is excessive where there is no proof of being permanently crippled in any manifest way or impairment of general health or incapacity to perform duties. Lake Shore Elec. Ry. vs. Gatens, 18 C. C. (N.S.) 173.

$7,000 is an excessive verdict for permanent injuries to a driver but which do not unfit him for his accustomed work, and it is doubtful whether defendant is liable at all. Greve vs. Cinti. Traction Co., 15 N. P. (N.S.) 289.

$10,000 for the loss of a leg of a fourteen-year-old boy is excessive and either a remittitur to $7,500 or a reversal must be accepted (below, 18 N. P. (N.S.) 409). Cinti. Trac. Co. vs. Wynne, 25 C. C. (N.S.) 49.

$500 for forcible ejection from a street car is excessive where there was no bodily injury or malice or ill-will or a studied evasion of franchise obligations. Northern Ohio Trac. & Lt. Co. vs. Peterson, 18 C. C. (N.S.) 242.

$1,800 (reduced from $2,500 by the trial court) is not excessive for the death of a child five years old. The jury not having found the mother, a beneficiary, negligent, and the father, the other beneficiary, having deserted the mother and child. Campbell vs. Tarr, 18 C. C. (N.S.) 323.

$1,400 is not excessive for an employe crippled for life with the certainty that he will always suffer pain and can not do any manual work without a steel brace on his leg. McWeeny vs. Standard Boiler & Plate Co., 11 O. L. R. 418.

$5,000 held not excessive where part of a girl's scalp was torn off by an unprotected shaft. Holland Gold Pen Co. vs. Juengling, 21 C. C. (N.S.) 593; 2 App. 20.

$8,500 to an employee, a trolley repairer, thirty-seven years old, in good health and receiving fair wages, who, by collision, was permanently disabled from doing manual labor, and both ankles were fractured and the bones grown together so that he can not walk without great pain, can not be held so excessive as to show passion or prejudice in the jury. Mansfield Ry., Lt. & Power Co. vs. Barr, 19 C. C. (N.S.) 466; 2 App. 367.

$5,400 for the death of a driver of a milk wagon thirty-eight years old, in perfect health and earning $20 a month and board, and leaving a wife and two small children, is not excessive. C., H. & D. Ry. vs. Buxton, 20 C. C. (N.S.) 22; 3 App. 298 (affirmed, no report, 91 O. S. 423).

$7,000 is not excessive for causing the death of a vigorous, industrious, temperate and thrifty man of twenty-six years, whose survivors were his parents and ten brothers and sisters, to whose support he contributed. Ohio Traction Co. vs. Flynn, 26 C. C. (N.S.) 250.

§ 538. Application.

The executor or administrator, having thoroughly investigated the matter and having arrived at a basis of settlement with the opposition, should then make his application, which may be in the following form:

(*Title.*)

Now comes A. B., administrator of C. D., and represents to the Court that he has made a claim for damages against (here mention the name of the person or corporation causing death), for causing the death of the said C. D. That the said (here mention party) proposes to settle said claim for the sum of.....dollars, and that suit has been brought thereon, in the Court of Common Pleas, of..... county. (Here, if no suit has been brought, so state.) And said defendant agrees, in addition to the above sum, to pay the costs of said action.

Said A. B. further says that he believes that it would be for the best interest of those beneficially interested to accept said proposition for settlement. Wherefore he asks authority of this Court to make such settlement.

.....

Sworn to and subscribed before me and in my presence this.....day of .....191....

§ 539. Entry allowing.

(*Title.*)

This day this cause came on to be heard, upon the application of A. B., administrator of C. D., for authority to settle a claim for damages against (here state name of party against). And it appearing to the Court that it would be to the best interest of the parties beneficially entitled to said claim, it is hereby ordered that the said A. B. be authorized to make said settlement, and the Court hereby consents to the same in full satisfaction of all claims and demands against the said party defendant, by reason of the death of the said decedent.[10b]

§ 540. Report of settlement.

The administrator, having made a settlement with the party, should file a report of his doings in the Court, which report may be as follows:

....

(*Title.*)

Now comes A. B., administrator of C. D., and respectfully represents to the Court, that in accordance with the former order of the Court, he has settled the claim against ....., and received therefor the sum of.....dollars.

He further represents to the Court that said C. D. died leaving E. F., a widow, and G. H., I. J., minor children, aged respectively.....and..... years. (Here set out the persons that are entitled to have the funds distributed to them.)

Wherefore he asks that the Court will confirm said settlement and make the apportionment of the funds received among the persons beneficially entitled thereto.

.....

Sworn to and subscribed before me and in my presence this .... day of .....191....

[10b] Where the application was made for authority to settle a claim and the same was granted, it is held the Probate Court has exhausted its power and can not in the future vacate such order. Bragg vs. Ohio Electric Co., 31 Dec. 125.

If there has been a suit in the Court of Common Pleas, and damages recovered, the sum ought to be reported to the Probate Court, and an apportionment asked, which might be in the following form:

(*Title.*)

Now comes A. B., administrator of the estate of C. D., and respectfully represents that he brought an action in the Court of Common Pleas of .....county, against....., to recover .....damages for the death of said C. D.; and that he has received in said action, by virtue of the judgment of said Court, the sum of.....dollars.

And further represents to the Court that (here state the names of the persons that are entitled to the funds, their relation to the deceased, and, if children, give their ages).

Wherefore he asks that said Court may apportion said funds among the said persons entitled thereto, as provided by law.

.....

Sworn to and subscribed before me and in my presence this.....day of .....190....

§ 541. Apportionment.

The section of the General Code provides[11] that unless the funds be apportioned among the beneficiaries themselves, the Court making the appointment shall apportion the same among such parties in such a manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying intestate. To comply with this law understand-

[11] The damages are to be distributed "by the Court making the appointment in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries, and the laws of descent and distribution of personal estate." It can easily be seen that a young child in a helpless condition would sustain a much greater pecuniary loss from the death of a parent than its brother or sister of mature years, and settled in an ample and comfortable condition in life; and the jury in making up its verdict should assess more damages as to such child than to its matured brother or sister. The Court also would regard it as fair and equitable to distribute to such child a sum proportioned to the loss by it sustained, having reference to its age and condition as compared with the age and condition of the other beneficiaries.

§§ 10772-3 G. C., §536.

Wolf vs. Ry. Co., 55 O. S. 537; Weichin vs. Rankin, 26 O. S. 522. The administrator must find out and is responsible for a distribution to the persons entitled. See § 330, Widow's allowance.

ingly may give the Court some difficulty, and it may depend upon the condition of the other estate left by the deceased how this should be apportioned. If the deceased left sufficient other personal property to set off to the widow her year's allowance, then, I think, it would be fair to distribute the money as the statute provides that personal property should be distributed. That is, the widow to receive one-half of the first $400 and one-third of the remainder; and the balance to be equally divided among the children. If, however, the deceased did not leave personal property or real estate sufficient to give the widow her year's allowance, it would be proper for the Court to first make such an allowance to the widow, and then to divide the remainder as previously stated. If the net amount received does not exceed that which would ordinarily be allowed to the widow as her year's allowance, the entire amount might very properly be apportioned to her. If the deceased left minor children and adult children, where there is no other property to be distributed, the Court might be justified in giving a very large portion, and in some instances all of the amount to the minors. At least such a sum might be given to them as would maintain them in the same condition as the adult children were maintained by the deceased parent until they became of age.

§ 542. Entry of apportionment.

(*Title.*)

This day this matter came on to be heard upon the report heretofore filed in this Court, showing amount received by said A. B., as administrator of C. D., on his claim against....., for the wrongful death of said C. D. Also upon the application of said administrator to apportion said fund among the beneficiaries entitled thereto.

Whereupon Court approves said report and the action of the administrator herein, and coming on to apportion said sum of..... dollars, among the beneficiaries, finds that it is fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal property left by persons dying intestate, that said amount should be apportioned as follows:

First, The costs and expenses should be taken therefrom, including the commission of the administrator, amounting to..... dollars.

Second, To the said widow the sum of....., and

Third, To.....(and here continue until distribution is fully made) and it is ordered that said administrator distribute said fund in accordance herewith.

The Probate Court has plenary power to determine all matters relating to distribution. The jury in the action is merely to determine the amount in the Court of Common Pleas. Cin. Tract. Co. vs. Roam, 3 O. L. R. 36; 16 Dec. 101.

CHAPTER XXXI.

NOTICE OF APPOINTMENT.

§ 543 Object and purpose of notice.
§ 544 When and how given.
§ 545 Notice.
§ 546 Affidavit as evidence of notice.
§ 547 Proof of publication.
§ 548 Cases where notice of appointment is not given within the proper time, or evidence not perpetuated.
§ 549 Form of petition, etc.
§ 550 Entry.
§ 551 Liability for omission to give notice.

§ 543. Object and purpose of notice of appointment.*

It is very often considered that the provisions of our statute requiring notice to be given is merely for the purpose of notifying creditors to present their claims. Some of the subsequent sections [1] give color to this idea from the fact that an administrator will not be protected in making payment either of claims against the estate or distribution unless notice be given; and that the right to present a claim against the estate would not be barred at any time, unless barred by the statute of limitations, unless the executor or administrator complies with the law in giving notice. No doubt it is the object and purpose of the statute, in requiring notice to be given, to notify the creditors; and that the administrator or executor may within a certain length of time thereafter, distribute the proceeds if their claims are not filed. But it seems to the author, that another wider, and more significant purpose, is, to confer or rather to complete the jurisdiction, the court holds over the administration of the estate. It is said and no doubt truthfully, that the proceedings in a Probate Court in the administration of an estate are pro-

[1] § 10741 G. C., § 667; § 10746 G. C., § 613.

* Cited, 79 O. S. 104; 82 O. S. 51. Formerly the notice was to be given by the administrator or executor, now it is given by the Probate Judge.

ceedings *in rem* and not *in personam*. But granting that the proceeding is *in rem*, still, there are certain things necessary to give the court full and complete jurisdiction; such jurisdiction, that thereafter it can make such orders as it deems just and proper in the administration of the estate, without giving special notice to anyone. Generally, when speaking about jurisdiction acquired in proceedings *in rem*, the fact that some kind of notice is given, is always included. Thus our Supreme Court in speaking of the distinction between action *in rem* and *in personam*, say: "A proceeding brought to determine the status of the thing itself, the particular thing, and which is confined to the subject-matter in specie, is *in rem*, the judgment being intended to determine the state or condition, and *ipso facto*, to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service and *making proclamation*, the court is authorized to decide upon it without other notice to persons, all the world being parties; while in the latter, in order to give the Court power to adjudge, there must be service upon those whose rights are sought to be affected." [2]

Woerner also says [3] "That only is a proceeding *in rem* in which the process is to be served on the thing itself, and the mere possession of the thing itself, by the service of the process and *making proclamation*, authorizes the Court to decide upon it without notice to any individual whatever. To constitute a probate proceeding a proceeding *in rem*, says Mr. Waples in his recent work on proceedings *in rem*, it 'must possess all the characteristics and embrace all the requisites of that form of action.'" [4]

It follows, that possession of the thing (custody of the *res*) is one of the essential conditions of jurisdiction over the thing.

[2] Cross vs. Armstrong, 44 O. S. 624.

[3] Woerner on Admin. 337.

[4] "There must be a *res*, custody of the *res*, right to proceed against it, a competent forum, allegations equivalent to an information, notice to all interested, a hearing, a finding of facts, an order, judgment or decree, a sale, and a confirmation or homologation, before the 'new title paramount' can be evolved from probate proceedings." Waples, Proc. *In rem*, § 563.

But the fact that the proceedings are *in rem* will not dispense with notice where the act done is one that, as reasonable construction of the statute, will require that notice be given. Thus the court cannot pass upon a claim for extra services of an administrator without notice.

Every other requisite may be conceded; and if executors and administrators be looked upon as officers of the court, so that possession by them may be considered possession by the court, the disposition of personal property by order or judgment of the Probate Court is clearly a proceeding *in rem.* The law vests title to all personal property of a decedent in his executor or administrator *and requires the latter to notify "all the world," by publication,* of his assumption of the office—a proceeding constituting the notice, monition, or proclamation required to obtain jurisdictoin *in rem.*[5]

If this view is the true object and purpose of the notice to be given by the administrator or executor, it will be seen that no estate can safely be administered without such notice being given. For no one interested in the estate would be bound by any action taken by the Probate Court, unless it would be in some instances in which his own conduct might estop him. It, therefore, becomes the first duty an executor or administrater ought to perform after he has received his letters.[6]

§ 544. **When and how given.** "Within one month after bond has been given by the executor, or administrator, for the discharge of his trust, the probate judge shall cause notice of the appointment to be published in some newspaper of general circulation in the county, in which the letters were issued, for three consecutive weeks." [R. S. § 6088; 102 v. 202.][7]

This notice is generally given when the application is filed. McMahon vs. Ambach, 79 O. S. 103.

See *In re* Ferguson, 6 N. P. (N.S.) 417-18; 81 O. S. 58; Low. D. 374; affirmed, no report.

[5] On the contrary, the legislature have a right to say that when the owner dies the court shall seize his property, and *by constructive notice compel all claimants to appear or be barred.* It is a case where it is proper for the court to seize the *rem*, and *by constructive notice*, make the whole world parties. Where all the world are in fact proper or necessary parties, the doctrine of due process of law does not prevent the legislature from adopting a more appropriate, adequate and complete remedy than that known to the common law. McNamara vs. Casserly, 61 Minn. 335-343.

[6] Experience has demonstrated that administrators and executors are somewhat careless in attending to this important duty. A practice has been adopted by some of the Probate Courts, and which acts very efficiently. Under that practice the court attends to this duty and charges it up with the costs of the case. This view now embodied in statute.

See § 668 Notice of demands.

[7] § 10712 G. C.

Where no bond is required the statute of limitations begins to run from the time notice of appointment is made. Grant vs. Baldwin, 89 O. S. 413.

If this notice is not given the limitations provided by § 10722 G. C., § 609, will not avail as a defense against an action brought more than six months after rejection of the claim. Croxton Mining Co. vs. Hubbard, 28 O. C. C. 249.

An administrator *de bonis non* must give notice of his appointment in the same manner as an original administrator or executor.[8]

§ 545. Notice.

The statute does not indicate what the notice should contain. So far as giving notice to creditors is concerned, it was held that the following was a sufficient notice:

All persons indebted to the estate of ....., late of .....township, ... county, deceased, are hereby notified to come forward and make payment immediately; and all persons having claims against said estate are notified to present them, properly authenticated, for settlement within six months from this date.[9]
(date)

.....

It has been held that notice of such appointment could not be legally advertised in a paper other than one printed in the English language.[10]

The following is a usual form:

LEGAL NOTICE.

..... has been duly appointed executor (or administrator) of the last will and testament of the estate of C. D., late of ...., deceased.[8*]

.....

It might be well in giving this notice to call creditors' attention particularly to the fact. Something of this nature might be added: "All persons indebted to the estate are requested to make immediate payment, and those having claims against the estate will present their claims, duly authenticated for settlement, within," etc.

§ 546. Affidavit as evidence of notice. "An affidavit of the publisher or agent of the newspaper making such publication made, filed and recorded, together with a copy of the notice, in the probate court, within six months after bond has been given, shall be admitted as evidence of the time, place and manner in which notice was given." [R. S. § 6089; 102 v 202.][11]

[8] § 10757 G. C., § 621.

[8*] Under present statute this should be signed by the probate judge.

[9] Gilbert vs. Little, 2 O. S. 156.

[10] Ringwald's Estate, 5 N. P. 496; 5 Dec. 452.

[11] § 10713 G. C.

The filing of the notice in the Probate Court is a mode of perpetuating the evidence that such notice was given, and for the convenience and protection of the administrator. The filing forms no part of the notice and is not for the benefit of creditors, the mere fact that the notice was not filed, if actually given, will not change a creditor's rights. Audrey vs. Shell, 77 O. S. 218.

§ 547. Proof of publication.

It is not only important to the administrator or executor that notice be given, but equally important that the evidence of such notice be perpetuated in the Probate Court; and it is for that purpose that the provisions of the above section was enacted into law. The affidavit may be in the following form:

State of Ohio,.....county, ss.
Personally appeared before me, a notary public in and for.....
.....county, ...for the publishers of (naming newspaper) who, being duly sworn says that the annexed advertisement was published in the....., a newspaper printed and of general circulation in said county for three consecutive weeks, commencing upon the.....day of.....190..., and that each insertion was upon.....day. (If the newspaper has also a daily edition, add.) Affiant further says that a daily and weekly edition of said newspaper is published, and that the circulation of the daily in this county exceeds that of the weekly, and that the cost of publication in the daily does not exceed that of the weekly.
Sworn to and subscribed before me this.....day of.....
A. D. 190....

.....
Notary Public in and for.....county, Ohio.

§ 548. Cases where notice of appointment is not given within the proper time or evidence not perpetuated. "If notice be not given of the appointment of an executor or of an original administrator or administrator *de bonis non*, within the one month prescribed for that purpose, or the evidence thereof be not perpetuated as hereinbefore provided, and cannot be made, on the petition of the executor or administrator the court may order such notice to be given at any time afterward, in which case such eighteen months and other periods of time, limited for the commencement of actions against executors and administrators, and for other purposes, and which begin to run from the date of the administration bond, shall begin to run respectively from the time such order of court is made, if notice be published in accordance therewith." [R. S. § 6126; vol. 102 v. 203.][12]

§ 549. Form of petition, etc.

It is the object and purpose of the above section that if for any cause an administrator or executor or other person required to give notice, fails to do so, or having given notice fails to file

[12] § 10760 G. C.

the proper evidence, showing that such notice was given, he may by permission of Court at any time when it is discovered that the statute has not been complied with, give proper notice. The petition may be in the following form:

(*Title.*)

A. B., administrator (or executor) of the estate of C. D., deceased, respectfully represents to the Court, that (here state for what reason proper was not given) he failed to give the notice of his appointment within the time limited by law for that purpose. Wherefore he asks that he may be authorized to give said notice and file the same and the affidavit to its publication in this Court as he could have done in the first instance.

.....

Sworn to and subscribed before me and in my presence this.....day of....., 190....

§ 550. Entry.

(*Title.*)

This day this matter came on to be heard, upon the application of A. B., for authority of this Court to give notice of his appointment as such administrator (or executor). And it appearing to the Court that the allegations of said petition are true, leave is hereby granted to said A. B. to give notice of his appointment as required by law.[13]

§ 551. Liability for omission to give notice. "No order of court, made by virtue of the next preceding section, shall exempt the executor or administrator, or their respective sureties, from liability for damages for which they would otherwise be liable, by reason of the omission to give notice within such three months." [R. S. § 6127.] [14]

It will be observed that under the provisions of sec. 10642 G. C. (§ 369) that the time limited for the commencement of actions, presentment of claims, etc., shall commence to run not from the date that the administrator has given his bond, but shall begin to run from the time that the order of the Court is made, and if in such instances the extension of time would work injuriously to the estate, the administrator would be responsible.

[13] Such an order would act retroactively, and validate all previous acts.

[14] § 10761 G. C.

CHAPTER XXXII.

PRESENTATION AND REJECTION OF CLAIMS.

§ 552 Object and purpose.
§ 553 What must be presented.
§ 554 What need not be presented.
§ 555 Sufficient presentation.
§ 556 When waived.
§ 557 Authentication of proof.
§ 557a Satisfactory voucher, etc.
§ 558 When not required.
§ 559 Allowance of a claim.
§ 560 Rejection of a claim.
§ 561 When claim shall be rejected at instance of heir or creditor.
§ 561a Action against administrator or executor.
§ 561b Notice.
§ 562 Comments.
§ 563 Requisition to reject a claim.
§ 564 Bond, etc.
§ 565 Entry ordering notice.
§ 566 Form of notice, etc.
§ 567 Action on real estate stayed.
§ 568 How action brought.

§ 552. Object and purpose.*

A person appointed administrator or executor of a deceased person's estate is not presumed to know of the existence of claims against the estate, or if he does know of their existence, he is not presumed to know their amount or their justness. For this reason the law requires that creditors shall present their claims to the administrator or executor for allowance; but before the executor or administrator can insist on the creditor's complying with this provision, he must first have complied with the law himself in having given the notice required in the previous chapter. The claims should be presented so that the administrator or executor can examine their validity, and if he finds them just, to save the expense, costs, and trouble of litigation. The law expects the creditor to be diligent about this matter, and while the statute nowhere expressly commands him to present his claim, yet it places him in danger of losing the same if he does not present it. If he fails to present it for six months after the executor or administrator has given notice of his appointment, the administrator or executor may proceed to pay the debts due from the estate, and in eighteen months he may distribute to the heirs, and he would not be liable to any creditor who has failed to present his claim, although the remaining estate should not be sufficient to pay such neglectful creditor.[1]

* Cited Bray vs. Darby, 82 O. S. 51.
See Harris vs. O'Connell, decided November 21, 1911. 85 O. S., as to eighteen months limitation.
See § 608, note.

[1] § 10741 G. C., § 667.

Where the claim of the creditor is due, he must present it within eighteen months from the date of the administration bond where the administrator or executor has given notice of his appointment.[2] Whether or not in such a case, if a creditor fail to present his claim, he might proceed against the heirs, is undecided, but if a good excuse could be shown, his claim could be enforced in equity against heirs receiving assets from the estate.[2a] If his claim was not presented within six months and assets of the estate had been distributed, in payment of debts, etc., he would be limited in any action he might bring against the administrator on his claim, to the amount of the assets remaining in the administrator's or executor's hands unadministered at the commencement of the action and he might be deprived of his costs.[3]

The creditor is absolutely barred of his right of action against the estate when he presents his claim and the same is disputed or rejected and he neglects to bring a suit on such a claim within six months from the time of its rejection or dispute.[4]

While the creditor should be diligent in presenting his claim the executor or administrator should likewise be diligent in either allowing or rejecting the claim. By neglect, the creditor may lose a part or the entirety of his claim. By inaction the administrator or executor will prolong the administration of the estate, and may in that manner not only injure the rights of the claimant, but also those beneficially interested in the estate. In this chapter and the subsequent three chapters these rights and liabilities will be considered, in some

[2] § 10746 G. C., § 613; § 10760 G. C., § 548.

A creditor may lose his claim by laches, which is defined to be such neglect or omission to assert a right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the adverse party, and operates as a bar in equity. Kemper . B. & L. Assn., 5 N. P. (N.S.) 403; 30 O. C. C. 70; 18 Dec. 484.

See § 584, where it is said equity will aid a creditor.

Cited Harris vs. O'Connell, 85 O. S. 145. See State vs. Schott, 22 Dec. 320, where it was held that failure to present to the administrator of a deceased county treasurer and deceased bondsmen within eighteen months of the qualification of the administrator, claims for interest illegally paid such treasurer on public deposit, does not bar a recovery on his bond. The author is inclined to doubt this in lieu of the language in Harris vs. O'Connell, 85 O. S. 145.

If notice of the appointment of the administrator is not given, the statute of limitations does not apply. Croxton Mining Co. vs. Hubbard, 28 O. C. C. 249.

[2a] § 10741 G. C., § 667.

[3] § 10737 G. C.

If an administrator has notice of a claim, and exhaust the funds in paying other claims, he will be liable. *In re* Wakefield, Goebel, 5.

[4] §§ 10722-3 G. C.

[5] The statute of limitations against a claim for funeral expenses does not begin to run until an administrator is appointed. *In re* Geo. H. Miller Estate, 12 Dec. 562.

See § 608, note.

See § 444, Statute of limitations; § 607, Limitation of actions; § 610,

instances the discussion of the various sections, perhaps, entrenching on each other.[5]

§ 553. What must be presented.

As a general rule it may be said that any claim of whatever character may be presented provided it existed against the deceased in his life time, and provided further that it is one which survives him.[6] The claim for services rendered after the decedent's death, is against the executor personally and not against the estate.[7]

Our statute, however, makes funeral expenses, etc., debts of the estate, and it would seem that all claims, for which the executor is not personally responsible, must be presented, etc., as required by statute.[8]

Claims which the executor or administrator is competent to adjust and settle are not confined to claims arising on contract, nor to those cognizable in the Common Law Courts. The object is to allow a presentation of all claims against the estate whether of a legal or equitable nature.[9] Contingent liabilities for which the estate is not primarily liable, upon which its liability has not been fixed, may be properly presented.[10]

A claim for a deficiency on a mortgage, foreclosure or claim, for which the decedent would have been liable if living, should be provided for by the executor or administrator, and hence ought to be presented. All claims to recover damages or negligence of an inn-keeper, mail-carrier, surgeon, attorney, etc., are in reality founded upon a contract, express or implied, and should be presented. This question will be further considered in the next section, by considering what kind of claims need not be presented.

§ 554. What need not be presented.

As the law does not require the doing of an idle thing it may be said as a general rule, that no claim is required to be

Suit on rejected claims; § 976, Insolvent estate; § 999, Presentation of claims; § 1628, Presentation in assignments.

6 Redf. Sur. Prac. 521.

7 Clark vs. Todd, 16 N. Y. Supp. 491; Woerner Admin. §§ 759-760.

8 See §1630. See McClellan vs. Filson, 44 O. S. 184. *In re* Geo. H. Miller Estate, 12 Dec. 562.

9 Hoyt vs. Bonnett, 50 N. Y. 538.

10 Cornes vs. Wilkin, 79 N. Y. 129. See § 569.

Where a claim is once presented and allowed, no suit thereon is necessary. Eicher vs. Darby, 17 Dec. 780; 5 O. L. R. 102; affirmed 11 C. C. (N.S.) 95.

Where once allowed and afterwards disallowed, the time limit for bringing action dates from the last disallowance. See Speidel vs. Phillips, 78 O. S. 196. This case distinguished Harris vs. O'Connell, 85 O. S. —; Bray vs. Darby, 82 O. S. 47; Stewart vs. McLaughlin, 47 O. S. 555.

However the suit must be brought within the limited period for bringing actions. Harris vs. O'Connell, 85 O. S. 145.

Where a person is found guilty of

presented, unless it is such a claim that the administrator or executor can legally refuse to pay. If the character of a claim is such that no action of the administrator or executor can defeat the validity of the claim, then it would be useless to present it, so far as affecting the legality of the claim itself is concerned. But if the claimant neglect to present his claim and the administrator or executor in ignorance distribute all of the assets of the estate, at the time provided by law, unquestionably the claimant would lose his demand. Thus a claim against a deceased stockholder of an insolvent corporation on his statutory liability, need not be first exhibited to his personal representative for allowance or rejection, before suit is brought.[11]

Where a judgment is a subsisting lien on the lands of the debtor at the time of his death, it is not necessary to present such a claim for allowance to the personal representative.[12] Neither is it necessary to present a claim in proceedings to revive an action.[13] A claim for taxes need not be presented as it is the duty of the representative to pay the taxes and debts chargeable, with the action of the officials in reference thereto.[14]

Where a claim against an estate has been duly presented and allowed by one administrator, no further allowance is required by a succeeding administrator.[15] The claim of a legacy need not be presented.[16] Nor is a claim of an annuity under a will one that must be presented.[17] Whether a contingent claim on a replevin bond need be presented or not was questioned in Daykin vs. Emery,[18] and the court rather placed it in the same category with a stockholder's liability of the decedent. A claim by a personal representative of a deceased executor for debts paid by such executor in administering the estate of

a crime and sentenced to pay a fine and dies before the fine is paid, the same is not a debt or demand that can be collected from decedent's estate, Hagan, J., in Clark common Pleas. However in the same case it was held that the costs of such action, was a debt for which the estate was liable.

Affirmed by court of Appeals.

[11] Hull vs. Standard Coal & Iron Co., 7 N. P. 157; 7 Dec. 527; Wanz vs. Park Hotel, 1 C. C. Rep. 105; 1 C. D. 63.

[12] Ambrose vs. Byrne, 61 O. S. 146; William vs. Bradley, 5 C. C. 114; 3 C. P. 61; 7 C. C. 227; *In re* Wakefield, Goebel, 5.

[13] Musser vs. Chase, 29 O. S. 577.

[14] Gager vs. Prout, 48 O. S. 89.

[15] Thomas vs. Chamberlain, 39 O. S. 112.

[16] Webster vs. Bible Society, 50 O. S. 12.

[17] Hunt vs. Hayes, 19 C. C. 151; 10 C. D. 388.

[18] 10 C. C. 653; 5 C. D. 121.

When a claim is in suit and revived in the name of the administrator no presentation is necessary. Glass vs. Buzzard, 33 O. C. C. 145, 14 O. C. C. (N.S.) 427; affirmed 85 O. S. 461.

If a guardian has rendered services to an imbecile ward, allowance for services is first to be determined by the Probate Court settling the account, in case of the decease of the ward, and it need not be presented to his administrator to secure its allowance.

Seasongood vs. Ingram, 86 O. S. 76; 89 O. S. 460.

his testator is not a claim against the deceased,[19] but if it is sought to make the estate liable it must be presented.

If the executor is residuary legatee and gives bond under the provisions of secs. 10608-9, G. C. (§ 57), a presentation of a claim against the estate is not necessary before suing on the bond.[20] Setting aside a will on contest five years after its probate, and thus annuling the letters to the executor is no excuse for not presenting a claim while he was acting, and an administrator being appointed, to whom plaintiff presented his claim for the first time, such claim is barred.[21]

§ 555. Sufficient presentation.

"A literal compliance with the terms of the statute," says a distinguished author,[22] "is the only course to secure absolute safety to the creditor, and to relieve the administrator from the perplexing doubt, and even personal hazard, which may arise if the sufficiency of the exhibition is not clearly apparent. For, however liberally disposed he may be to waive technical defenses and to deal with creditors on the basis of substantial justice, he stands as the representative of all creditors as well as of heirs, legatees, and distributees, whose technical rights he is not at liberty to disregard. It is by no means easy to determine how far literal compliance can be insisted on, to what extent the administrator may waive it, and from what circumstances a waiver may be presumed. The utmost strictness is essential where the time of the exhibition of the creditor's claim affects its priority over others. It is obvious that the administrator can exercise no discretion in such case, and that the sufficiency of the exhibition can be tested by the statute alone, because whatever indulgence is extended to a creditor who has not strictly complied with the statutory requirements in insolvent estates must result to the injury of others, who have conformed to the law."

[19] Stewart vs. O'Donnel, 2 Dem. 17. See § 645.

[20] Stevens vs. Hartley, 13 O. S. 525. However, it would seem that he should make a demand on the legatee, before he is allowed to maintain his action.

[21] Delaplane vs. Smith, 38 O. S. 413. See § 1630. This is on the ground that no administrator is liable for any action after eighteen months from the time he has given bond.

[22] Woerner on Admin. 804.

It is not necessary to formally present the claim, if the holder of the claim notifies the administrator that he has the claim, and is informed by the administrator that he need not be in a hurry. If within a reasonable time thereafter the administrator informs the claimant that the claim is rejected, unequivocally, a suit must be brought within six months or the claim will be

The presentation of a claim may be considered in a two-fold view. First, as to what would be sufficient to place a liability on the executor, if he does not consider it in his payments of the debts of the estate. And second, as to the responsibility thrown on the creditor to bring suit on his claim within the required time. As to the first of these I apprehend that an executor or administrator might be under some danger in making a distribution, if he has such knowledge of the existence of a claim, although it was not formally presented, that his payment of the debts of the deceased without considering it would be a fraud upon the holder.[23] Where the executor or administrator knows of the existence of a claim that ought to be presented, the better practice would be to indicate to the holder of the claim that he ought to present it. However, in the absence of fraud, it is the duty of the owner to present the claim without special notification from the executor or administrator.[24]

As to what will be a sufficient presentation of a claim to authorize or require a creditor to sue thereon within six months is a somewhat different matter and will be again referred to, sec. 607 *et seq.* Before suit can be brought upon a claim it must be formally presented, unless the executor or administrator by his acts shows that a presentation is not necessary.

barred. An attorney may reject a claim for his client. Miller vs. Ewing, 68 O. S. 176.

[23] Bank vs. Carpenter, 7 O. pt. 1, 21-70.

[24] "Therefore a creditor should not rely upon the fact or supposed fact that the executor or administrator has knowledge of the existence of his claim. Such knowledge on the part of the executor or administrator of the existence of a claim against the estate does not avoid the necessity of its due presentation." See Matter of Morton, 7 Misc. 343, citing Livingston vs. Gardner, 4 Redf. 516, and note.

An administrator who has conformed to the requirements of the statute and has published the prescribed notice, has a right to assume that all persons having claims against the decedent which they intend to enforce have presented the same and demanded payment thereof; and if he thereafter distribute the assets to those entitled to them, or distribute them in a manner to which they give approval and consent, he will not be held accountable for such distributed estate to a creditor who neither presented his claim nor took any legal proceedings to collect it while the funds were in the administrator's hands. See O'Conner vs. Gifford, 117 N. Y. 275, 283; Erwin vs. Loper, 43 N. Y. 521; Field vs. Field, 77 N. Y. 294; Jessup's Sur. Prac. 913.

See note, §§ 552, 668, 557.

In re Wakefield's Est., Goebel 5.

Generally it may be said that a claim need not to be presented in any particular form provided it be sufficiently definite to notify the administrator of its character, and amount, and enable him to make provision for its payment.[25]

The notice must be actual and unmistakable and the claim should be described with such accuracy as to distinguish it from all similar claims. Our statute contemplates that the claim be made in writing and if it is in the form of an account, it should set forth each item distinctly. The creditor having a claim against the estate should be careful in presenting it in the proper time and ascertaining the disposition that the executor or administrator intends to make of it. If not presented within eighteen months from date of giving bond by the executor or administrator, no action could be maintained thereon.[26]

§ 556. When waived.

While the statute throws around the presentation of a claim, proper formalities, yet they are not such but what may under certain conditions be waived. Thus where an administrator has not seen and examined a claim against the estate he represents, and is subsequently requested to allow it, which he refuses to do, such claim being present in the pocket of its owner, and the administrator so told, a formal presentation of the claim is not necessary, but may be presumed to be waived,[27] and the claim considered as presented and rejected.

[25] Henderson vs. Ilsley, 49 Am. Dec. 41; S. C. 11 S. & M. (Miss.) 9.

[26] § 10746 G. C., § 613.

See § 668, Notice of demands.

[27] It is shown in the bill of exceptions that the administrator had seen and examined the account in March, 1858. The evidence tended to show that in September following the plaintiff asked the administrator to allow the account, which was refused; that the account was not in fact presented, though the plaintiff had it in his pocket, and told the administrator he had it with him. If such were the facts, of what importance could it be, that the account should be taken from the pocket and formally presented? The object of the law in requiring the presentation of claims against an estate to the administrator, is to apprise him of their existence, amount and character. Such knowledge of this claim the administrator had already acquired in March; and

Where the same person is administrator of the creditor estate as well as of the debtor estate, no formal presentation or allowance of the claim need be made.[28] However, if the executor is appointed without giving bond, the claim must be presented within the time limited by law from the date of his giving notice of his appointment.[29] And where a claim against an estate is of such a character that it could be presented to the administrator for allowance before suit can be brought thereon, where the executor enters appearance in the suit so brought and proceeds to trial without objection, this amounts to a waiver, and such waiver cannot be taken back by the administrator when the case comes on for trial.[30] Where a claim is once allowed and the estate is afterwards declared insolvent, it need not be again presented unless a commissioner of insolvency be appointed.[31] In all actions brought against an administrator or executor, it must be proven that such a claim was presented and rejected.[32] A presentation to one of several executors or administrators is sufficient.[33]

§ 557. Authentication of proof. "When a claim is presented against the estate of a deceased person, the executor or administrator may require satisfactory vouchers in support of it and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no set-offs against it to his knowledge. Such oath may be taken before any officer authorized to administer oaths. The expense of it shall be allowed by the executor or administrator, if the claim itself is allowed." [R. S. § 6092.][34]

assuming that the other facts were proved which the evidence tended to prove, we think that a refusal to allow the account under such circumstances, would be a waiver of its formal presentation, and that the jury would be warranted in so finding. . Cheesman vs. Kyle, 15 O. S. 15.

[28] Thomas vs. Chamberlain, 39 O. S. 112.

[29] Delaplane vs. Smith, 38 O. S. 413.

[30] Daykin vs. Emery, 10 C. C. 652; 5 C. D. 121.

[31] Haley vs. Krug, 1 C. C. 44; 1 C. D. 27.

[32] Yager vs. Griess, 1 C. C. 531; 1 C. D. 296.

[33] Woerner on Admin. 806.

Where a petition against an administrator does not show that the claim was presented and disallowed and the administrator goes to trial and makes no objection, it is too late after several trials and costs have been incurred, to raise the question. Devereaux vs. Hutchinson, 16 O. C. C. (N.S.) 447; affirmed, 78 O. S. 415, no op.

If a creditor neglects to present his claim and takes security to insure its payment he will be held to have waived his claim. Shell vs. Bernhardt, 24 Dec. 182. So also if he conceals his claim and if as heir he participates in a partition proceedings.

[34] § 10717 G. C.

§ 557a. Satisfactory voucher, etc.

While the claimant may not be required to place all his evidence before the executor or administrator which he may have to support his claim, yet the statute would deem to indicate that more than the affidavit may be required.

"The executor or administrator may require satisfactory vouchers in support of the claim and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no set-offs against same," etc.,

is the language of the statute.

It will be observed that the matter of "satisfactory vouchers in support of the claim" is in addition to the requirement of the affidavit. So far as the author knows this has received no judicial construction in Ohio, and not very much elsewhere. The statute of New York is very much similar to our own, but not much light is thrown on the matter by text writers from that state.

"The statute plainly intends" says one, "that the claim shall be presented or exhibited in some writing, stating its nature and the amount, the name of the creditor and a demand for its payment. The personal representative of the estate is put by such paper in possession of information which enables him to act intelligently either in admitting the claim or taking such steps as are necessary to protect the estate against it." [34a]

Another says:

"The verification of a claim gives it the character of an undisputed debt; the claimant is not required to furnish other evidence unless required to do so by the representative. He may be required to furnish a bill of particulars or make his claim more definite and certain." [34b]

The claim as presented

"shall give to the personal representative such information concerning the nature and amount of the demand as to enable him to act intelligently in providing for its payment, or in rejecting it." [34c]

The general rule of law is that if suit be brought on a demand that has not been rejected, that the party is non-suited.[34d] Before the claim can be rejected it must be presented as the statute requires. It follows therefore that a claim might be

[34a] Jessupp, Surrogate Prac., p. 913 (N. Y.).

[34b] Redfield, Law and Practice, Surrogate courts, 5th ed. 525 (N. Y.).

[34c] 18 Cyc. 480.

rejected for either of one of two reasons. First, that it was not presented, when so required, with satisfactory vouchers, or proper affidavit, or, Second, because of the denial of the justice of the demand.

It is the object and purpose of the law that estates be settled as economically and speedily as possible. All demands against the estate are to be settled without litigation when the same can be done without detriment to the interests of the estate.

But claims will arise concerning the merits of which the executor or administrator has little or no knowledge. This knowledge may be peculiarly within the possession of the claimant. Without such knowledge, the administrator or executor is unable to determine whether the claim is just or not. "Voucher" it is said

"is a word that has several meanings; but in its ordinary signification it means a document which serves to vouch the truth of accounts, or to confirm or establish facts of any kind." [34e]

And "satisfactory" is defined as

"giving or producing satisfaction; yielding content; especially relieving the mind from doubt or uncertainty and enabling it to rest with confidence." [34f]

It would therefore seem to follow that under this statute the executor or administrator has a right to demand when a claim is presented, not only an affidavit embodying the facts required by the statute, but such additional matters as will enable him to satisfactorily determine whether the interests of the estate require the acceptance or rejection of the claim.

If the claimant can, and will not give this required evidence, and the claim is rejected for that reason, we believe this becomes jurisdictional, and no right of action would lie to enforce collection of the same by suit.

When therefore a claim is presented about which the administrator or executor is ignorant he should inform claimant of the facts which he desires to know, and which he deems necessary for him to know to enable him to intelligently and properly determine whether the claim should be allowed or rejected, and if claimant captiously or negligently refuses to give the same, then reject the claim for that reason and that there may be no question as to the reason for his conduct, indorse on the claim the reasons for his action.

[34d] Rice Probate Law 352.
[34e] 40 Cyc. 228.
[34f] 35 Cyc. 794.

§ 558. When not required.

Whether an administrator or executor will allow a claim against the estate without compliance with the above section rests in his discretion.[35] He may pay any debt which he knows the estate is owing, indeed it is his duty to do so without requiring the above formalities. But if, however, he has not sufficient knowledge to lead him to a conviction that the debt exists, he should require a verification. Of course in no instance should an executor or administrator pay a claim without taking a receipt. Neither will an administrator or executor be justified in accepting a claim which he knows or has reason to believe is not just, even though it be sworn to. If a claim be presented to an administrator which is not sworn to, and the administrator rejects the claim, unless he rejects it for that reason, it will be presumed that he rejects the claim for the reason that it is not a valid debt, and not because it is not verified.[36]

Form of affidavit may be as follows:

State of Ohio, ...County, ss.

A. B., being duly sworn, says he is the owner of the annexed claim against the estate of C. D., deceased, that the same is justly due; that no payments have been made thereon (except such as appear thereon credited), and that there are no set-offs against the same to the knowledge and belief of affiant.

A. B.....

Sworn to and subscribed by A. B. before me this.....day of..... A. D. 188...

Indorsement on claim.— Allowed as a valid claim against the estate of C. D., deceased. E. F., Administrator.[37]

[35] Morgan vs. Bartlette, 3 C. C. 431; 2 C. D. 244.

[36] Kyle vs. Kyle, 15 O. S. 15; Harter vs. Taggart, 14 O. S. 126.

The New York statute is very much similar to our own. Under that statute it was held: "The statute authorizing an administrator or executor to exact proof of a specified character is not compulsory upon the personal representative, but is a privilege accorded to him which he may take advantage of or not. There is nothing in the statute which necessarily requires that the evidences of the debt should be laid before the executor or administrator, or that claimant should make oath of the justice of the claim, unless required to do so by the executor or administrator."

Ransom, S., in Matter of Sears, N. Y., Law, J., June 6, 1890.

[37] See § 1615.

§ 559. Allowance of a claim.

The allowance or rejection of a claim when presented to the executor or administrator will depend upon the circumstances surrounding each individual case. The difficulty in determining whether or not a claim has been allowed or rejected, oftener depends upon the actions of a claimant and an administrator or executor, than upon the law applicable. If the actions of both the administrator or executor and the creditor have been positive, no difficulty will be experienced, but as it often happens in such cases, one or the other, or both have not been positive and exact in their dealings with each other, and many perplexing questions arise. If a claim be presented to an administrator and the administrator takes no action upon it, and the creditor makes no more inquiries about it, what are the rights and liabilities of the respective parties? It was at first held by the New York Courts,[38] that if the executor or administrator failed to notify the creditor that the claim was rejected, that it was allowed and in such cases became a liquidated demand against the estate and could not thereafter be disputed. This matter was reviewed and the doctrine substantially renunciated, in a later case, in which it was held that the failure to act, upon the part of the executor or administrator would not bind the estate, and that any time thereafter such a claim could be disputed and rejected.[39]

[38] Lambert vs. Craft, 98 N. Y. 342. See § 669.

[39] Schutz vs. Morette, 146 N. Y. 137.

"In view of the power and duty of an executor or administrator, the inference from his silence, merely, of an agreement on his part to pay a debt so situated, would be unreasonable. The statutory system for the presentation and adjustment of claims against the estate of a decedent furnishes a summary and inexpensive method by which claims can be adjusted without action, or by reference. The executor or administrator may, on being satisfied of the justice of a claim presented, admit it, or if he doubts its justness, may reject it and leave the creditor to his remedy by action, if a reference is not agreed upon. But the presentation of a claim, followed by inaction, the executor or administrator neither rejecting nor admitting it, does not, we think, bind the estate as upon an account stated. It may be justly claimed that the executor or administrator ought, in the fair discharge of his duty both

This no doubt is the doctrine of our State, for in Thomas vs. Chamberlain,[40] it was said "the allowance of a claim when exhibited or presented to the administrator for allowance is not conclusive against the estate, as to its validity. It may afterwards be disputed and contested by the administrator. The administrator or executor may at any time thereafter dispute the bill even where it is allowed. May he, where there is no expressed allowance of the claim, proceed without notifying the creditor to pay out the funds of the estate? While the mere holding of a claim will not make it incontestible, yet it is such notice to the executor or administrator of the claim, that it would be a fraud on his part to pay out the funds of the estate without notifying the creditor of its rejection, if the administrator or executor intended to reject it. However, if a claim were presented to an administrator and no further action was taken by either party and the statute of limitation would bar the claim before the administrator or executor was required

to the creditor and to the estate, to examine the claim within a reasonable time and make known his position in respect to it. But it would be hazardous, in view of the ignorance or inexperience of the persons called upon to act as executor or administrator to construe mere silence on his part as an admission that the claim was a valid one. The creditor must see to it that the claim is admitted and allowed by the executor or administrator and an implied admission from silence is not sufficient. Id.

In Reynolds, Admr., vs. Collins, 3 Hill 36, it was held that the presentation of a claim under the statute does not bar the Statute of Limitation, and if the executor neither allows nor rejects it, the creditor must take care to have the matter adjusted or commence his action within the period of the statute or he will be too late."

And in a still later case, Matter of Callahan, 152 N. Y. 320, 352, the same judge, referring to the case of Schutz vs. Morette, remarked, "we are of the opinion that mere silence on the part of an executor or administrator after the presentation of a claim under the statute, accompanied by lapse of time, will not in any case preclude the representative from thereafter contesting its validity."

See Matter of Pierson, 19 App. Div. 478. If the claim is not rejected, and on an accounting no objection is taken to its allowance, then the Surrogate will be authorized to treat it as an admitted claim and direct its payment. But the claim does not become established from mere silence of the executor or administrator. See also Matter of Doran, 38 N. Y. Supp. 544.

[40] 39 O. S. 121.

The payment of interest on a promissory note will be considered as the allowance of the note as a claim against the estate. Kemper vs. Building & L. Assn., 5 N. P. (N.S.) 403; 18 Dec. 484.

Part payment is an allowance. *In re* Patterson, 58 Bull. 305.

to reject it, the creditor would then be in very great danger of losing his claim.[41] The mere inaction of the administrator or executor not being sufficient to make a claim incontestible, neither will it be sufficient to cause a rejection. The creditor presenting a claim in such a case would not be barred of his right to sue as provided under the provisions of sec. 10722-3, G. C., until the period of six months had elapsed from the time that he had information that the claim was disputed or rejected, provided he brings his action within eighteen months from the date of the administrator's bond.[41*] Part payment of a claim without disputing the balance has been held a sufficient allowance of the whole.[42]

Likewise a promise to pay a foreclosure decree by the executors out of the proceeds of sale, is an allowance of a claim.[43] But merely receiving a claim, examining it and comparing it with the decedent's books is neither an allowance nor rejection.[44] Likewise acknowledging notice of the existence of "notes" is not allowing or rejecting them.[45] Where an administrator filed a petition to sell real estate of the deceased in which he set up a certain claim as one of the debts of the decedent, it was held that this was an allowance of the claim.[46]

§ 560. Rejection of a claim.

An idea prevails to a certain extent that the claim can only be rejected as provided in sec. 10722-3, G. C. (§ 609), and that unless an administrator or executor has written on a claim, the word *rejected,* or something to that effect, that the claim is not rejected until that is done. The Supreme Court has on several occasions controverted this idea, although in one instance they used words which indicated that a demand must be made for such an endorsement.[47] In giving construction to this last

41 See previous note.

41* § 10746 G. C., § 613; See Mattoon vs. Clapp, 8 O. 248. The text is supported by the recent case of Harris vs. O'Connell, 85 O. S. 145, where it is held that if the claim is rejected suit must be brought not more than six months from the time of its rejection and within eighteen months from the date of the administration bond. Formal indorsement is not necessary. Smosk vs. Bouse, 12 C. C. 46; 5 C. D. 293.

42 Thomas vs. Chamberlain, 39 O. S. 112.

43 Bank vs. McIntire, 40 O. S. 528.

44 Keenan vs. Saxton, 13 O. 41.

45 Fisher vs. Mossman, 11 O. S. 42.

46 Smosk vs. Bouse, 12 C. C. 46; 5 C. P. 293.
See § 1634, Assignments.

47 Keenan vs. Saxton, 13 O. 42.

clause of sec. 10722-3, G. C., the Court in Harter vs. Taggart,[48] says: "The phraseology of the last clause, when contrasted with the other sections, seems to indicate that its principal object is to *compel* a doubting or distrustful executor or administrator to allow the claim or to submit to an action for its enforcement. The provision is a beneficial one, and should be fairly construed. Its object is attained when the creditor is advised by the executor that his claim is rejected, and the policy of the statute then requires him to institute proceedings without delay. If such rejection is *distinctly declared,* and the creditor told *so to regard it,* no beneficial purpose can be attained by requiring a written indorsement of an allowance which he is already advised the executor will not make. The proof of rejection must, necessarily, still rest in parol, unless the executor should perform an act which the statute nowhere enjoins, by indorsing his rejection upon the claim."

Again the Court says,[49] "We do not conceive that by the statute or under the authority of the case referred to, the right to sue depends upon an indorsement on the claim of its disallowance, or upon the fact that the creditor has made a specific demand that the allowance of the claim be indorsed thereon. That an unequivocal rejection of the claim should be obtained before suit is brought is undoubtedly true; but the only purpose of the last clause in the section of the statute referred to, is to make a refusal on the part of the executor or administrator to indorse his allowance, when demand is made for that purpose, conclusive proof of its rejection."

These decisions of our Supreme Court, establish the rule to be that there is no formal way required to constitute a rejection of a claim, and places the power within the hands of the creditor by asking or demanding a written indorsement to compel the executor to either reject or accept the claim; and if the executor or administrator refuses to act in such manner that it shall be held to be a rejection. If the administrator or executor in any manner inform the creditor that the claim will

[48] 14 O. S. 122-126.

[49] Stambaugh vs. Smith, 23 O. S. 584.

Part payment may constitute an acceptance. Kemper vs. Loan Co., 5 N. P. (N.S.) 403; 1 Dec. 489; 11 C. C. (N.S.) 372; 30 C. C. 700.

not be paid, it is a rejection and the creditor thereafter must act or suffer the consequences. The statute is somewhat peculiar when it says that if the claim be *disputed* or *rejected*, the creditor must bring his action or be barred. These words *disputed* or *rejected* are not synonymous. And as every word in the statute should be given a meaning where the same can consistently be done, each one of these words is entitled to some consideration. To reject is to refuse to receive. To dispute is to controvert, to deny, to contend in argument, to reason or argue in oppposition, to debate, etc. Giving to this word dispute, its proper and ordinary meaning, a creditor might be compelled to bring his action before a claim was actually rejected within the ordinary meaning of the word "rejected." It seems, therefore, that about the only consistent construction that can be arrived at, is, that if a creditor presents a claim and the executor or administrator questions its justness, or in any way disputes about its validity, or the estate's liability, and does not ask for time to investigate the merits of the claim, that within the meaning of the statute the claim must be considered rejected from that time. In the case of Keenan vs. Saxton,[50] in which the Court held there was neither an acceptance nor rejection of a claim, the executor upon its presentation did not deny the validity of the claim, but merely claimed the right of paying it in wheat.[51]

[50] 13 O. 41.

[51] The case of Treasurer vs. Walker, 22 Bull. 106, although the decision of an inferior Court, presents the question very well. In this the evidence showed that, "On the 11th day of April last the plaintiff handed to Perry G. Walker, Esq., one of the defendants, a written statement of the taxes standing charged upon the tax duplicate of this county against the estate of Mary Barney, deceased. About ten days or two weeks thereafter plaintiff spoke to Mr. Prout, Walker's co-executor, about the payment of the taxes. Prout then requested him to defer payment for a short time for the purpose of determining whether an adjustment of the matter might not be reached. A short time after the above conversation he again met Mr. Prout, when he (Prout) said, 'all I can say in reference to the tax matter is, No!'" After considering the decisions of the Supreme Court, the Judge concludes: "The object of the statute referred to is to give the executor or administrator time and opportunity to investigate, and inquire into the merits of the claim and prevent needless and vexatious

In a case reported in one of the New York reports, when the claim was presented, it was not admitted. In a few days afterwards the administratrix declared to the creditor "that they did not consider it a legal claim, and had no right to pay it." This was held to be a disputed claim.[52]

In another case where the executor claimed that he told the creditor when the bill was presented that the estate was not liable, and this was denied; about twenty months afterwards, however, the executor gave the claimant a written notice that the claim was rejected. It was held that the rejection only occurred when the written notice was received.[53] Again where the executor claimed that he had mailed a notice to the claimant informing him of the rejection of the claim and the creditor denied having received such notice, it was held that the claim was not rejected.[54] It has been held that the Probate Court has no jurisdiction to instruct the administrator whether he should allow or reject the claim.[55]

I might in conclusion say, that unless an executor or administrator requests delay for the purpose of making investigation as to the merits of a claim, or so acts as to mislead a person of ordinary care and prudence that such was his intention, the creditor is in very great danger of losing his claim, unless he sue on it within six months from the date of presentation. The policy of our administration laws, is to have a speedy settlement of the estate, and the statute expressly gives the power to the creditor to enforce an acceptance or rejection of his claim in a manner about which there can be no dispute. If the administrator neither allow nor reject the claim exhibited to him, says Woerner, it is deemed rejected, and the creditor may bring his action.[56]

litigation and wasting the estate in useless costs and expenses. It is the opinion of the court that the evidence shows that the executors had ample time and opportunity to inquire into the merits of the claim, and that upon mature deliberation they decided to reject it. And we are also of the opinion, as a conclusion of law, that a right of action on said claim accrued to plaintiff from the time such decision was reached by the executor, whether he was cognizant of such decision or not."

[52] Tucker vs. Tucker, 4 Keys 136; 4 Abb. Ct. 428.

[53] *In re* Miller, 9 N. Y. Supp. 60.

[54] Edmonds vs. Edmonds, 62 N. Y. Supp. 653.

[55] Jackson vs. Jackson, 5 Bull. 647.

§ 561. When claim shall be rejected at instance of heir or creditor. "If an heir or creditor of a deceased person, or a person who has purchased, or claims to hold by purchase or otherwise from such heir, any lands or other property inherited by such heir from the decedent, files in the probate court of the county in which administration is taken out on an estate, a written requisition on the administrator or executor, to disallow and reject a claim presented for allowance, whether the claim has been allowed or not, but which has not been paid in full, and enters into a bond, with sufficient surety, to be approved by the probate judge, conditioned to pay all costs and expenses of contesting such claim, in case it finally is allowed, the claim shall be rejected by such administrator or executor." [R. S. § 6098.][57]

§ 561a. Action against administrator or executor. "The holder of such claim, within six months after its rejection, is required to bring his action against such administrator or executor, to enforce it, and if he recovers the judgment shall be against the administrator or executor. In such action, such heir, creditor, or other person claiming to hold such property, shall be made a party defendant with the administrator or executor, and have the right to plead and make any defense to it which he could make." [R. S. § 6098.][57*]

§ 561b. Notice. "When such written requisition and bond are filed in the probate court, the probate judge at once shall notify such administrator or executor thereof, who thereupon must notify the holder of such claim that it is rejected. If proceedings to sell lands of the decedent to pay such claim, have been begun, they shall be stayed, and no further order or decree taken therein, until the validity of the claim is determined. If the plaintiff recovers, the judgment must be against the administrator or executor, but the costs shall be awarded against the

[56] Upon this subject Woerner says (Woerner on Admin. 812): "In rejecting the claim, he should indorse the reason of his rejection upon it, and notify the claimant in person, and in terms so unequivocal that the creditor may know with certainty when his claim, if not sued on, would be barred. A secret rejection and refusal to inform claimant, may operate as a fraud, and is invalid as a rejection. He will not be heard to object for the first time when sued upon the claim, that it was not properly authenticated, or in proper form. The rejection by one of several administrators is sufficient to authorize a suit upon the claim." See § 1634.

[57] § 10724 G. C. See § 1636.

The word heir includes devisees and legatees. Todd vs. Todd, 6 C. C. (N.S.) 105; 27 C. C. 224.

[57*] § 10725 G. C.

If the purchaser under a land contract presents a claim against the estate of a vendor for damages for breach thereof he can not maintain an action to compel performance of such contract. Mignery vs. Olmstead, 91 O. S. 416.

party filing the requisition to disallow the claim." [R. S. § 6098.][57†]

§ 562. Comments.

In a great many States the Probate Court passes upon claims before they are paid, and in that manner heirs and others interested, have a right to be heard and question the payment of a claim. In our State, however, an administrator or executor may pay a claim where he is satisfied it is honest and just, without any notification to those beneficially interested in the estate. If he paid a claim which was manifestly unjust, and under such conditions that would indicate the want of ordinary care, exceptions might be filed to his account and his authority in that manner questioned. The object of the above section may be said to be two-fold. In the first place if the administrator or executor has doubt about the justness of a claim, but does not wish to act thereon, on his own responsibility, he may notify the heirs that unless they object as provided by law, he will pay the claim; and if they do not wish it paid they must assume the task of resisting such payment; and in the second place it gives to the heir or creditor power to compel an administrator or executor to reject a claim. If an executor or administrator notifies the heirs and creditors that he intends to pay a claim, and they take no action, and there exists reasonable grounds for the payment of the claim, the administrator or executor should proceed to make payment. It might, however, be said to be a good rule where the claim is questioned by any of the heirs, for the executor or administrator to notify them before he makes payment, and give them an opportunity to assume the costs and expenses of resisting such claim if they so desire.[58]

[57†] § 10726 G. C.

The word heir, includes a devisee or legatee, and they may file such request. Todd vs. Todd, 6 C. C. (N.S.) 105; 27 C. C. 224 (1905).

If an administrator pays a claim from his own funds he is subrogated to the rights of a creditor. Eicher vs. Darby, 17 Dec. 781.

The heir has no right to prosecute error from the administrator's allowance of a claim, unless he makes the requisition not to so allow the claim as provided by statute. Kemper vs. Bldg. & Loan Assn., 5 N. P. (N.S.) 403; 18 Dec. 484.

When a claim has been once allowed and afterward rejected, the action is in time if brought within six months from such rejection, although more than six months has expired since the claim became due. Speidel vs. Phillips, 78 O. S. 197. See Harris vs. O'Connell, 85 O. S. —.

[58] Verbal notice to the administrator of an estate, by the widow of the deceased, not to allow a specified claim against the estate, is not sufficient proof of fraud on the part of the administrator for afterward making such allowance. Thomas vs. Chamberlain, 39 O. S. 112.

See § 1636.

See § 610.

§ 563. Requisition to reject a claim.

An heir or creditor, or any one who has purchased lands from an heir, may file the requisition. It must be in writing and it must be filed in the Probate Court which granted the letters of administration. It does not make any difference whether the claim has been presented or allowed or not, but it will not be effective if the claim has been paid. Neither would it be effective unless an undertaking was filed and approved by the Probate Judge. The form of requisition may be as follows:

To G. H., executor of the last will and testament (or administrator of the estate) of I. J., deceased.

You will take notice that the undersigned, a creditor of the estate of I. J., deceased, does hereby require you to reject and disallow the claim of X. Y. against said estate for the sum of.....dollars (describe claim). Said claim having been, as I am informed, presented to you for allowance. A. B.[59]

§ 564. Bond, etc.

The statute seems to contemplate that at the same time that the heir or other person entitled thereto files the requisition, that there should be filed in the Court a bond or undertaking with sufficient surety, conditioned to pay all costs and expenses of contesting such claim in case it shall be finally allowed. The statute does not indicate to whom the bond should be payable and perhaps this would not be a material matter, but as a general rule it is made payable to the executor or administrator and may be in the following form:

Know all Men by these Presents:

That we, A. B., C. D. and E. F., are held and firmly bound unto G. H., executor of the last will and testament (or administrator of the estate) of I. J., deceased, in the sum of.....dollars to be paid to the said G. H., as aforesaid and his successors, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators severally and firmly by these presents. The condition of the above obligation is such that whereas A. B. has this day filed in the Probate Court of .....county, Ohio, his written requisition on the said G. H., executor of the last will and testament (or administrator of the estate) of I. J., deceased, as aforesaid, to disallow and reject the claim of X. Y. against the estate of said I. J., amounting to the sum of.....

[59] See § 1636.

.....dollars. Now therefore, if the said A. B. shall well and truly pay all costs and expenses of contesting said claim, in case it shall be finally allowed as (decided by a court of competent jurisdiction to be) a valid and proper claim against said estate, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed at.....by us this.....day of.....
.....190....

Executed in presence of, etc.[60]

§ 565. Entry ordering notice.

The bond and the requisition having been filed in the Probate Court, the following entry should be made thereon:

(*Title.*)

This day came A. B., a creditor of the estate of C. D., deceased, and filed in this Court a written requisition on G. H., executor (or administrator) of the estate of C. D., to disallow the claim of X. Y. against said estate as described in said requisition, also having executed a bond to said G. H. as required by law in such cases. Which bond has been filed in this Court. Wherefore it is ordered that said bond be approved, and that the said executor is ordered and directed to disallow said claim. And it is further ordered notice be given to said executor that he is required to reject said claim, and that notice also be given to said X. Y. that by order of Court such executor has been directed to reject his said claim.[61]

§ 566. Form of notice, etc.

Whenever a requisition and undertaking shall be filed in the Probate Court, the Probate Court shall at once notify such administrator or executor thereof; and thereupon the administrator (or executor) shall at once notify the holder of such claim that his claim is rejected and disallowed. The form of notice to an executor may be as follows:

To G. H., executor (or administrator of the estate of I. J., deceased:

You are hereby notified that A. B. on the.....day of.....,
filed in this Court a written requisition on you as such executor, to disallow and reject a certain claim, it being represented in said request that said claim is.....dollars, for (here state what said claim is supposed to be for) that said claim has been or will be presented to you for allowance against the estate of said I. J. That the said A. B. also on the same day filed in this Court a bond conditioned to pay all costs and expenses of contesting said claim, as required by law, and that on the same day, an order was made in this Court, that you disallow said claim, that notice thereof be given to you and to the holder of such claim. You will, therefore, proceed to at once notify X. Y. that his claim has been rejected.

.....
Probate Judge.

[60] Whit. Probate Code. [61] See § 1636.

Form of notice to the holder of the claim may be as follows:

To N. Y.
You are hereby notified that your claim of.....dollars, for.....which has been presented to me (or which I understand will be presented to me) as executor (or administrator) of the estate of I. J., deceased, for allowance, in accordance with an order made by the Probate Court of.....county, is disallowed and rejected by me, and that you are required to sue on said claim within six months from this date, or be forever barred.

.....
Administrator.

§ 567. Action on real estate stayed.

If at the time a requisition has been filed in the Probate Court, proceedings to sell lands of decedent to pay such claim have been commenced, they shall be stopped and no further proceedings shall be had, until such claim shall have been determined. The matter may be determined either by a suit at law, or compromise, or if the creditor fails to sue on the claim within six months from the time of notice of its rejection has been served on him. Thereafter proceedings shall be taken up, if the claim has been found to be a valid one, and proceed as if no such requisition had been filed.

§ 568. How action brought.

The action shall be brought against the administrator or executor and the judgment shall be against the administrator or executor; and the heir or person making the requisition shall be made a party defendant and shall have a right to plead and make any defense which the administrator or executor could make. If the plaintiff shall recover judgment, it shall be against the executor or administrator, but the costs shall be against the party filing the requisition. In a suit by an administrator to recover upon a bond given in the pursuance of the provisions of sec. 10724 (§ 561), it is necessary to enable him to recover, for him to show that the requirements of said section have been strictly complied with.[62]

[62] Fullerton vs. Davis, 1 C. C. 572; 1 C. D. 320.

If the heir or other party filing the requisition so desires, he may prosecute error.[63]

We therefore hold that if the administrator desires to recover these costs, it is his duty to see to it that the costs are awarded against the party giving the bond. There having been no "costs awarded against" the plaintiff in error in the original suit, he would not be liable therefore upon his bond, and for reasons above stated he would not be liable for the attorney's fees or other expenses.

[63] Spaulding vs. Allen, 19 C. C. 608; 10 C. D. 259.

We hold that the provisions of the statute which authorize the heir in such action "to make any defense to such action which such administrator or executor should make" necessarily carries with it the right to test the regularity of the proceedings in the trial Court, in the same manner as the administrator or executor could do, and this includes the right to institute and carry on proceedings in error. Suppose the Court had overruled a demurrer filed by these heirs to the petition, and had been clearly wrong; or had sustained a demurrer to their answer and had been clearly wrong; to hold that the heirs might not proceed in error to have such wrong righted, would cut them off from what the statute clearly gives them, viz.: "To make any"—every—"defense to such action which such administrator or executor could make."

For recovery on bond. See Fullerton vs. Davis, 1 C. C. 572; 1 C. D. 320.

CHAPTER XXXIII.

PRESENTATION OF CLAIMS NOT DUE.

§ 569 Contingent claims.
§ 570 Debts not due paid by administrator, etc.
§ 571 When claim allowed by Court.
§ 572 What claims included.
§ 573 Presentation of claim, etc.
§ 574 Notice, etc.
§ 575 Order of the Court.
§ 576 Ordering claim paid.
§ 577 Ordering assets to be retained.
§ 578 Ordering the giving of bond.
§ 579 Form of bond.
§ 580 Allowance of Court not conclusive.
§ 581 Action to be brought against executor or administrator; against heir if he has given bond.
§ 582 Pleading when action brought on bond.
§ 583 Appeal and error.

§ 569. Contingent claims.

The administration laws of our State contain no provision especially applicable to contingent claims, where the estate is solvent. If the estate is insolvent, it makes provision for their payment or presentation.[1] The reason for this may be, that by the provision of other sections [2] the distributees and legatees are liable for any claim that may become due after the settlement of the estate. If the estate be insolvent, of course there are no funds to be distributed to heirs, and therefore unless the creditor could present a contingent claim, he would be absolutely without remedy. There may be instances which under our present law an owner of a contingent claim may be left without a remedy. For instance suppose that a contingent claim does not become a fixed one, for several years after the estate has been distributed, in which time the distributees have squandered the estate, in such cases the owner of a contingent claim, it seems, would be without a remedy. It would be advisable, however, for the owner of a contingent claim to present the same, either to the Court or to the legal representative.

[1] § 10888 G. C., § 983.

[2] §§ 10876, 10877-8 G. C., §§ 585, 587.

The distribution of an estate will not be delayed by a contingent claim. See § 775.

Of course the administrator or executor would not be liable to make a payment thereon until the contingent claim had become a fixed one and he was notified of that fact. An administrator might pay debts within six months after his appointment, but he could not safely make a distribution with notice of a contingent claim, unless more than eighteen months had elapsed from the date of his giving bond, if he has given his notice of appointment as provided by law.

"Claims not absolute or certain," says Woerner,[3] "but depending upon some event after the debtor's death, which may or may not happen, are not enforceable against executors or administrators after they have fully administered, without notice that such claim has become absolute."[4]

§570. Debts not due paid by administrator, etc.

There are two sections, to-wit, secs. 10735, 10748, G. C. (§571), which seem to be applicable to debts of a fixed character that do not mature within the eighteen months limit of administration. The provisions of sec. 10735 give ample power to an administrator or executor for paying a debt that is not yet due, where he is satisfied that the debt is an honest one and allows it. Section 10748, G. C., seems to make provision for the allowance of a claim which by reason of its not being due cannot be presented as a legal claim to the administrator. Section 10735 is as follows:

"Debts not due may be paid by an executor or administrator, according to the class to which they belong, after discounting the legal interest upon the sum paid for the time unexpired, if the claim does not bear interest before maturity." [R. S. § 6104.][5]

§ 571. **When claim allowed by Court.** "A creditor whose right of action does not accrue within eighteen months after the

[3] Woerner on Admin. 818.

[4] "A contingent claim is where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability. Poland, C. J,, in Sargent vs. Kimball, 37 Vt. 320. Cassaday, J., in Austin vs. Saveland, 77 Wis. 108. Starr, C. J., in Hantzch vs. Massolt, 61 Minn. 361. See § 607, Limitation of action; § 982, Order of distribution.

[5] § 10735 G. C.

And the court may order him to make such payment, or receive a debt not yet due. Denmead vs. Sharp, 14 Dec. 301. It is probably a discretionary power in the Probate Court.

date of the administration bond may present his claim to the court from which the letters issued, at any time before the estate is fully administered. If, on examination thereof, it appears to the court that the claim is justly due from the estate, by consent of the creditor and executor or administrator, it may order the claim to be discharged, as if due after discounting interest, or that the executor or administrator retain in his hands sufficient to satisfy it. If an heir of the deceased, or devisee, or others interested in the estate, offers to give bond to the alleged creditor, with sufficient surety or sureties for the payment of the demand, in case it be proved to be due from the estate, the court may order such bond to be taken, instead of ordering the claim to be discharged, or requiring the executor or administrator to retain assets as aforesaid." [R. S. § 6115; 102 v. 204.][6]

§ 572. What claims included.

The above section is the only provision of our laws that permit a claim to be presented to the Probate Court for its allowance. The holder of the claim may present it, even if the same be not due, to the administrator, and if the administrator allows the claim as provided in sec. 10735, G. C., the same need not be presented to the Probate Court. But if it is such a claim that the executor or administrator does not wish to allow, and the creditor wishes to hold the assets in the hands of the administrator or executor to apply on his claim, then he must make application as provided in the above section. If the creditor so chooses, he need not present his claim, and when it is due, he can sue on the same and recover from the distributees of the estate. Even if the claim be presented to the Probate Court and for some reason be not allowed, the creditor has a right to sue the distributees.[7]

Whether or not a contingent claim could be presented under the above section is certainly questionable. If it were highly probable that the contingency upon which the claim depends would arise at an early date, the Court might make an order protecting its payment for a short time. But it seems from the

[6] § 10748 G. C.

[7] §§ 10877-8 G. C., § 587. Judgment on lands is entitled to be paid, although no execution has been issued within five years. Ambrose vs. Byrne, 61 O. S 146.

words of the statute that it is only when the claim is justly due that the Court may make the order. The Massachusetts statute is very much similar to our own. There it was held that the proceedings apply to any claim arising out of the contract of the deceased, the right of action on which does not accrue within two years.[8]

The statute does not compel the administrator to sell real estate to meet the liability when it shall accrue.[9]

A creditor of an estate upon which ancillary administration has been taken out here is entitled to have assets retained to satisfy his claim when it shall accrue.[10]

A claim of a balance due a ward from a guardian of a deceased intestate, upon an account filed by him in his lifetime, which was not allowed by the Probate Court until more than six year after the taking out of administration on his estate, is within the statute.[11]

Pleading the lien by the judgment creditor, in an action brought by the personal representative to sell the land for the payment of debts, is not the commencement of an action within the purview of the statute limiting the time within which action may be commenced against executors and administrators.[12]

§ 573. Presentation of claim, etc.

A creditor holding such a claim should present a full statement of it in writing to the Probate Court with a petition for an order requiring the executor or administrator to retain in his hands assets sufficient to satisfy it when it becomes due and payable. The claim may be presented at any time before the estate is fully administered. The following may be used as a form for the petition:

[8] Hammond vs. Granger, 128 Mass. 272.

[9] Clark vs. Holbrook, 146 Mass. 366.

[10] Newell vs. Peaslee, 151 Mass. 601.

[11] Cobb vs. Kempton, 154 Mass. 266.

[12] Ambrose vs. Byrne, 61 O. S. 146.

(Title.)

Now comes E. F. and represents that he holds a note (or other claim) against the estate of A. B., deceased, of which C. D. is administrator, etc. dated.....day of....., for..... dollars, which said note will not become due until (here state date). (If the claim is of any other nature or character other than that of a promissory note, so state, giving a full and complete description of the claim.)

Wherefore he asks that said administrator (or executor) may be ordered to retain in his hands a sufficient amount of the assets of said estate to pay said note when the same becomes due. Or said administrator (or executor) may be directed, if he agrees thereto, to pay said note out of the funds of the estate now in his hands.

.....

Sworn to and subscribed before me and in my presence this.....day of....., 190....

§ 574. Notice, etc.

There seems to be no provision in the statute requiring a notice to the executor or administrator, or to any one beneficially interested. Possibly from the subsequent provisions of the General Code[13] it is not intended that any such notice should be given. The one[14] provides that the decision of the Court shall not be conclusive against any person interested to oppose the allowance, and the other provides that if it is not allowed, suit may be brought against the distributees. If it is sought, however, to have the claim discounted and paid by the administrator, he should in some manner be brought into Court. Perhaps the best way would be, if the administrator or executor is willing, for him to file an answer, which might be in the following form:

(Title.)

Now comes C. D., administrator (or executor) of the deceased A. B., and represents to the Court that he has examined the application of E. F. for the Court to make an order allowing his claim which is not yet due; and the said administrator (or executor) consents to the prayer of said application and joins therein asking the Court to make an order that the same be discharged in like manner as if due, after discounting the interest.

.....

§ 575. Order of the Court.

The statute seems to contemplate that the Court may make either one of three orders. First, it may order the claim to be paid by the executor after discounting the interest, or second, it may order the executor or administrator to retain in his hands

[13] §§ 10749, 10877-8 G. C., §§ 580, 587.

[14] § 10749 G. C.

sufficient assets to satisfy the same, or third, if any of the heirs or devisees or others interested in the estate shall offer to give a bond to the alleged creditor, the same may be taken instead of ordering either the claim paid or the retaining of assets. Neither one of these orders can be made by the Court, unless it shall appear to the Court that the claim is *justly due* from the estate. These are the words that seem to make it very doubtful whether the Court could make an order on a contingent claim, for no claim can be said to be *justly due* which may never become due at all. Several entries providing for the various orders which the Court may give will be given in the following sections.

The application to the Court does not involve an inquiry into the amount of assets in the executor's hands, but is limited to the question whether the claim is, or may become, justly due from the estate.[15]

§ 576. Ordering claim paid.

If, upon hearing, which should be one that fully satisfies the Court that the claim is justly due, and it further appear that both the creditor and the executor are willing to have the claim allowed and paid out of the assets, and the heirs do not offer to give bond, the following may be a proper entry:

(*Title.*)

This day came E. F. and presented to the Court his claim in the sum of.....dollars, against the above estate. Which claim is not due until after the.....day of....., which is more than two years from the date of the bond of the said administrator (or executor) of said estate. And the said C. D., administrator (or executor), having filed his answer in this Court consenting that said claim may be ordered paid, and on examination it appearing to the Court that said claim is justly due from the said estate, it is now ordered that said administrator (or executor) of said estate pay the present value of said claim, to-wit: The sum of.....dollars, to the said E. F. in full satisfaction and discharge of his claim.

§ 577. Ordering assets to be retained.

If it appear to the Court, on examination of the claim, that the estate is justly indebted thereon, that neither or either of the

[15] Hammond vs. Granger, 131 Mass. 351.

The words "justly due" on draft mean, not that the claim is then due and payable, but that it constitutes a just debt of the estate and should in equity be payable out of the funds of the estate.

creditor or administrator or executor desires or consents to the present payment of said claim, and the heirs do not offer to give bond, the following may be used as proper entry:

(Title.)

This day this matter came on to be heard, upon the application of E. F., for an order of this Court on his claim, amounting to..... dollars, which is not yet due. And it appearing to the Court that there is justly due on said claim, from the estate of A. B., the sum of..... .....dollars. Neither the said E. F. nor the said C. D., administrator (or executor) of the estate of A. B. consenting to the payment of said claim, and none of the heirs or others interested in said estate offering to give bond, as provided by law, it is ordered that said C. D., as administrator (or executor) of the estate of A. B., retain in his hands sufficient money to satisfy the said claim when it shall become due and payable.

§ 578. Ordering the giving of bond.

If any of the heirs of the deceased or devisee, or others interested in the estate, shall offer to give bond to the alleged creditor with sufficient surety or sureties for the payment of the demand, the Court may, if it thinks fit, order such bond to be taken, instead of ordering either the claim to be paid or assets to be retained. In such cases the entry may be in the following form:

(Title.)

This day this matter came on to be heard upon the application of E. F., for an order of this Court on his claim, amounting to..... dollars, which is not yet due. And it appearing to the Court that there is justly due on said claim, from the estate of A. B., the sum of..... .....dollars. And I. J., one of the heirs of the deceased, having offered to give bond with sufficient surety to the said E. F. for the payment of said claim when it shall become due and payable, in case it shall prove to be valid. It is now ordered that if the said bond, with M. N. and O. P. as sureties, be executed and given to said E. F., that the said administrator (or executor) be released from the payment of said claim, and that the said E. F. shall thereafter proceed to collect his claim from the said I. J., as provided by law.

§ 579. Form of bond.

The bond shall be given to the alleged creditor with sufficient surety or sureties for the payment of the demands in case the same shall be proved to be due from the estate. It seems that the creditor having applied to the Court, is bound to accept the bond ordered by the Court. The bond may be in the following form:

Know all Men by these Presents:

That we, I. J., M. N. and O. P., are held and firmly bound unto E. F. in the sum of.....dollars, to the payment of which we

jointly and severally bind ourselves, our heirs, executors and administrator, if default be made in the condition following.

Whereas, E. F. has filed his petition in the Probate Court within and for the county of....., and State of Ohio, alleging that he holds a claim against the estate of A. B., deceased, consisting of a note, dated....., 190..., and calling for..... .....dollars in.....years from date (or otherwise briefly describe the claim, according to the facts); and praying that inasmuch as said note will not become due until after the expiration of two years from the date of the bond of C. D., the administrator of the estate (or executor of the last will and testament) of said A. B., deceased, said C. D. may be ordered to pay said claim forthwith, upon rebate of interest, or that he may be ordered to retain in his hands sufficient assets of said estate to pay said claim when the same becomes due; and, whereas, the said I. J., one of the heirs-at-law of said A. B., deceased, has offered to said Probate Court to give bond for the payment of said claim, in case the prayer of said E. F. should not be granted, which offer has been accepted by the Court. Now, therefore, if the said I. J. shall pay the claim of said E. F. when the same becomes due, in case it shall be proved to be a valid debt of said estate, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

Signed by us, this.....day of....., A. D. 190....

(Signatures.)

§ 580. Allowance of Court not conclusive, and executor or administrator not compelled to pay if disputed, unless, etc. "The decision of the court thereon shall not be conclusive against the executor or administrator, or other person interested to oppose the allowance of the claim. They shall not be compelled to pay it if disputed by them, unless it be proved to be due, in an action to be commenced by the claimant, within six months after it becomes payable." [R. S. § 6116.][16]

It will be observed from the provisions of the above section that the orders made under sec. 10748, G. C., do not prevent the executor or administrator, or any other person, from opposing the allowance of the claim, any time thereafter when it shall be presented as a claim against the estate. It would therefore seem that any action that might be taken under sec. 10748, G. C., would have no other bearing on the claim when it became due except to retain assets to meet the same, or to have a sufficient bond to provide for its payment. It is no adjudication of the claim in any respect whatever.

§ 581. Action to be brought against executor or administrator; against heir if he has given bond. "The action for this purpose must be brought against the executor or administrator,

[16] § 10749 G. C.

in case he has been required to retain assets therefor, or ordered to pay it. But if the heirs or others interested in the estate gave bond, as before provided, the action shall be brought on the bond." [R. S. § 6117.][17]

§ 582. Pleading when action brought on bond. "If action be so brought, the plaintiff must set out his demand as in an action against the executor or administrator, alleging the liability of the defendants by reason of the bond. The defendants may plead any defense that would be available to the executor or administrator." [R. S. § 6118.][18]

§ 583. Appeal and error.

There seems to be no statute making provision for an appeal from the decision of the Probate Court made upon any question presented under the provisions of sec. 10748, G. C. (§ 571), and it is therefore thought there is no right of appeal. It is likewise very questionable whether error could be prosecuted on any order that the Court might make, for sec. 10877, G. C. (§ 587) contemplates that a claim presented may not be allowed by the Court. If it is not allowed by virtue of that section, the right of the creditor to prosecute his claim against the distributees is fully protected. Likewise in sec. 10877, G. C. (§ 587) it is provided that the decision of the Court shall not be conclusive against the executor or administrator, or other person interested, to oppose the allowance thereof. So it may be very much doubted whether the action of the Court on a claim presented under sec. 10748, G. C. (§ 571) would be such a final order as would give ground to prosecute a suit in error.

[17] § 10750 G. C.

[18] § 10751 G. C. Action under these sections will not prevent action against heirs, etc., as elsewhere provided. § 10752 G. C., § 585.

CHAPTER XXXIV.

CLAIMS UNPAID AT SETTLEMENT.

§ 584 Claim due must be presented, etc.
§ 585 Estate of deceased in the hands of the heir, etc.; liable for certain debts.
§ 586 Jurisdiction, etc.
§ 587 Heirs, etc., to contribute to pay claims after settlement of estate, and how.
§ 587a Limitation, etc.
§ 588 Comments.
§ 589 Estate of any heir, etc., liable after his death.
§ 590 Where two or more liable, creditor may proceed against all in one action.
§ 591 Insolvency, etc., of heir or devisee not to affect liability of others.
§ 592 Amendments allowed to bring in other parties.
§ 593 Heirs, etc., liable to contribution. How recoverable.

§ 584. Claim due must be presented, etc.

In the previous chapter we have treated of the manner in which claims that are not due before settlement, or eighteen months from the time the administrator or executor gives bond, may be presented and the creditor's rights protected. It was there said that it was not mandatory on the creditor to present his claim if it was not due before final settlement was made. It will be the purpose of this chapter to give the provisions of the General Code giving to creditors a right to proceed against heirs and legatees. As the Probate Court has no jurisdiction over the settlement of estates after a final settlement is made, it might not properly come within the province of this work to treat of actions brought after a final settlement, but as it is very closely allied to a proper settlement of an estate, the sections of the General Code will be given with some brief comments. It has always been deemed equitable and just that the assets of a deceased person should, wherever they may be found, be made applicable to the payment of his just debts and liabilities. Creditors, however, can not sit idly by during the administration of

Beneficiaries under a trust can not maintain an action against the heirs and legatees of a deceased trustee or enforce a claim against their interest in trust property, there being no claim asserted against his estate within the time fixed by the laws of administration. Robson vs. Evans, 35 O. C. C. 510.

an estate and not present their claims without danger of losing the same. If they do not present them within six months, the executor or administrator may proceed to pay debts. If they do not present their claims in case they are due before he makes a final settlement, provided such settlement is made more than eighteen months after the date of his bond, or when settlement has been made before eighteen months from date of bond, and claim has not been presented before the expiration of the said eighteen months, they can not proceed to collect the same from the heirs or devisees. Such neglect or failure to act upon the part of the creditor will have lost him his claim entirely. Under the provisions of the subsequent sections of the General Code referred to in this chapter, the creditor would also be barred of his claim if he did not commence action within one year after the same was due. Another matter that should be observed is that no creditor can bring a suit against an heir or devisee until after a final settlement.[1]

If no action can be brought by a creditor against an heir until after a final settlement, it would likewise follow that no creditor could bring suit against an heir until there had been an administration of the estate. The method of procedure for a creditor who has a claim, in which there had never been an administration of the estate, is to have an administrator appointed, and then present his claim to the administrator.

Courts of equity refuse to aid creditors who fail to collect their claims, in the mode thus pointed out by law, before final settlement and discharge of the administrator, without satisfactory excuse.[1*]

§ 585. Estate of deceased in the hands of heirs, etc.; liable for certain debts. "After the settlement of an estate by an executor or administrator, and the expiration of the time limited for the commencement of actions against him by the creditors of the deceased, his heirs, next of kin, widow as next of kin, devisees, and legatees shall be liable by action in the common pleas or superior court as provided in the following sections, for all debts, which could not have been sued for, against the executor or administrator, and for which provision was not made, as hereinbefore provided." [R. S. § 6217.][2]

[1] Arbaugh vs. Millett, 5 C. C. 295; 3 C. D. 146.

[1*] Collamore vs. Wilder, 19 Kan. 67, 80; Public Works vs. Columbia College, 17 Wall, 521, 530. See § 614, Limitation of action; § 617, When not barred.

[2] § 10876 G. C.

§ 586. Jurisdiction, etc.

The action by the creditor must be brought in the Common Pleas or Superior Court of the county in which service of summons on the heir can be obtained, and only exists for debts on which an action could not have been maintained against the executor or administrator, or where no provision has been made, such as the retaining of assets, or the giving of bond provided for in the previous chapter. As before stated, the action cannot be brought until the estate has been administered upon, and a final settlement made.[2a] As a general rule, it may be said that the sale of real estate by an heir conveys a title which is subject to a creditor's lien,[3] unless the estate has been fully administered, as provided by law, and the sale be made to an innocent purchaser.

It should be further observed that the action provided for is a personal action against the heir or distributee, etc., and that it is not one that follows the property itself, which may have been received in distribution; and therefore if the heirs and distributees become bankrupt before the creditor gets judgment, he would be without a remedy.

§ 587. **Heirs, etc., to contribute to pay claims after settlement of estate, and how.** "Such creditor, whose right of action first accrues after the expiration of the time of such limitation, and whose claim had not been presented to the court, or if presented, not allowed, as hereinbefore provided, may recover it against the heirs, widow, as next of kin, and next of kin of the deceased, and the devisees and legatees under his will, each one of whom shall be liable to the creditor to an amount not exceeding the value of real or personal estate that he or she received under the will, or by the distribution of his estate. If, by the

[2a] Arbaugh vs. Millett, 5 C. C. 295; 3 C. D. 147.

[3] Farren vs. Robinson, 17 O. S. 243; Stiver vs. Stiver, 8 O. 221; Piatt vs. St. Clair, 6 O. 227.

In an action by a creditor against the heirs, after the estate is settled, the same defense may be made as could have been made by the administrator. Camp vs. Bostwick, 20 O. S. 337.

will of the deceased, any part of his estate, or one or more of the devisees or legatees, be made exclusively liable for the debt, in exoneration of the residue of the estate, or of the other devisees or legatees, it must be complied with in that respect, and the persons and estate so exempt by the will, be liable for only so much of the debt as can not be recovered from those first chargeable therewith." [R. S. § 6218.][4]

§ 587a. **Limitation.** "No such suit shall be maintained unless commenced within one year next after the time when the right of action first accrues, except the person entitled to bring it be, at the time it accrued, within the age of twenty-one years if a male, eighteen years if a female, insane, or imprisoned, in which case, every such person may bring such action within one year after the disability is removed." [R. S. § 6218.][4*]

§ 588. Comments.

Several things may be observed about the above section. First, the creditor can only bring the action if it accrued after the time of the limitation of a settlement, or when a settlement has been made that the claim shall not have been presented to the Court, or if it has been presented, that it was not allowed. Second, that the creditor may recover the same against the persons that have received the estate on distribution, each one of whom shall be liable not exceeding the value of what he shall have received. Third, if there was a will, and any part of the funds or property distributed was made liable primarily for the debts, the legatee receiving the same first would be liable, and the will in that respect should be complied with. Fourth, that no suit shall be maintained unless it be commenced within one year after the time when the right of action accrued, except for a disability therein mentioned.

[4] § 10877 G. C.

[4*] § 10878 G. C.

This limitation is not merely a statute of limitations relating to the remedy, but is a necessary qualification of the right to maintain the action. Roth vs. Hummel, 1 O. App. 361; 35 O. C. C. 355.

The only cases in which heirs and devisees might be held liable are under the provisions of §§ 10876, 10877 and 10878 G. C. Robson vs. Evans, 35 O. C. C. 513. See Thomas vs. Kalbfus, 97 O. S. 232.

When a cause of action accrues before the expiration of the time in which an executor may be sued, suit can not be maintained against the heirs. Bevitt vs. Diehl, 12 Dec. 383-315. See § 613.

§ 589. Estate of any heir, etc., liable after his death. "If any of such heirs, next of kin, widow, devisees, or legatees, dies without having paid his or her just proportion of such debt, his or her executors or administrators shall be liable therefor to the extent he or she would have been if living." [R. S. § 6219.][5]

§ 590. Where two or more liable, creditor may proceed against all in one action. "If, in the cases specified in the next three preceding sections, more than one person is liable for the debt, the creditor by one action shall proceed to recover it against all so liable, or as many of them as are within the reach of process. Thereupon, by the verdict of a jury if either party requires it, the court must determine what sum, if any, is due to the plaintiff. They also according to the equities of the case, shall decide how much each of the defendants is liable to pay toward the satisfaction of the debt, and the court shall render judgment accordingly." [R. S. § 6220.][6]

§ 591. Insolvency, etc., of heir or devisee not to effect liability of others. "If any of the heirs, devisees, or others who were originally liable for the debt, be insolvent or unable to pay his proportion, or is beyond the reach of process, the others nevertheless shall be liable to the creditor for the whole amount of his debt; except that no one shall be compelled to pay more than the amount received by him from the decedent's estate." [R. S. § 6221.][7]

§ 592. Amendments allowed to bring in other parties. "No suit shall be dismissed or debarred for not making all the persons defendants who might have been included as such. In any stage of the cause the court may award process to bring in other parties, and allow amendments necessary to charge them, as defendants, upon such terms as it deems reasonable." [R. S. § 6222.][8]

§ 593. Heirs, etc., liable to contribution. How recoverable. "If, in consequence of insolvency, absence or other cause, any of the persons liable for such debt, fails to pay his just proportion to the creditor, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their

[5] § 10879 G. C.
[6] § 10880 G. C.
[7] § 10881 G. C. Each heir is liable separately for the amount received by him from the estate. Spicer vs. Giselman, 15 O. 338.
[8] § 10882 G. C.

just proportion of the debt—such indemnity to be recovered by all of them jointly, or in separate actions by any one or more, for his or their parts respectively, at their election." [R. S. § 6223.][9]

[9] § 10883 G. C. See general discussion of subject, Woerner on Admin., pp. 1261 to 1272. See Schouler, Extrs. § 445.

CHAPTER XXXV.

ARBITRATION OF CLAIMS.

§ 594 Doubtful claims against an estate to be referred to arbitration.
§ 595 Construction of statute.
§ 596 Agreement to refer.
§ 597 How proceeded on if claim is less than one hundred dollars.
§ 598 Duties of the Justice of the Peace.
§ 599 If it exceed one hundred dollars.
§ 600 Duties of Probate Judge, etc.
§ 601 Notice and oath to referees.
§ 602 Referees to report to Court. Proceedings, powers, and compensation of referees; costs.
§ 603 Hearing, etc.
§ 604 Witnesses, how procured, etc.
§ 605 Filing of an award.
§ 606 Form of confirmation of award.

§ 594 Doubtful claims against an estate to be referred to arbitration. "If the executor or administrator doubts the justice of any claim presented, and so verified, he may enter into an agreement in writing, with the claimant, to refer the matter in controversy to three disinterested persons, who, if the claim does not exceed one hundred dollars, shall be approved of by a justice of the peace of the county in which the letters were issued. If the claim exceeds one hundred dollars, the referees must be approved of by the probate judge." [R. S. § 6093.][1]

§ 595. Construction of statute.

In construing the sections of the General Code referred to in this chapter, our Supreme Court says:[2] "That an executor or administrator has the power, at common law, to submit to arbitration a disputed claim against the estate which he represents is, we think, unquestionable. An important part of the duties which he is appointed to perform is the payment of the debts due from the estate. In the discharge of this duty he

[1] § 10718 G. C.
For authority of administrator or executor to submit to arbitration of claims in favor of the estate, see § 455. See § 969, Insolvent estates.

[2] Childs vs. Updyke, 9 O. S. 336.
The rejection of a claim does not prevent the administrator from submitting it to arbitration. Bradstreet vs. Pross, 9 Dec. Rep. 154; 11 Bull. 117.

must first ascertain the extent to which the claims presented for payment are just and valid. This he may do, if he and the creditors can so agree, either by means of arbitration or without it. And by such acts, done in good faith, the estate must be bound. These sections provide, substantially, that when the amount of the claim so referred does not exceed one hundred dollars, the agreement or reference and the approval of the referees may be filed with such Justice of the Peace as the parties may agree upon, who shall thereupon docket the cause, appoint a day of trial, cite the referees, subpœna witnesses, and proceed to the trial of the cause, and render judgment upon the finding of the referees. But, if the claim so referred exceed one hundrd dollars, the agreement of reference and approval of the Probate Judge may be filed with the clerk of the Court of Common Pleas of the county in which the parties, or either of them, reside (now Probate Judge), and said clerk shall thereupon docket the cause, and enter a rule referring the matter in controversy to the persons so selected. The referees shall thereupon hear and determine the matter, and make their report thereon to said Court. This report the Court may set aside or confirm, and render judgment thereon, which shall be valid and effectual, and in all respects, as in other cases (Swan's Stat. 377, original secs. 87, 88, 89). The manifest object of these provisions was to furnish a mode of trial, a cumulative remedy, which, by consent of parties, the administrator might adopt, instead of an ordinary civil action. In this mode of trial, the award or report of the referees stands as the verdict of a jury, on which judgment may be summarily entered. To give it this effect the requirements of the statute must be substantially pursued, and therefore the referees must be approved by the proper officer. But this cumulative remedy does not, as we think, take away or affect the common law right of the parties to submit the matter in dispute between them to arbitration. The award rendered in such common law arbitration has no judicial force. It operates neither as a judgment nor as the verdict of a jury. The failure to perform it may constitute a cause of action, or its performance may furnish a good defense in a subsequent suit between the parties

on the same subject matter. But no judicial action can be had upon it without pleadings as in other cases."

A claim may be submitted to arbitration even after it has been rejected by the administrator and suit brought.

In Bradstreet vs. Pross,[3] it was held that "notwithstanding the parties to a statutory arbitration may have agreed that the award of the arbitration upon questions of fact should be final and conclusive upon both parties, such an agreement cannot deprive the Court of jurisdiction to order a remittitur, where, in the opinion of the Court, the sum awarded by the arbitrators was excessive. The parties cannot by their agreement either give jurisdiction to the Court or take it away from the Court."

§ 596. Agreement to refer.

Several matters are jurisdictional in order to constitute a valid award within the provisions of the sections of the General Code given in this chapter. The first is that a claim must have been presented, verified according to law, to the administrator or executor. Then there must be an agreement entered into in writing to refer the matter in controversy. The statute does not contemplate that there should be any other pleadings in the case than what may be shown upon this agreement in writing. It is said therefore that this agreement in writing should state the names of the parties and such allegations showing the nature and kind of the claim, as would support a petition if the claim were sued on in a court of justice. It is further a jurisdictional matter to have the reference approved as provided by statute. The form of agreement may be as follows:

Whereas, the undersigned A. B., holds a claim against the estate of C. D., deceased, in the sum of.....dollars (state the nature of the claim) which he has presented for allowance to E. F., the executor of the last will and testament of (or administrator of the estate of) said decedent: Whereas said defendant E. F., disputes the validity of said claim (or denies that the claim is a just debt against said estate). It is therefore agreed between the said A. B. and E. F., to refer the matter in dispute to the arbitration of G. H., I. J. and K. L., who shall be subject to the approval of M. N., of.....county (in which letters were issued). (But if the claim does not exceed one hundred dollars, say)

[3] 11 Bull. 117; 9 Bull. 244.

who shall be subject to the approval of O. P., a justice of the peace, of .....county (where letters were issued), that this agreement with the approval of said referees shall be filed with said O. P. (or any other justice of the county the parties may agree upon) and such further proceedings shall be had before said justice as the statute provides.

Dated.....day of....., 190.... (*Signed.*)

Indorsement.— I approve the referees within named.

.....day of....., 190....

.....

Probate Judge.

Or Justice of the Peace of.....County.[4]

§ 597. **How proceeded on if claim is less than one hundred dollars.** "If the amount of the claim so referred does not exceed one hundred dollars, upon filing the agreement of reference and the approval of the referees, with such justice of the peace as the parties agree upon, he shall docket the cause, appoint a day of trial, issue a citation for the referees, and subpœnas for witnesses. The cause shall be regulated, and in all things, proceed as is provided for arbitration before justices of the peace, except, that if judgment is rendered against the executor or administrator for the debt, damages, or costs, it shall be rendered, and execution issue thereon, as in actions against executors and administrators." [R. S. § 6094.] [5]

§ 598. Duties of the justice of the peace.

The statute is specific in pointing out what the duties of a justice shall be when a reference is had for a claim not exceeding one hundred dollars. It is the object and purpose that when a reference is filed with the justice it shall be treated as if a suit had been commenced in such justice's Court, and therein the parties had agreed to submit the matter to arbitration. As such a matter is to be tried before the arbitrators, subject to the approval of the justice of the peace in whose Court the agreement in writing has been filed, the law applicable to such trials generally, is applicable here, and will be found discussed fully with the necessary forms in that invaluable aid to practitioners before the Justices of the Peace Court, Swan's Treatise. No further discussion will be made here, but the reader is referred to that work.[6]

[4] Whit. Prob. Code.

[5] § 10719 G. C.

[6] Swan's Treatise 198; sections of the G. C. from 10364 to 10370.

§ 599. **Id. If it exceeds one hundred dollars.** "If the claim so referred to arbitration exceeds one hundred dollars, upon filing the agreement of reference in the probate court of the county in which the letters were issued, the probate judge shall docket the cause, and make an order referring the matter in controversy to the referees so selected." [R. S. § 6095.][7]

§ 600. Duties of Probate Judge, etc.

If the amount referred to in arbitration exceed one hundred dollars, then it must be filed in the Probate Court which granted the letters of administration. The judge must docket the case, and make an order referring the matter to the referees. The statute makes no provision for service of notice upon the referees, and an order for them to appear at a certain place and proceed to hear the matter in controversy, like it does in the previous section, where the matter is less than one hundred dollars. It seems that it would be good practice for the Court, when making an order of reference, to also include in the order, that notice should be given to the referees, and that a time should be fixed for their meeting to consider the matter. The order of reference may be in the following form:

ORDER OF REFERENCE.

(*Title.*)

This day came A. B., administrator of C. D., deceased, and E. F., a creditor of said estate, and filed in this Court their agreement in writing to submit the matter in controversy between them, as to the validity of the claim of E. F. against said estate, and the amount thereof to arbitration, naming G. H., I. J. and K. L. as arbitrators, and the said agreement having been approved by the Court. It is this day ordered that the matters in controversy between the parties be referred to the arbitrators or referees aforesaid; and that they meet on the.....day of..... ....., at.....o'clock...M. At (here mention place where the referees are to meet), after having been sworn, proceed to the discharge of their duties under the law providing for such cases. And it is further ordered that notice be given by.....(here insert the name of the party that is to give notice to the referees) to the said G. H., I. J. and K. L. of their appointment as referees in this case, and the time when they shall first meet to consider the same.[8]

[7] § 10720 G. C.

[8] The terms arbitrators and referees are used synonymously. The statute referring such matter to the Probate Court calls them referees instead of arbitrators. As the law previously stood, the Probate Court had no other duty and au-

§ 601. Notice and oath to referees.

The following may be used as a form of notice to the referees:

To.....(here insert name of person to make services):

You are hereby commanded to notify G. H., I. J. and K. L. that they have been selected as referees in a matter between A. B., administrator of the estate of C. D., and E. F., a creditor of said estate; and that they are ordered to appear at (here mention place), on the.....day of..... ....., at.....o'clock...M., to proceed to hear and determine the said matter in controversy.

Given under my hand this.....day of....., 190....

.....
Probate Judge.

The statute requires the referees to take an oath to be administered to them by a judge or justice of the peace.[9]

A notary public cannot administer the oath.[10] But if the parties proceed to a hearing before an unsworn arbitrator they will be held to have waived such irregularity.[11]

The following may be used as a form of oath:

In the matter of arbitration between A. B., administrator of C. D., and E. F., a creditor, we, the undersigned referees, swear that we will faithfully hear and examine the matter in controversy between them, and will make a just award according to the best of our understanding.

.....
.....
.....

Sworn to and subscribed before me and in my presence this.....day of.....,....., 190....

.....

thority in the matter than to approve the referees, and reference was required to be perfected in, and the report made to the Common Pleas Court. Anderson vs. Backer, 15 O. S. 173.

The present statute, however, has been changed and the Probate Court is now the Court to which the report must be made and all further orders had in such Court, the same as the Common Pleas Court formerly could have made or entertained.

[9] § 12153 G. C.

[10] State vs. Jackson, 36 O. S. 281.

[11] Rice vs. Hassenpflug, 45 O. S. 377.

The parties may waive an objection to the manner of swearing the arbitrators. Where the statute provided that the oath to the arbitrators and witnesses must be administered by a judge or justice of the peace of the county, and such oath was administered by a notary public, but the defendant, an attorney-at-law, was present when the oath was administered, and made no objection to the proceeding — held that defendant had waived the objection to the manner of swearing the arbitrators. Bradstreet vs. Pross, 11 Bull. 117.

§ 602. Referees to report to court. Proceedings, powers, and compensation of referees. Costs. "The referees thereupon must proceed to hear and determine the matter, and make their report thereon to the probate court. The same proceedings may be had before the referees, and they shall have the same powers, and be entitled to the same compensation as if the reference were made under the provisions for arbitrations under a rule of the common pleas court. The court may set aside the report of the referees or appoint others in their places, or confirm such report and adjudge costs, as in actions against executors and administrators. The judgment of the court thereon shall be valid and effectual as in other cases." [R. S. § 6096.][12]

§ 603. Hearing, etc.

The referees having met, the statute confers upon them the same powers and duties as if the reference was had in the Court of Common Pleas under the general statute referring to matters of arbitration.[13]

The statute provides that persons submitting matters to an arbitration may enter into a bond.[14] But whether or not such may be done in cases in the Probate Court may be questionable. If such bonds were entered into, I presume they could be enforced.[15]

Witnesses may be subpœnaed and such other process may be had as would be necessary to secure all the facts required for a decision of the matter in controversy. The New York statute is very much similar to our own, and decisions from their Court will be of value to us.[16]

[12] § 10721 G. C.

[13] See §§ 11475, 11486 G. C.

[14] § 12149 G. C.

[15] For form of such bond see Kinkead's Pleading, 187.

[16] If the executor or administrator doubts the justice of any such claim, he may enter an agreement in writing with the claimant to refer the matter in controversy to one or more disinterested persons, to be approved by the Surrogate. On filing such agreement and approval in the office of the clerk of the Supreme Court in the county in which the parties or either of them reside, an order shall be entered by the clerk referring the matter in controversy to the person or persons so selected. On the entry of such an order the proceeding shall become an action in the Supreme Court. § 2718 Code Civil Proc. N. Y.

In Tracy vs. Suydam,[17] it was held that where parties agree to refer under the statute "the agreement to refer need not notice matters of defense to the claim. The account presented is, in effect, the plaintiff's complaint, and there being no pleadings, and no provision in the statute for pleadings, the defendant is limited to no particular defense; and consequently, any and every legal defense against the claim must necessarily be available." And it was also said in that case: "And every species of legal proof adapted to show the injustice of the claim, or its invalidity as a whole, or in degree or amount, is admissible." And the executors are "at liberty to make any defense that their testator or intestate could himself make, if alive, and the same were properly pleaded, in an action upon such claim." [18]

Under the New York statute it was held that a reference under the statute stands in the place of an action, and the entry of an order to refer must be deemed its commencement.[19]

§ 604. Witnesses. how procured, etc.

All parties to such reference shall have the benefit of legal process to compel the attendance of witnesses, which shall be issued by the Probate Judge, or possibly by the justice of the peace, and shall be returnable before the referees on the day and place inserted therein named.[20]

[17] 30 Barb. 110.

[18] Jessup's Sur. Prac. 920.

In Roe vs. Boyle, 81 N. Y. 305, a similar reference had been ordered, and the Court said: "This is not an ordinary proceeding. It is specially regulated by statute, 2 R. S. 89, 90. It cannot be commenced by summons. It can only be commenced by the consent of the parties and the approval of the Surrogate. It can be tried in no other way than before a referee. There are no pleadings, and the representatives of the estate proceeded against can prove against the claim any defense which they have without pleading it in any form."

In Mowry vs. Peet, 88 N. Y. 453, it was said that "In trying and adjudicating upon these matters which are within the scope of the reference, the statute (2 R. S. 88, § 36) confers upon the referee and the Court the same powers as if the reference had been made in an action. But the proceeding is not an action."

[19] Bucklin vs. Chapin, 1 Lans. 443.

[20] § 12151 G. C.

Disobedience to such a subpœna is a contempt of Court and shall be punishable as in other cases.[21]

Such witnesses shall be duly sworn by a judge or justice of the peace. The form for a subpœna may be as follows:

State of Ohio,.....county, ss.
The State of Ohio to....., Sheriff of.....
.....county, Greeting:

You are hereby commanded to summon X. L. and Z. T. to appear before E. F., G. H. and I. J., or any two of them, arbitrators chosen to determine a controversy between A. B., administrator of C. D., and E. F., a creditor, at....., in....., said county and State, on the.....day of....., 190..., at..... o'clock...M., then and there to testify and give evidence in relation to said controversy before said arbitrators on the part of said A. B. (or C. D.) and of this writ make due return to me.

Given under my hand this.....day of....., 190....

.....

The referees having concluded the hearing of the case, must make an award or finding. The statute requires that the award must be in writing and signed by the referees, or a majority of them,[22] and the same must be filed with the Probate Court.[23]

The award must be confined to the terms of the agreement, which cannot be changed in any respect or a different one substituted.[24] It may be made in the following form:

(*Title.*)
To the Honorable the Probate Judge.....County.

The undersigned, to whom were referred certain matters in controversy between A. B., administrator of the estate of C. D., and E. F., which matters are more particularly mentioned in the agreement to arbitrate, signed by said parties on the.....day of....., having each of them been first duly sworn and having heard the testimony of witnesses and the evidence adduced, do determine and award that the claim of said E. F. against said estate is a valid one, and that the said A. B., as administrator of C. D., out of the assets of the estate of said C. D., should pay said E. F. the sum of.....dollars in full of his said claim against the estate of C. D. (here if the finding should be that the claim is not a valid one, say that we find that the claim of E. F. against the estate of C. D. is not a valid one and that there is nothing indebted thereof to the said E. F.), that the costs of this reference amounts to.....dollars, and that we find that the same should be paid by.....

Given under our hands this.....day of....., 190....

.....
.....
.....

The following is an itemized statement of the costs incurred:

.....
.....

[21] § 10217 G. C.
[22] § 12154 G. C.
[23] § 10721 G. C.
[24] See Kinkead's Pleading, 191.

Sec. 12160, G. C., provides that each arbitrator shall be entitled to receive one dollar a day for his services, and each witness for his attendance; and the justice or judge shall be entitled to like fees as in other cases, which fees shall be taxed by the arbitrators and included in the award.

§ 605. Filing of an award.

The referees, after they have heard the matter, shall make their report thereon to the Probate Court, and the Court may set the same aside, or appoint others in their places, or confirm such report and adjudge costs as in an action against executors or administrators; and the judgment of the Court shall be valid and effectual. If objection is sought to be made against the award, such objection should be filed with the Probate Judge. The law and practice in reference thereto is the same as that of the Common Pleas.[25]

§ 606. Form of confirmation of award.

(*Title.*)

This day this matter came on to be heard upon the application of A. B., administrator of C. D., for this Court to approve and confirm the award heretofore made and filed in this Court by G. H., I. J. and K. L., referees appointed to determine a matter of controversy between the said A. B., administrator, and E. F., and it appearing upon examination that the proceedings of said referees have in all respects been in conformity to law, and no exceptions to their award having been filed by either of the parties, said award is approved and confirmed, and it is considered by the Court that said claim, so arbitrated and allowed, is a valid claim against the estate of C. D., deceased. And it is further ordered that the same be paid out of the assets of said estate, the same as other claims of its class; and that the costs of said reference and the costs that have accrued thereon in this Court be paid out of said assets as a part of the costs of administering said estate.

If the finding of the referees be against the creditor after the formal passing of the above entry, it should conclude as follows:

And it is further ordered and found by the Court that said claim is not a valid one against the estate of C. D., and the said E. F. is ordered to pay the costs of this reference, together with the costs which have accrued or may accrue in this Court, and that execution issue against him for the same according to law.

[25] See Kinkead's Pleading, 194, 195.

CHAPTER XXXVI.

LIMITATION OF ACTIONS BY CREDITORS AGAINST ADMINISTRATORS.

§ 607 Generally.
§ 608 Claim barred by general statute.
§ 609 When claim barred if not sued within six months after rejection. What deemed rejection.
§ 609a Rejection of a claim.
§ 610 Suit on rejected claim.
§ 611 Time within which action can not be brought.
§ 612 Construction of the above section.
§ 613 Limitation of action by creditors.
§ 614 Construction of statute.
§ 615 Assets received after eighteen months.
§ 616 What constitutes new assets.
§ 617 Action of creditor against heirs, etc., not barred.
§ 618 Limitation of action against administrator *de bonis non.*
§ 618a Not required to answer to suit brought after two years.
§ 619 Administrator *de bonis non* liable for two years after giving bond.
§ 620 When liable for actions for two years.
§ 621 An administrator *de bonis non* to give notice of his appointment.
§ 622 Barred claims not revived.
§ 623 To be further liable if new assets received.

§ 607. Generally.

For various reasons statutory limitations have been placed upon the right to prosecute actions upon claims against an administrator or executor of an estate. We have heretofore discussed in various chapters how claims must be presented,[1] and how suit may be brought on the bond of an administrator or executor,[2] or against distributees.[2*]

It will remain for a future chapter to discuss how a suit must be brought by distributees.[3]

In the present chapter we will treat generally of the effect of the general statute of limitations and of special provisions relating to when and how claims against an estate may be enforced

[1] §§ 552, 569 *et seq*
[2] § 260 *et seq.*
[2*] § 587.
[3] § 761 *et seq.*

by an action. In order that the proper administration of an estate may not be interfered with, the law provides that within a certain length of time, and under certain conditions, although the creditor's claim may be allowed, it cannot be sued on.[4] And then other provisions protect an administrator against a suit on a claim which is not brought within eighteen months from the time he gives bond, provided he has given notice of his appointment, or before the estate is finally settled.[5] And another section limits the creditor's right of action to assets received after the expiration of eighteen months from his giving bond.[6] And still another provision[7] provides that if action is not brought on a rejected claim within six months it is forever barred. The general statute of limitation provides substantially that an action for the recovery of title to real property must be brought within twenty-one years;[8] upon specialty or an agreement, contract or promise in writing, within fifteen years,[9] and a contract not in writing within six years,[10] and trespass on real estate and an action for relief on the ground of fraud within four years,[11] and an action of libel, slander, etc., within one year,[12] and on an official bond of an administrator, executor or guardian within ten years from the time the right of action accrues.[13]

In a previous chapter the law providing when a creditor may bring suit against an heir, is discussed.[14]

4 § 10740 G. C., § 611.
5 § 10746 G. C., § 613.
6 § 10747 G. C., § 615.
7 §§ 10722-3 G. C., § 609.
8 §§ 11219-20 G. C.
9 § 11221 G. C.
10 § 11222 G. C.
11 § 11224 G. C.
12 § 11225 G. C.
13 § 11226 G. C.
14 § 585 *et seq.*
§ 10876 G. C. *et seq.*
See §§ 555, 987.

There is a general statutory provision that no action shall be brought whereby to charge the defendant, an executor or administrator upon any special promise to answer for damages out of his own estate unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized. § 8621 G. C.

An action may be brought against an administrator, guardian or trustee either in the county in which he was appointed or resides. § 11278 G. C.

§ 608. Claim barred by general statute.

Whether or not an administrator has power to revive a claim barred by the statutes of limitation is a question upon which our Courts are not in harmony.[14*] The question has never been directly passed upon by our Supreme Court. It has, however, been passed upon directly by our old District Court.[15]

In this District Court case it was held directly and upon the strongest kind of logical reasoning that an administrator or executor has no power by a new promise to revive a claim or debt already barred by the statute of limitations. And it is further held in this case, that the administrator or executor can only allow claims which can be legally enforced against the estate, and so claims not barred at the time of their being presented to him may be allowed.

In this case it is said: "On principle, speaking for myself, I should have no hesitation in holding, independent of the decision of the Supreme Court in the 17 Ohio 9, that an administrator has no power to revive a claim once barred by the statute of limitation. The duties of the administrator are limited to collecting the debts due to, and to the payment of those owing by, the intestate. What right he has to be generous with the property of others, to pay debts for which there exists no legal liability against the estate, I could never comprehend. But whatever may be the law elsewhere, we have to expound it as we find

[14*] It is held in England and in some of the United States that an executor or administrator is not obliged to plead the general statute of limitation in actions on claims against the estate, if they are otherwise justly due, but that it is discretionary with him to interpose the bar of the statute. But according to some authorities any person who has an interest in the estate as creditor, legatee, etc., may plead the statute without the concurrence of the executor or administrator. In other States it is held that it is the duty of the personal representative to interpose the bar of the statue on every claim not properly asserted within the statutory period, and in some jurisdictions an administrator may waive the bar of the statute of limitations where it attached after the debtor's death, though he may not do so if it attached before. 11 Am. & Eng. Ency. of Law, 2d ed., 919.

[15] See Drouilliard vs. Wilson, 10 W. L. J. 385.

it settled in Ohio. In Hill vs. Henry,[16] the Supreme Court held that the effect of our statute, when it had once run out, was to extinguish the debt or claim, so that no recovery could be had on the original promise or obligation, but that the recovery could only be had on the new promise, supported and upheld by the moral obligation resting upon the debtor to pay the original debt. Such, then, is the law in Ohio. Now, can an administrator make a new contract to bind the estate, predicated upon a mere moral obligation, resting upon the intestate? We think not. The administrator has to execute legal liabilities existing against the estate; he has nothing to do with the moral obligations resting upon others. His duty is to audit, allow and pay the legal liabilities of the estate; and hence he can allow all claims not barred; but when once barred by the statute, he has no authority to create a new liability, predicated upon a mere moral obligation, resting upon others. Whatever, therefore, may be the decisions elsewhere, we have no hesitation in holding that, under the provisions of our statute, as expounded by the Supreme Court, an administrator cannot, by a new promise, revive a claim once barred."[17]

[16] 17 Ohio 9.

[17] Whitman, J.: I am compelled, very reluctantly, however, to acquiesce in this decision. There seems to be no means of escaping the effect of the decision in the 17 O. 9. By that decision this claim became extinguished in 1847, and no recovery could ever have been had upon it; there can then exist in Ohio, no doctrine of the waiver of the statute; there must be a new contract based on a mere moral obligation; and no one ever supposed that a personal representative had power to create new contracts. Independent of this decision I should have held the new promise effective to authorize a recovery.

Nash, J.: In the Court below, I ruled this case in favor of the plaintiff, in obedience to what I supposed to be the weight of authority, though my own mind has never been brought to acquiesce in its correctness. I never could understand what right an administrator had to pay debts which has ceased to be enforcible in a Court of justice. The case in 17 O. 9, was not at the time brought to my mind, or I might then have felt at liberty to have decided otherwise. But that case necessarily settled this, unless we are prepared to hold that an administrator can create contracts based upon a mere moral obligation to the same extent as the intestate himself. Hence he might, by a new promise, revive a claim barred by a certificate of bankruptcy, or released on a composition among creditors with the intestate

The Court places its decision not only on principle, but on the 17 Ohio, which has never been reversed; therefore, it seems notwithstanding what may have been said by the Court in the case of Fisher vs. Mossman,[18] "that the statute of limitations does not cancel the debt, but merely destroys the remedy;" that the law in Ohio may be considered to be that an administrator has no right to pay or allow a claim that is barred by the statute of limitations. The only case that throws some doubt upon this, other than that found in the 11 O. S. 42, is the case of Joyce vs. Hart.[19]

This was an action brought to restrain an administrator from selling real estate to pay a claim which had been barred by the general statute of limitations, and also was not brought within the provision of sec. 10746, G. C. The Court, while not necessary to the decision of this case, plainly found that the administrator could waive the statute. The real reason why the action was dismissed was that if the administrator wrongfully paid a claim he was guilty of a *devastavit,* and the parties therefore had their action at law for damages, and a case for the action of a Court of equity was not presented. In the decision in this case neither the 17 Ohio, nor the one in the 10 W. L. J. is referred to.

The Court was no doubt right in dismissing the proceedings for injunction, but not on the ground that the administrator had a right to waive the statute of limitations.

The case of Fisher vs. Mossman,[20] in which the language is found "that statutes of limitation being statutes of repose, suspend the remedy, but do not cancel the debt," decides that where a claim was secured by mortgage and no action could be main-

in his lifetime. This would hardly be claimed by any one. I, therefore, cheerfully concur in the opinion first pronounced, because, independent of our own statute and decision, and on principle, I never could understand how a mere trustee could be allowed to pay debts which had ceased to exist as a legal charge upon the estate. 10 W. L. J. 391.

[18] 11 O. S. 42.

[19] 27 Bull. 144. Since this text was written the Circuit Court in Crouse vs. Fryburger, 22 C. C. 325, criticise this case and decline to follow its conclusion. See Baen vs. Weller, 12 Dec. 128.

[20] 11 O. S. 42.

tained on the claim by reason of the statute of limitations, yet the mortgage could be enforced.

In the case of Keer vs. Lydecker,[21] the Court says the case of Fisher vs. Mossman correctly holds that the bar of the note or other instrument secured by mortgage, does not necessarily bar an action on the mortgage. Thus it will be seen that the only cases[22] which seem to contain language throwing doubt upon the decision of Drouilliard vs. Wilson,[23] the question was not directly involved and a decision was not necessary to decide the case.[24]

It has, however, been held that part payment, or acknowledgment, by the administrator, of a valid existing claim against his intestate will take the case out of the statute of limitations, so that time will begin to run only from the time of such payment, and the claim will not be barred until the expiration of the limited period thereafter.[25]

As a general principle, it would seem that during the interval between the debtor's death and the appointment of an ad-

[21] 51 O. S. 240.

[22] Joyce vs. Hart, 27 Bull. 142; Fisher vs. Mossman, 11 O. S. 42.

See Crouse vs. Frybarger, 22 C. C. 315.

[23] 10 W. L. J. 385.

[24] In Moore vs. O'Brannin, 14 O. S. 179, J. Ranney, says: "But it is said that no right of action existed against the estate of Hugh Moore, and that the allowance of these sums as claims of the estate was a simple attempt of the executrix to create a liability which she had personally incurred, and throw the burden upon the estate. That she could not do that or even revive a debt of the estate once barred, is too clear to need an argument or illustration."

And again in quoting from Doherty vs. Stephenson, 20 Pa. St. 210, he says: "Executors or administrators may not create a new cause of action against the estate whose interest they are charged with, nor revive an old one barred by the statute of limitation."

[25] Niemcewicz vs. Bartlett, 13 O. 271.

In Marienthal vs. Mosler, 16 O. S. 566, it was held that there was a distinction between a part payment made by an administrator, and one made by an assignee. And that the payment of the dividend by the assignee of an insolvent debtor is not such a part payment as will take the residue out of the statute of limitation as against such debtor.

See title, limitation of actions, 13 Am. & Eng. Ency. of Law, 707. Where it is said the law does not require an executor to make his testate sin in his grave by setting up an unconscious defense. See Woerner on Admin. 843, in which the view is taken that no executor is compelled either at law or equity to take advantage against a demand otherwise well found.

ministrator of his estate the general statute ought not to run.[26] But it has been held to the contrary on the ground that the creditor may compel an administration at any time.[27]

If a creditor has a claim which is in danger of being barred by the general statute of limitations, he ought to present it at once to the administrator; and if there be no administrator, proceed to have one appointed.*

Where a claim has once been allowed by an administrator or executor, the statute of limitations does not run thereafter against such claim. Thus where a party died insolvent in 1853, and part of the real estate was sold and part was set aside as a homestead, and the right to the homestead having expired in 1876, twenty-three years after the claim was allowed, it was held to be a valid claim against the estate, and that the administrator might proceed to sell the homestead to satisfy such claim.[28]

If a testator in his will direct his executor to allow a claim barred by the statute of limitations, this would be sufficient acknowledgment of the debt to take it out of the estate, and it would be the executor's duty to allow such a claim.[29]

§ 609. When claim barred if not sued within six months after rejection. What deemed a rejection. "If a claim against the estate of a deceased person be exhibited to the executor or administrator, before the estate is represented insolvent, and be disputed or rejected by him, and has not been referred within six months after such dispute or rejection, if the debt, or any part of it be then due, or within six months after some part becomes due, the claimant must commence a suit for the recoverey thereof, or be forever barred from maintaining an action thereon. No action shall be maintained thereon after such period, by a person deriving title thereto from such claimant." [R. S. § 6097.][30]

[26] Woerner, Admin. 844; *In re* Geo. H. Miller, 12 Dec. 562.

[27] Baker vs. Brown, 18 Ill. 91; Byrd vs. Byrd, 28 Miss. 144; Nelson vs. Herkel, 30 Kans. 456.

[28] Taylor vs. Thorn, 29 O. S. 570; 39 O. S. 112.

[29] It was held under a former statute that no claim is barred until one year from the time the action has accrued. McKent vs. Kent, 2 W. L. M. 541; 2 Dec. 375.

If the debt does not become due until after the death of the decedent, then the statute does not begin to run until there is an administrator appointed. Under the holding of the court, while it would be proper for the creditor to have an appointment made, he would not lose his claim by reason of the statute of limitations if he did not do so. If the debt was due at the time of the death of decedent, then it would be barred in the statutory time. In the court below it was held, that if due or not, that the statute would begin to run from the time letters ought to have been issued, depending upon the circumstances of each case. Hoiles vs. Riddle, 74 O. S. 175; reversing 4 C. C. (N.S.) 449; 16 Cir. D. 365; reversing 26 O. C. C. 305.

[30] § 10722 G. C. See § 1637.

Action may be brought in the municipal court at Cincinnati. Keck vs. Bakkle, 6 O. App. 246; 26 C. C. (N.S.) 398; 37 C. C. 390.

§ 609a. Rejection of a claim. "A claim shall be deemed disputed or rejected, if the executor or administrator, on presentation of the vouchers thereof, refuses, on demand made to indorse thereon his allowance of it as a valid claim against the estate." [R. S. § 6097.][30*]

§ 610. Suit on rejected claim.

In a previous chapter the question as to what constitutes the rejection of a claim has been considered.[31]

Statutes of this character are generally called statutes of non-claim, and are highly penal and must be strictly construed.[32] But notwithstanding such construction, it has been held that the failure of the creditor to sue within the time limited after his claim has been rejected, not only bars his action against the executor or administrator, but also his action against the heirs and next of kin.[33]

Of course this only applies to such claims as must be presented. If the estate is liable without presentation it would follow that the claim would not be barred by non-action. The time begins to run from the date of the dispute or rejection of the claim.[34]

30* § 10723 G. C.

31 §§ 552, 558a.

32 Elliott vs. Cronks, 13 Wendel. 35.

33 Selover vs. Coe, 63 N. Y. 438.

34 There is no statute or rule of law which requires the notice of rejection to be in writing or in any particular form. Peters vs. Stewart, 2 Misc. 357, reversing 1 Misc. 8. The claim had been presented orally and the rejection was oral.

Judge Bookstaver added: "If the agent presenting the claim had authority to present it to the administrator, it necessarily follows that he had authority to receive on plaintiff's behalf notice that he accepted, or disputed and rejected it. Where a creditor sends a person to collect a claim of a debtor, the latter certainly is authorized to receive and receipt for any money that may be paid to him on account of that claim; and where one sends an agent to make a demand of any kind, the answer of the person on whom the demand is made is good when given to the agent and in law is considered as if given to the principal personally. *Qui facit per alium facit per so* is one of the oldest and best established maxims of the law. Hence we think the statute commenced to run at the time of the verbal notice that the claim was disputed and rejected." Where the notice of rejection is actually received, on the other hand, it is immaterial whether it be directly from the executor, or from the executor through his attorney. Wintermeyer vs. Sherwood, 77 Hun, 193; Selover vs. Coe, 63 N. Y. 438; Jessup's Sur. Pract. 930.

It is error to render a judgment upon a claim due and disallowed more than six months previous. Pollock vs. Pollock, 2 C. C. 140; 1 C. D. 408.

The action is a civil action and not a special proceeding. Kennedy vs. Thompson, 3 C. C. 448; 2 C. D. 254.

Such statutes are more rigorously applied than the general statute of limitations, and the administrator cannot waive it.[35] And even where the suit was brought on a claim that had been disallowed more than six months prior to the commencement, and the executor failed to plead such a bar, it was error in the Court to give a judgment.[36]

An action is deemed commenced from the date of issue of the summons.[37] But if an action is commenced in due time and the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action has at the date of such failure expired, plaintiff may commence a new action within one year after such date.[38] And hence if a suit on a rejected claim was commenced in the United States Court within six months after its rejection, and was dismissed by that Court otherwise than on its merits, it is such a suit as will permit the plaintiff to commence another suit in the State Court within one year after the dismissal of the action.[39]

The fact that the non-suit was occasioned by the failure of the plaintiff to give security for costs does not withdraw the case from the operation of the statute so construed.[40]

The suit brought on a rejected claim is a civil action, and not a special proceeding.[41]

It seems that some Courts have misconceived the kind of an action that should be brought on a rejected claim against the administrator of an estate, and have proceeded in the same way that action is brought against an assignee by a creditor of the estate on a rejected claim.[42] This is certainly an erroneous idea. The action against an assignee is one specifically provided for by statute,[43] and cannot be made to apply to executors and administrators. The Probate Court cannot order a

[35] Woerner, 845; McKent vs. Kent, 2 W. L. M. 541; 2 Dec. 375.

[36] Pollock vs. Pollock, 2 C. C. 140; 1 C. D. 418.

[37] § 11230 G. C.

[38] § 11233 G. C.

[39] Burgoyne vs. Moore, 12 C. C. 31; 5 C. D. 522.

[40] Haymaker vs. Haymaker, 4 O. S. 272.

[41] Kennedy vs. Thompson, 3 C. C. 446; 2 C. D. 254.

[42] See Smock vs. Bouse, 12 C. C. 46; 5 C. D. 522.

[43] §§ 11134, 11135 G. C., § 1628.

claim paid.[44] If a claim is rejected by an executor or administrator, the creditor must commence a civil action and pursue whatever remedy the nature of his action will entitle him to, in a Court of general jurisdiction. The Common Pleas Court has no authority whatever to direct an administrator or executor to allow a claim; and the Probate Court has no authority so to do, except by the provisions of sec. 10748, G. C., on a claim not yet due.

The statute runs alike against all persons, under or over age, or whether insane- non-resident, or under other disability of whatever kind.[45]

§ 611. Time within which action can not be brought. "No executor or administrator shall be liable to the suit of a creditor of the deceased until after the expiration of twelve months from the date of his administration bond, or the further time allowed by the court for the collection of the assets of the estate, unless it be for the recovery of a demand that would not be affected by the insolvency of the estate; or be brought after the estate has been represented insolvent, for the purpose of ascertaining a claim that is contested; or the claim that has been exhibited to the executor or administrator and disputed or rejected by him." [R. S. § 6108; 102 v. 203.] [46]

§ 612. Construction of the above section.

The above section of the General Code does not apply to a suit brought on an administration bond,[47] nor where a claim has been presented and rejected.

The object and purpose of the above section may be stated to be two-fold; first, upon the death of a debtor, his estate of whatever description, stands for the payment of all his debts, and all of the creditors share alike. One creditor cannot by superior diligence acquire a superior right to any part of the estate,[48] and

[44] *In re* Geo. V. Miller, 12 Dec. 562; Jones vs. Green, 21 C. C. 101.

[45] Woerner, 846; Favorite vs. Booker, 17 O. S. 555.

The widow and heirs are not necessary or proper parties to a suit brought against the administrator. Williams vs. Longley, 3 C. C. 508; 2 C. D. 292.

[46] § 10740 G. C.

[47] Geer vs. State, 2 O. S. 574.

For action on administration bond, see § 260, *et seq.*

[48] McDonald vs. Aten, 1 O. S. 293.

thus it would be useless for him to get a judgment against it. The second object that the above limitation has in view is that the administrator or executor in his conduct of the administration of the estate shall not be embarrassed by litigation, and that he shall have time and opportunity to collect the assets of the estate. The statute permits an administrator to pay claims after six months from the date of his bond, but does not compel him to do so until one year have expired. In computing this time the date on which the bond is given is excluded.[49]

Likewise it has been held that a bond without surety approved by the Probate Court is not such a bond as statutes require, and the statute of limitations will not apply.[50]

An action can not be brought, not only during the one year, but also during any future time that may be allowed by the court for the settlement of the estate. The statute protects the creditor as to such future time when it provides that if there is more than one hundred dollars in the hands of the administrator or executor the court shall not grant a longer period. A petition against an administrator must show the lapse of one year, or that the case is within one of the exceptions.[51]

It will be further observed from the reading of sec. 10740, G. C. (§ 611), that there are three instances in which a creditor may bring an action against the administrator or executor within the time limited. The first is, if it be for the recovery of a demand that would not be affected by the insolvency of the estate. Thus the foreclosure of a mortgage would be an exception.[52]

This would include the enforcement of any lien on the property of the deceased, or any demand which was fixed and of such a character that its payment would not depend upon the solvency or insolvency of the estate, such as is preferred by the statute.[53]

[49] Paul vs. Stone, 112 Mass. 27.

[50] Abercrombie vs. Sheldon, 8 Allen, 532.

[51] Hammerle vs. Kramer, 12 O. S. 252; Levi vs. Buchanan, 2 C. S. C. R. 144; Rhodes vs. Doggett, 3 W. L. M. 134; Green vs, Ulyatt, 3 W. L. M. 44; Pepper vs. Sidwell, 36 O. S. 454, 456.

[52] Green vs. Ulyatt, 3 W. L. M. 44.

[53] Bank vs. Staunton, 116 Mass. 435; Studley vs. Williss. 134 Mass. 155.

The second exception is, unless it be brought after the estate has been represented insolvent, for the purpose of ascertaining a claim that is contested. This is referred to in the provisions of sec. 10890 G. C. (§ 1004), and will be referred to under an appropriate chapter. The third exception is, that unless the claim has been exhibited to the executor or administrator and by him been disputed or rejected. As to what constitutes a disputed or rejected claim, has been previously discussed.[54]

The mere allowance of a claim will not prevent action after twelve months, or after such future time, as may be granted, to collect assets, has expired.[55]

If an executor qualifies without giving bond, the statute begins to run from the time of his appointment and qualification. This being held to be synonymous to the words "from the time of his giving bond."[56]

§ 613. Limitations of actions by creditors. "No executor or administrator, shall be held to answer to the suit of any creditor of the deceased unless it be commenced within eighteen months from the time of his giving bond except as hereinafter provided. A creditor whose cause of action accrues after the expiration of eighteen months from the time the executor or administrator gave bond according to law, and before such estate is fully administered, may begin and prosecute such action within six months after the accruing of such cause and before the estate is fully administered. No cause of action against an executor or administrator shall be barred, by lapse of time, until the expiration of six months from the time it accrues." [R. S. § 6113; 102 v. 203.][57]

[54] See § 610; §§ 552, *et seq.*

[55] Thomas vs. Chamberlain, 39 O. S. 112.

[56] Jones vs. Jones, 41 O. S. 417.

[57] § 10746 G. C.

The rendition of a judgment, is the accruing of a cause of action under the section. The law in force at the time the action, accrues controls. Bevitt vs. Deihl, 12 Dec. 315, 383.

Allowing further time for settlement of estate does not take claim out of this statute. Gilbert vs. Little, 21 O. S. 156.

Time runs from date of bond. Ardrey vs. Shell, 77 O. S. 218. See Grant vs. Baldwin, 89 O. S. 156.

When cause of action accrues.

If there is no bond required the statute begins to run from the time of giving notice of appointment.

"Action" and "suit" are synonymous. Kennedy vs. Thompson, 3 C. C. 446; 2 C. D. 254.

The declarations of the administrator when not made in accepting or rejecting the claim, are not binding upon the estate. Hueston vs. Hueston, 2 O. S. 489.

§ 614. Construction of statute.[57a]

The above section is a transcript of the Massachusetts statute; and the term creditor is used in a generic sense, and includes all persons having rights in action against the decedent. It is founded on reasons of public policy, and its object is to promote the early and final settlement of the estate to enable distribution to be made of the residuum among those entitled, and free from charges and incumbrances.[58] It does not include a legatee.[59]

This statute was formerly four years. The legislature has very wisely reduced it to eighteen months. Experience has demonstrated that it was very often either a matter of inconvenience to the administrator or executor, or hardship on the heir, for the administrator or executor to hold moneys in his hands to meet the possible demands that might be presented within four years. If the administrator or executor was obstinate, it was a very

A claim for a widow's allowance comes within the statute. *In re* Glenn, 23 C. C. 397.

[57a] Cited Harris vs. O'Connel, 85 O. S. 145.

If the claim has been presented, brought within the eighteen-months period, even though six months has not expired from the time it was presented.

Cited *In re* Estate Patterson, 58 Bull. 310.

Where the appointment is revoked by the Probate Court, but on appeal the administrator is restored, the period during which he was suspended is to be deducted from the time allowed to bring suit. Badger vs. Orr, 1 O. App. 293; 19 O. C. C. (N.S.) 312; 34 O. C. C. 328.

[58] Favorite vs. Booher, 17 O. S. 554.

White, J.: "Nor will the fact that the creditor is under the disability of infancy save him from the operation of the bar which the statute interposes. The general rule in regard to the application of statutes of limitation is, that all persons, whether under disability or not, are barred by them, unless excepted from their operation by a saving clause. General words of a statute are to receive a general construction, and unless there is found in the statute itself some ground for restraining it, it can not be restrained. Angell on Lim., § 194. The same principle of public policy that requires the statute to embrace all subjects of demand, also requires that it should be held to embrace all classes of creditors. Accordingly it was held in Massachusetts, before the adoption of the statute in this state, that for the purpose of enforcing the policy of the statute, it was an absolute bar; and that the fact the plaintiff had been under the disability of infancy during the time the estate of the deceased was under administration, did not prevent his claim from being barred by the lapse of time prescribed by the statute. Angell on Lim., § 194; Hall vs. Bumstead, 20 Pick. 2.

And, in the case last cited, Shaw, C. J.: "That no such disability had ever been allowed, as an avoidance of this statute."

[59] Fuller vs. McEwen, 17 O. S. 288.

It has been held that this section does not bar the administrator from recovering on claims against the estate for money advanced, and where he is subrogated to the rights of the parties. Glenn vs. Eicher, 30 O. C. C. 821.

doubtful question whether the heir could have compelled him to distribute even by offering to indemnify him with a bond as provided by law.[60]

Generally, administrators and executors are desirous of making a speedy settlement. Under the former law they often took the chance and made distribution before the expiration of the eighteen-month limit. The time begins to run not from the time that the notice of the executor's or administrator's appointment has been made, but from the time of his qualification.[61] A later decision makes the time begin, where no bond is required, from the giving of the notice of appointment.[61a]

Where a claim is presented by a creditor to the administrator of an estate, and is allowed, which is afterwards disallowed and rejected by a successor of the one that allowed it, the eighteen-months statute or limitations provided by sec. 10746, G. C., begins to run in such cases only from the time of the rejection of the claim.[62]

While there is *dicta* in a Supreme Court decision,[63] and a Common Pleas Court [64] supporting the theory that an administrator or executor can waive the statutory limitation provided by sec. 10746, G. C., yet it seems to the author that it is somewhat questionable. We have heretofore in this chapter discussed the subject whether or not an administrator or executor could waive the general statute of limitations, and there come to the conclusion that he could not. If he could not waive the general statute of limitations, it would seem that he could not waive it in this instance.[65]

As a general rule, those courts which hold that an administrator can waive the general statute of limitations hold that he has no power to waive these special statutory limitations.[66]

[60] § 10762 G. C., § 696.

[61] Jones vs. Jones, 41 O. S. 420.

[61a] Grant vs. Baldwin, 89 O. S. 156.

[62] Stewart vs. McLaughlin, 47 O. S. 555.

[63] Fisher vs. Mossman, 11 O. S. 46.

[64] Joyce vs. Hart, 27 Bull. 144.

[65] Fisher vs. Mossman, 11 O. S. 45. Recent case of Crouse vs. Fryberger, 22 C. C. 361, supports the author's view.

[66] Woerner on Admin. 845. While, as a general rule, statutes of limitation are strictly construed, their practical wisdom is admitted; and their true intent and meaning, when ascertained according to established rules of interpretation, must be enforced whenever a pleader invokes their aid in sufficient form. The section before us is a part of what is popularly known as "the Administration Act." Considering the controlling importance of a prompt settlement of the estate of a decedent, so that his creditors may be paid and the shares of his heirs or legatees ascertained and distributed, the provisions that claimants

Sec. 10746, G. C., after the general provisions, provides "excepting in the case hereinafter mentioned." The excepted cases decribed are those provided for by secs. 10747, 10748, 10749 and 10750, G. C.[67]

The other matter excepted from the general provisions is where a creditor shall have a claim which does not accrue until after the period of eighteen months from the qualification of the executor or administrator, and while the estate is still being administered he may commence an action on his claim six months after the same becomes due, and before such estate shall be fully administered. Unless the action would be commenced before the estate was administered, no action could be maintained against the executor or administrator, although the six months had not expired from the time that it was due.[68]

§ 615. Assets received after eighteen months. "When assets come to the hands of an executor or administrator, after the expiration of such eighteen months he must account for, and apply them in like manner as if they had been received within eighteen months. He shall be liable to an action, and to be proceeded against on account of such assets, by or for the benefit of any creditor in like manner as if they had been received within the eighteen months; but such action or proceeding must be commenced within six months after the creditor has notice of the receipt of such new assets, and not more than eighteen months after they actually are received." [R. S. § 6114; 102 v. 203.][69]

against the estate shall prosecute their claims within so many months, or years, stand upon a footing somewhat different from the ordinary statute of limitations, behind whose bar the debtor himself may take refuge. Such provisions should be construed in furtherance of the main purpose and intent of the entire statute. It is plain that the General Assembly considered that four years (1½), computed from the moment when the law created a responsible representative of the decedent, competent to allow or reject claims, and liable to suit upon rejected claims, was as much time as ought to be allowed for any ordinary creditor to delay the distribution of an estate. This time is clearly defined as four years (1½). Jones vs. Jones, 41 O. S. 420.

[67] Jones vs. Jones, 41 O. S. 420. See § 584, *et seq.*

[68] See § 732.

Action for agreement to make testamentary provision must be brought within the statutory period. Sayler vs. Sellers, 2 O. App. 439; 19 O. C. C. (N.S.) 206; 36 O. C. C. 225.

The widow's year's allowance comes within the statute. *In re* Glenn, 3 C. C. (N.S.) 608; 23 C. C. 398.

[69] § 10747 G. C.

Not applicable when evidence of debts is unsatisfactory. Smith vs. McIntire, 13 O. F. D. 15; 95 Fed. Rep. 585.

§ 616. What constitutes new assets.

The above section simply extends the right of a creditor to new assets which might be received by the administrator or executor after the expiration of the eighteen months limit. In such a case if the creditor expected to retain a claim on the assets, he should in some way notify the executor or administrator; for, if he does not notify him and the assets are all paid out before action is brought, even though the action be brought within six months from the time the creditor has notice of the receipt of such new assets, still the administrator or executor would not be responsible. Money arising from the sale of land possessed by the decedent at the time of his death, and sold for the payment of debts, and money received by the administrator, from the guardian of the heirs of the deceased under an arrangement made to save their lands from sale, are not new assets within the meaning of this section, and will not extend the limitation within which creditors are required to sue.[70]

As a general rule, no property can be considered new assets, so as to revive unsatisfied claims that have been barred, which has been in the hands and under the control of the executor or administrator, or has been inventoried, or which is the product of such property, although it may have assumed, or been converted into a new form.[71]

§ 617. Action of creditors against heirs, etc., not barred. "Nothing herein contained shall prevent or bar the action or suit of a creditor, against the heirs, next of kin, devisees, or legatees of the deceased, as hereinafter provided." [R. S. § 6119.][72]

The matters included in the above section in reference to the rights of heirs are those mentioned in secs. 10876 G. C. (§ 585), 10877 G. C. (§ 587), 10878 G. C. (§ 587), 10879 G. C. (§ 589), 10880 G. C. (§ 590), 10881 G. C. (§ 591), 10882 G. C. (§ 592), 10883 G. C. (§ 593).[73]

[70] Favorite vs. Booker, 17 O. S. 558.

[71] Schouler Exrs. § 446b. See Smith vs. McIntire, 95 Fed. 585, when a sale to pay debts will be presumed to be valid.

[72] § 10752 G. C.

[73] Referred to in a previous chapter. § 584, *et seq.*

§ 618. Limitation of actions against administrators de bonis non. "When an executor or administrator dies, resigns, is removed or his letters are revoked, or his powers have ceased, without having fully administered the goods and estate of the deceased, and a new administrator of the same estate is appointed, the time allowed to creditors for bringing their actions shall be enlarged as follows: to so much of the eighteen months provided for the limitation of the action as expired while the former executor or administrator continued in office, must be added so much time after the appointment of the new administrator, as will make two years in all." [R. S. § 6120; 102 v. 203.] [74]

§ 618a. Not required to answer to suit brought after two years. "The new administrator shall not be held to answer to the suit of a creditor, commenced after the expiration of such two years, except as provided in the following sections." [R. S. § 6120; 102 v. 203.] [74*]

§ 619. Administrator de bonis non liable for two years after giving bond. "In all cases such new administrator shall be liable to the actions of the creditors for the space of one year after he gives bond for the discharge of his trust, although the whole time allowed to the creditors be thereby extended beyond such two years." [R. S. § 6121; 102 v. 203.] [75]

§ 620. When liable for actions for two years. "If the former executor or administrator did not give notice of his appointment as prescribed in this chapter, the new administrator shall be liable to actions of the creditors for two years from the date of the bond given by him." [R. S. § 6122.] [76]

§ 621. An administrator de bonis non to give notice of his appointment. "The new administrator shall give notice of his appointment in the manner prescribed with respect to an original administrator. If he fails so to do, he shall have no benefit of the limitations herein provided." [R. S. § 6123.] [77]

§ 622. Barred claims not revived. "Nothing in the next four preceding sections shall revive a claim barred under this

[74] § 10753 G. C.

[74*] § 10754 G. C.

See Badger vs. Orr, 34 O. C. C. 328, as to application of section to limitation of time.

[75] § 10755 G. C.

[76] § 10756 G. C.

[77] § 10757 G. C. See §§ 160, 544.

If he does not give notice limitation does not apply. Mining Co. vs. Hubbard, 8 O. App. 105.

or any other act, during the continuance in office of the original executor or administrator, or of a former administrator *de bonis non.*" [R. S. § 6124.][78]

§ 623. To be further liable if new assets received. "When assets come to the hands of such new administrator, after any of the periods above limited for the commencement of suits against him, he shall account for them, and be liable to suits and proceedings on account thereof, as is provided in this chapter with respect to an original administrator." [R. S. § 6125.][79]

[78] § 10758 G. C. See note under previous section.
[79] § 10759 G. C. § 616.

CHAPTER XXXVII.

EXECUTION. COSTS. JOINT DEBTOR.

§ 624 How estate of deceased joint debtor liable.
§ 625 Preceding section not to affect rights of surety, etc.
§ 626 How and when execution may issue against an executor.
§ 627 Revivor of actions and judgments.
§ 628 Executions against executor or administrator.
§ 628a Action upon suggestion of waste.
§ 629 Costs in actions against an estate, when not recoverable.
§ 630 When costs allowed and by whom.

§ 624. How estate of deceased joint debtor liable.

By a settled rule of the common law, the death of one of the joint makers of an obligation extinguished all remedy at law against his estate. If the contract was joint, the action must be joint, and a joint judgment must follow. But as the same judgment could not be rendered against the survivor, and the personal representative of the deceased party the consequence was, that no action at law could be maintained against the personal representative, either jointly with the survivor or by a separate suit. In such cases relief was afforded in chancery, but only when a necessity for such interposition was shown to exist, and, therefore, only upon the condition that the remedy at law against the survivor had proved fruitless. And inasmuch as no equities arise against a surety, and he is only legally bound upon the strict terms of the obligation into which he has entered, there is no small show of authority in the early cases for affirming that no such interference can be invoked against the estate of a party thus situated.[1]

To meet the difficulties presented by the common law, the following statute was passed:

[1] Burgoyne vs. O. Life & Trust Co., 5 O. S., § 586.

"When two or more persons are indebted in a joint contract, or upon a judgment founded on it, and either of them dies, his estate shall be liable therefor as if the contract has been joint and several, or as if the judgment had been against himself alone." [R. S. § 6102.][2]

§ 625. Preceding section not to affect rights of surety, etc. "The next preceding section shall not affect the rights of a surety, when certified as such, in a judgment rendered jointly against him and his principal." [R. S. § 6103.][3]

This section evidently refers to the provisions of sec. 11713, G. C., which provides, how judgment against principal and surety is to be entered, and how execution is to be enforced in such cases.

§ 626. How and when execution may issue against an executor. "No execution shall issue upon a judgment against an executor or administrator, unless upon the order of the court which appointed him, or unless the twelve months allowed by law, or the further time allowed by the court for the collection

[2] § 10733 G. C.

"The surviving obligor or obligors in a joint contract may be joined with the personal representatives of a deceased obligor, in an action upon such contract, and a several judgment can be rendered against each, Id. Where partners are indebted for services rendered to them the indebtedness is joint, and under the former practice, on the death of one the only remedy of the creditor at law was a suit against the surviving partner; but by the statute the debt becomes a joint and several obligation, and the creditor has his election to sue the surviving partner or the administrator of the deceased partner or both the surviving partner and the administrator. Weil vs. Guerin, 42 O. S. 209. Where two administrators give a joint bond with surety for the faithful administration of the estate that may come into their possession, and thereafter all the property of the deceased comes into their joint possession, if waste is committed by one of the administrators after the death of the other, the surety can require that the estates of both be exhausted before he shall be liable for the surviving administrator's default. Eckert vs. Myers, 45 O. S. 525. The surviving administrator and the representatives of the deceased administrator will be jointly liable to indemnify the surety, Id. By the provisions of this section a judgment rendered against one of two joint debtors and the administrator of the estate of another is a several and not a joint judgment." Williams vs. Bradley, 5 C. C. 114, 117; 7 Id. 227; 3 C. D. 58.

See § 225.

The estate of a deceased partner and the surviving partner are severally liable for joint obligations. Lackner vs. McKeeney, 252 Fed. 403.

[3] § 10734 G. C.

of the assets of the estate, have expired. If an account has been rendered, and settled by the court, execution shall issue only for the sum that appeared, on the settlement of such account, to have been a just proportion of the assets applicable to the judgment." [R. S. § 6105; 102 v. 202.][4]

It will be observed from the wording of the above section that it is the intention that no administrator or executor shall be embarrassed with an execution so long as the estate is unsettled and he is within the jurisdiction of the Probate Court. Unless the Probate Court authorizes the issuing of such an execution. If the administrator has made his final settlement, then execution may issue without permit of the Probate Court; and if there are assets in the hands of the administrator or executor, the execution shall issue only for the sum that shall have appeared on the settlement of such account to have been a just proportion of the assets applicable to the judgment.[5]

§ 627. Revivor of actions and judgments.

An action for libel, slander, malicious prosecution, nuisance or against a justice for official misconduct, abates by the death of either party. All other actions or proceedings, such as survived at common law and by statute, may be revived and proceed in the name of the personal representative.[6] If the plaintiff in an action dies, the action may be revived in the name of the personal representative or heirs and devisees, to whomsoever his rights in the action passed.[7]

A proceeding for the condemnation of lands must be revived in the names of the heirs or devisees.[8] If the defendant to an action in which the right survives to his personal representative dies, it shall be revived against him; and if to his

[4] § 10736 G. C.

[5] See Sur. Prac. 558 for discussion of N. Y. Law.
See Woerner on Admin. 864.
See Kemper vs. B. & L. Co., 11 C. C. (N.S.) 372; 30 C. C. 700; 80 O. S. 732; Smith vs. Lauer. 65 O. S. 563 below; Lauer vs. Smith, 1 C. C. (N.S.) 121; 24 C. C. 47.

[6] §§ 11235, 11407 G. C. and § 11407 G. C. Kinkead's Pleading, § 1054.

[7] § 11407 G. C. Kinkead's Pleading, § 1055.

[8] Ry. Co. vs. Bohm, 29 O. S. 633.

heirs and devisees, then it shall be revived against them.[9] An action for the recovery of real property is revived against the heirs or devisees of the defendant.[10] A revivor against a representative or successor of a defendant must be made within a year from the time it could have been first made.[11] But it cannot be revived in the name of the personal representative or successor of the plaintiff as a matter of right, if the expiration of the year from the time that the order might have first been made.[12] If a party dies after a levy has been made, it is not necessary that the action be revived before proceeding to sell.[13]

A claim upon which suit has been commenced against a person who dies before its termination, need not to be presented to his personal representatives before the revivor of the action may be had.[14] A revivor may in the Court's discretion be allowed if more than a year has elapsed since the death of some of the plaintiffs, and will be allowed if there has been no laches.[15] Where the summons is returned "not found — dead" there is no suit pending which can be revived against the administrator.[16] If after attempted revivor, an administrator comes in and files a general denial to the action, he becomes a party, and the action may proceed.[17] If a firm sues in the firm name, and one partner dies, action may be continued in the same name.[18] If either or both parties die after judgment rendered before satisfaction, their representatives may be made parties and the same revived by an action brought for that purpose; or they may be made parties in the same manner as in the revival of an action before judgment, and judgment may be rendered against them accordingly. If either party die after verdict rendered on error, and before the judgment is car-

[9] § 11408 G. C.
[10] § 11409 G. C.
[11] § 11410 G. C.
[12] For further discussion, see Kinkead's Pleading, § 1055.
[13] Cist vs. Beresford, 13 Bull. 363.
[14] Musser vs. Chase, 29 O. S. 577.
[15] Barr vs. Chapman, 5 C. D. 46; 11 C. C. 196; Eagle Paper Co. vs. Bragg, 4 Dec. 194; 7 N. P. 165.
[16] Daykin vs. Denner, 5 C. D. 121; 10 C. C. 652.
[17] Id. *Supra.*
[18] Pa. Ins. Co. vs. Carnahan, 10 C. D. 225; 19 C. C. 97.

ried into execution by the lower Court, the same may be revived in the lower Court.[19]

If the plaintiff dies after personal judgment has been rendered, or a decree for the specific sale of real estate is made, the action must be revived before a levy or sale can be made thereunder.[20] But unless such a judgment becomes a lien during the lifetime of the debtor, it cannot be enforced against the heirs.[21] But if a debtor dies after a levy has been made, the sale may proceed without making the personal representative a party.[22] If a defendant die after execution is levied, the execution proceeds as if the death had not taken place. But where execution is issued after the death of the defendant, upon a judgment rendered in his lifetime, and levied upon lands of which he died seized, the sale, if made, is void.[23]

§ 628. **Executions against executor or administrator.** "All executions against executors and administrators, for debts due from the deceased, except in the cases otherwise provided for herein, shall run against the goods and estate of the deceased in their hands." [R. S. § 6107.][24]

§ 628a. **Action upon suggestion of waste.** "When an execution against an executor or administrator, for a debt due from the estate of the deceased, is returned unsatisfied, the creditors may bring an action, upon a suggestion of waste, against the executor or administrator. If the defendant does not show to the contrary, he shall be deemed guilty of waste, and be personally liable for the amount thereof when it can be ascertained. If the amount of such waste can not be ascertained, the executor or administrator shall be liable for the amount due on the original judgment, with interest thereon, from the time it was rendered, and judgment and execution must be awarded accordingly as for his own debt." [R. S. § 6107.][24*]

According to the above section no execution can issue except by permission of the Probate Court, unless the estate has been

[19] § 11649 G. C.

[20] Cist vs. Beresford, 1 C. C. 32; 1 C. D. 19; Moore vs. Ogden, 35 O S. 430; Beaumont vs. Herrick, 24 O. S. 445.

[21] Miller vs. Taylor, 29 O. S. 257.

[22] Bigelow vs. Renker, 25 O. S. 542; Kinkead's Pleading, § 1057.

[23] Lessee of Massie's Heirs vs. Long, 2 O. 287.

[24] § 10738 G. C.

[24*] § 10739 G. C.

fully settled. Then if it is issued and no goods are found upon which a levy can be made, a suit may be brought against the administrator; and if the value of the property which the administrator or executor should have in his hands applicable to the execution cannot be ascertained, then the entire amount of the execution claim shall be recovered. A suit might also be brought on the bond.[25]

Where a judgment is a subsisting lien on the lands of the debtor at the time of his death, it is not necessary thereafter to issue execution upon it in order to preserve the lien. It is entitled to share in the proceeds of the land, when sold by the personal representative, according to its priority at the time of the debtor's death, although execution be not issued thereon within five years from its rendition or the date of the last execution.[26]

§ 629. Costs in actions against an estate, when not recoverable. "In suits against the estate for the recovery of money only, or of specific personal property, in which no provision is made herein in relation to costs, no costs shall be recovered against the executor or administrator, to be levied of his property or of the property of the deceased, unless it appears that the demand on which the action is founded, was presented within six months after his giving bond for the discharge of his trust, that its payment was unreasonably resisted or neglected, or that the defendant refused to refer it pursuant to the preceding provisions. In such cases the court may direct such costs to be levied of the property of the defendant, or of the deceased, as are just, having reference to the facts appearing on the trial." [R. S. § 6106; 102 v. 202.][27]

§ 630. When costs allowed and by whom.

Where a judgment for a sum of money, or for specific personal property is awarded against the administrator or executor in an action against him, it will be observed that the statute prescribes certain conditions precedent to the rights of the plaintiff to recover costs, to-wit: It must appear (1) that the plain-

[25] See § 262, § 10869 G. C.

[26] Ambrose vs. Byrne, 61 O. S. 146.

[27] § 10737 G. C.

tiff's demand was presented within one year after his giving bond for the discharge of his trust, and (2) that its payment was unreasonably resisted or neglected, or third that the defendant refused to refer the claim. On such conditions the Court having reference to the facts appearing on the trial, may award costs against the executor or administrator to be collected out of his individual property or out of the property of the deceased; and such costs are a matter of right.[28] These conditions apply to actions against executors, etc., and not for action by executors. And they do not apply to actions commenced against the decedent in his lifetime, and continued, after his death, against the executor, etc.;[29] nor to actions upon claims created since his decease, by or under the direction of the executor.[30] Nor does the statute apply to costs on appeal, or interlocutory costs.[31]

[28] Snyder vs. Snyder, 26 Hun 324. There seems to be no reported decision of our Courts on the above section, and as it is very similar to the provision of the New York Code, citations will be made from that State, from the valuable works of Redf. Sur. Prac. 542. And Jessup's Sur. Prac. 926.

[29] Benedict vs. Caffe, 3 Duer, 669; Lemen vs. Wood, 16 How. Pr. 285; Tindall vs. Jones, 19 Id. 469; 11 Abb. Pr. 258; Merritt vs. Thompson, 27 N. Y. 225; Mitchell vs. Mount, 17 Abb. Pa. 213; Yorks vs. Peck, 9 How. Pr. 201.

Merritt vs. Thompson, *supra*, expressly overrules McCann vs. Bradley, 15 How. Pr. 79, which had given a contrary construction of the statute, but in which another ground for denying plaintiff's motion to be allowed costs existed, and was noticed by the Court.

Mitchell vs. Mount, *supra*, decided at about the same time as Merritt vs. Thompson, was followed by Lemen vs. Wood, *supra*, and view in harmony therewith was adhered to in Tindall vs. Jones, 19 How. Pr. 469.

The same conclusion as that in Merritt vs. Thompson is said to have been reached, in the general term, in Haight vs. Hayt, which, however, is not reported upon this point, but was affirmed on the merits by the Court of Appeals (19 N. Y. 464), and the costs of the several appeals allowed, on the ground that an appeal is in the nature of a new action, and that as to the appeal, the executors ceased to be defendants.

[30] Smith vs. Patten, 9 Abb. Pr. N. S. 205.

[31] Hunt vs. Connor, 17 Abb. Pr. 466; Judah vs. Stag, 22 Wend. 641. The statute does not apply to a suit to foreclose a mechanic's lien (Marryatt vs. Riley, 2 Abb. N. Cas. 119). To warrant the charging of the costs on the representative personally, he must be found to be guilty of mismanagement or bad faith in the defense (Co. Civ. Proc., § 3246 R. S.).

In order to avail himself of the statutory exemption from costs, the executor or administrator must bring himself clearly within the conditions contemplated by the statute. The rule prevails, that the representative must have been guilty of some violation of duty, such as an unreasonable neglect or refusal to pay the claim when presented, before he can be properly charged with costs, in addition to referee's fees and disbursements; and no such violation of duty being shown, it is error to allow costs.

First condition. As to the first condition, it is fatal to a claim for costs that the creditor had not presented his claim within six months after the administrator or executor had given his bond. In New York it is held that it is wholly immaterial whether the executor or administrator ever gave notice of his appointment.[32] And that it does not matter that the executor or administrator unreasonably resisted and neglected to pay or refer the claim; that the plaintiff is not entitled to costs, if his claim was not presented within the statutory limitation.[33]

(2) As to the second condition — that, to charge defendant with the costs, he must be shown to have "unreasonably resisted or neglected" to pay the claim,— in deciding whether such resistance or neglect was reasonable or not, the Court must have "reference to the fact which appeared on the trial." If the Court finds that the defense was reasonable and proper, it is sufficient to exempt the defendant from costs, although in the end he was unsuccessful. Where there is reason, in the complicated nature of the accounts involved, in the great amount of business transacted and in the supposed and actual existence of grave counterclaims, to justify the defense actually made, especially if it appears that the judgment was rendered for a much

[32] Roe vs. Hunter, 8 N. P. 21; Brinker vs. Loomis, 43 Hun 247.

[33] Supple vs. Sayre, 51 Hun 30; King vs. Todd, 27 Abb. N. Cas. 149. The rule is not altered by the fact that the creditor was unaware of the publication of notice to present claims, until the statutory period allowed therefor had expired (Clarkson vs. Root, 18 Abb. N. Cas. 462). Horton vs. Brown (29 Hun 654), so far as it holds that the first condition must have been complied with and one of the subsequent conditions must have also happened, in order to entitle plaintiff to costs, has been overruled.

smaller sum than the original claim, costs should not be awarded to plaintiff.[34] It must appear, however, that the defendant had good reason to believe that there was a valid defense to the claim, in whole or a material part of it, or that the defense would probably have been successful, if, for example, he could have procured the attendance at the trial of a certain witness.[35]

Where the claim is materially reduced on the trial, it cannot be said to have been unreasonably resisted.[36] The claim on which the recovery is had must be substantially the same as the one which was presented to, and rejected by, the executor.[37] But the fact that the plaintiff was allowed to amend his complaint so as to claim a larger recovery, and to prove and to recover a larger compensation for services, than that stated in the claim presented to the executors, does not change the claim from that originally presented.[38] Nor does the fact that the action was for a smaller sum than the amount claimed in the account as presented and rejected, deprive plaintiff of his costs.[39]

[34] Johnson vs. Myers, 103 N. Y. 666.

[35] Stephenson vs. Clark, 12 How. Pr. 282. He will not be charged with costs for resisting a claim referred under the statute, where he has acted with reason and good faith, although the claim be finally allowed (Vaughn vs. Strong, 66 Hun 278; s. c. 21 N. Y. Supp. 154). In that case, which was a reference in a special proceeding, it appeared that defendant found among papers of deceased, documents in his handwriting from which she had a right to assume that the claims were unjust; and that, on two successive trials referees had found in defendant's favor. Held, erroneous, on judgment being rendered against her, on the third trial, to grant a motion for costs on the ground that payment had been unreasonably resisted.

[36] Cruikshank vs. Cruikshank, 9 How. Pr. 350; Comstock vs. Olmstead, 6 Id. 77; Buckhout vs. Hunt, 16 Id. 407; Harrison vs. Ayers, 18 Hun 336; Pursell vs. Fry, 19 Hun 595; 58 How. Pr. 317; Pinkernelli vs. Bischoff, 2 Abb. N. Cas. 107; Daggett vs. Mead, 11 Id. 116; Webster vs. Nichols, 21 Week Dig. 566; where the claim was reduced one-third. But a reduction of one-fifth, in a claim for services, in consequence of a difference of opinion as to value, where there had not been a denial of the whole claim, does not relieve from costs (Fort vs. Gooding, 9 Barb. 388). For other illustrations, see Darling vs. Halsey, 2 Abb. N. Cas. 105.

[37] Genet vs. Binsse, 3 Daly 239.

[38] Field vs. Field, 77 N. Y. 294.

[39] Carter vs. Beckwith, 104 N. Y. 236.

(3) As to the third condition — that to charge the defendant with costs, he must have "refused to refer the claim, as prescribed by law," — the foregoing considerations are entirely applicable. A refusal to refer is a fact, and not a conclusion of law, and before costs can be included in the judgment, the fact of a refusal must be found or certified to by the referee, or if the certificate does not state all the facts, fully and fairly, they may be shown by affidavits on a motion for costs.[40] The reply of the representative (defendant), on rejecting the claim, to the claimant's (plaintiff's) suggestion of a compromise and reference, that the claim had better take its course at law, is a refusal to refer, entitling the latter to costs, on a recovery.[41]

It is not necessary for plaintiff to show that, after the rejection of the claim, he offered to refer the matter before the commencement of the action (Id.). But in Nellis vs. Duesler (44 N. Y. State Rep. 229; s. c. 18 N. Y. Supp. 315), it was held that where an executor rejected a claim and refused to refer it, the claimant, though recovering only a small part of the amount demanded, was entitled to costs.

[40] Ely vs. Taylor, 42 Hun 205. The certificate of the referee, based upon a concession of the defendant on the trial that he had refused to refer the claim, should be conclusive upon the Court in awarding costs (Id.). See Russell vs. Lane, 1 Barb. 519; Wilkinson vs. Littlewood, 67 How. Pr. 474; Meltzer vs. Doll, 91 N. Y. 365.

[41] Clark vs. Corwin, 39 N. Y. State Rep. 784; s. c. 21 Civ. Pro. Rep. 108; 15 N. Y. Supp. 618.

CHAPTER XXXVIII.

CLAIMS OF EXECUTOR OR ADMINISTRATOR.

§ 631 Debts due to executor, etc.
§ 632 General Law Applicable.
§ 633 Proceedure on presentation of executor's or administrator's claim to Probate Court.
§ 634 Claims under fifty dollars.
§ 635 Where the claim exceeds fifty dollars.
§ 636 Presentation of claims.
§ 637 Entry and notice.
§ 638 Entry and notice for non-residents.
§ 639 Character of proof required.
§ 640 Allowance or disallowance of claim.
§ 641 Hearing. Exceptions. Appeal.
§ 641a Appeal on claims by executor or administrator for debt.
§ 641b On appeals from probate to common pleas court.
§ 641c Bond.
§ 642 Error, etc.
§ 643 Appeal.
§ 644 Form of appeal bond.
§ 645 Debts due for services rendered to the estate by others.

§ 631. Debts due to executor, etc.

We have heretofore seen [1] that at common law the naming of a person as executor cancels the executor's debt. This was on the theory that, the testator knowing that the executor could not sue himself, meant by naming him to serve in that capacity, that the debt should be canceled. This rule was changed by the statute. It was likewise a rule of the common law that where a person was appointed administrator or executor of an estate which was indebted to him, such administrator or executor had a right to retain his own debt out of whatever assets might come into his possession. He could do this even if it gave to his claim a superior right over others. He could also retain sufficient assets to pay his own claim without the Court passing upon the justice of the same. This idea was not in accordance with justice, and Courts of Equity were frequently called upon to correct inequalities.[2]

This matter is settled in our State by the following statute:

[1] § 10691 G. C., § 389.

[2] Schouler on Extrs. 439; Woerner, Admin. 842.

"No part of the assets of the deceased shall be retained by an executor or administrator, in satisfaction of his own debt or claim, until it has been proved to and allowed by the probate court. Such debt is not entitled to preference over others of the same class." [R. S. § 6099.][3]

§ 632. General law applicable.

There are two particular classes of debts that may be due an executor or administrator. The first class might be said to include claims for moneys advanced by him to pay legacies or debts before he has realized on the assets of the estate; and the second, debts owing to him as an individual by the decedent at the time of his death. In respect to the first class of debts it may be stated, that the payment of legacies or debts by an executor, before ascertaining what is due to the creditors, and thus before being in a position to know whether the balance of the estate will be sufficient to pay debts and legacies, is at his peril.[4]

Where an executor personally makes advances to legatees, so far as the estate is concerned he is entitled merely to be subrogated to the rights of the legatees and to a repayment from the shares of such legatees only, and if after the payment of debts it becomes necessary to scale down the legatees *pro rata,*

[3] § 10727 G. C.

Where an executor is removed, etc., and files his account, if his own claim has not been adjudicated as provided, he may sue his successor. Sharp vs. Pontius, 2 C. C. 7; 1 C. D. 331.

[4] Abbott vs. Abbott, 5 O. 86, 536; Glacius vs. Fogel, 88 N. Y. 434.

The debts of an estate must be paid before distribution to heirs; and distribution made to heirs upon the advice of counsel and the probate judge, is made at the peril of the administrator. If the estate proves solvent, he should be credited with such distribution, but if insolvent, he should not receive such credit. James vs. West, 47 Bull. 750.

Surrogate Bradford, in Clayton vs. Wardell, 2 Bradf. 1, 7, held, "that the losses suffered by the executors by these overpayments, could easily have been avoided by reserving the funds necessary to meet all claims of which notice had been received. The advertisement for claims under the statute, affords sufficient protection to the executor or administrator, if he pays or distributes after the period for the advertisement to run has expired. If he pays before, it is at his own risk, and he should suffer, in preference to an innocent creditor."

When a widow who is administratrix of her husband's estate pays a debt of the estate out of her individual funds, she is subrogated to all the rights of the creditors. *In re* Patterson, 11 O. L. R. 373; 58 Bull. 305. Judgment on exceptions to an executor's account disallowing a claim made by him to the proceeds of a certain farm by virtue of an agreement with the testator does not bar a proceeding under Sec. 10728 for compensation for working the farm under a claim of an agreement therefor. The two claims are different and inconsistent. Estate of Ward, 21 O. C. C. (N.S.) 753; 22 O. C. C. 44.

the right of the executor, independently of his ultimate remedy against the legatee, is merely to that *pro rata* share of the assets available for distribution among the legatees to whom he has made advances.[5]

But for advances made by an executor to pay debts of a solvent estate, he is entitled to reimbursement.[6] It is the second class of claims that is referred to in the above section of the General Code that will be considered in this chapter; and it is intended to place an administrator or executor upon the same plane as any other creditor of the estate.[7] Where a creditor is appointed administrator to his debtor and dies without receiving assets, it is not to be assumed that the debt was paid or extinguished. In such a case the administrator of the deceased administrator may sue the administrator *de bonis non* and recover.[8] It is perfectly competent for an executor or administrator to assign his claim against the estate and the assignee may maintain action thereon as any other creditor could.[9] The question might some times arise as to the effect of the statute of limitations either general or special in relation to the executor's claim. In view of such a question arising, the Code of New York provides that from the death of the decedent until the first judicial settlement of the account of his executor or administrator, the running of the statute of limitations against a debt due from the decedent is suspended.[10]

There is no statutory provision in Ohio on that subject, and it may, therefore, be said that if an administrator's or executor's claim is barred by the statute of limitation before the death of the deceased, it could not be revived by action of the administrator or executor. The object of the suspension of the running of the statute in New York is for the reason that the executor's claim could not be passed on until the first judicial settlement of his account. Such not being the case

[5] Rogers vs. Weaver, 5 O. 536; Tickel vs. Quinn, 1 Dem. 425, 432. See also Estate of Randell, 8 N. Y. Supp. 652.

[6] Livingston vs. Newkirk, 3 Johns. Ch. 312; Yeddo vs. Whitney, 17 Weekly Dig. 120. Even if he borrows money for that purpose. Westwater vs. Gintner, 18 N. P. (N.S.) 209.

[7] Williams vs. Purdy, 6 Paige, 166; Clark vs. Clark, 8 Paige, 152.

[8] Hall vs. Pratt, 5 O. 72.

[9] Snyder vs. Snyder, 96 N. Y. 88.

[10] New York Civ. Code, § 2731; Jessup's Sur. Pract. 1311.

in Ohio, our statute permitting the executor or administrator to file his claim for allowance any time after his appointment. It would seem that the general rule to be applied to an ordinary creditor would be applied on the claim of an executor or administrator. And if the administrator or executor fail to present his claim to the Probate Court until the right of action is barred thereon, he would lose his claim.[11] Of course, after the claim was once presented the statute would cease running. Under the New York statute, after the first judicial settlement, the statute begins to run.[11*]

§ 633. Procedure on presentation of executor's or administrator's claim to Probate Court. "When an executor or administrator presents a debt or claim to the probate court for its allowance, which he owns, against the estate he represents, amounting to fifty dollars or more, the court must fix a day, not less than four weeks nor more than six weeks from its presentation, when the testimony touching it shall be heard. The court forthwith shall issue an order, directed to the executor or administrator, requiring him to give notice in writing to all the heirs, legatees, or devisees of the decedent interested in the estate, and such creditors as are therein named. Such notice must contain a statement of the amount claimed, designate the time fixed for hearing the testimony, and be served upon the persons named in the order at least twenty days before the time for hearing. If any persons mentioned in the order are not residents of the county, service of notice may be made upon them by publication for three consecutive weeks in a newspaper, published or circulating in the county. All the persons named in the order shall be parties to the proceeding, and any other person having an interest in the estate, may come in and be made a party thereto." [R. S. § 6100.][12]

11 *In re* Ward, 21 C. C. 753.

11* Redf. Sur. Pract. 528.

12 § 10728 G. C.

A proceeding commenced by an executor or administrator under § 10728 G. C., for the allowance of a claim which he owns himself, is an action or suit in his behalf. *In re* Ward, 21 C. C. 754.

The Probate Court has jurisdiction under § 10728 G. C., § 633, to reject or allow claims of an executor, etc., and all equitable power necessary to a full and complete justice, and allowance may be made to a mother out of a child's estate for past support under extraordinary circumstances. Spink vs. Spink, 7 C. C. (N.S.) 89; 28 O. C. C. 94; affirmed 78 O. S. 390.

The original jurisdiction of the Probate Court in the allowance of the administrator's claim. Field vs. Block, 4 C. C. (N.S.) 216; 26 O. C. C. 113. See Liggett vs. Liggett, 51 Bull. 59, following the same rule. A payment made by the administrator on his own claim would not take it out of the statute because he had no right to make such payment. In procedure for allowance of a claim of the executor against an estate a co-executor is not a necessary party. Downing vs. Downing, 3 O. C. C. (N.S.) 623; 23 O. C. C. 389.

§ 634. Claims under fifty dollars.

The above section makes no provision as to how a claim of an administrator or executor under fifty dollars may be allowed. It is evidently the intention of the law that where a claim is less than fifty dollars that the executor or administrator shall verify and file his claim with a receipt for its payment with his account, and permit it to be attacked in exceptions to the account. Of course the administrator or executor would have no right to pay his own debt in any other order of priority than that allowed to other claims of a like character. It sometimes happens that even where claims above the sum of fifty dollars exist in favor of the executor, that it is the desire of all parties to save the annoyance and trouble of the Courts passing on such a claim. If the estate is solvent, and the administrator procure a written approval of all the heirs, I see no reason why he could not retain sufficient assets to pay the claim. The better way, however, is always to follow the provisions of the statute.

§ 635. Where the claim exceeds fifty dollars.

Where the claim exceeds fifty dollars the statute is specific in providing the mode of procedure. In the first place it must be presented to the Probate Court that made the administrator's or executor's appointment. In the second place the Court shall fix a day for hearing not less than four weeks, nor more than six weeks from the time of its presentation. In the third place an order shall be issued to the executor or administrator requiring him to give notice to all the heirs, legatees, or devisees, and such creditors as the Court may think proper. Which notice shall contain a statement of the amount of the claim, and designate the time fixed for hearing. Fourth, that said notice must be served at least twenty days before the time fixed for hearing. And fifth, if any of the persons requiring notice be non-residents they shall be served by publication for three consecutive weeks in a weekly newspaper published or circulating in the county. Sixth that all of the persons named

in the order requiring notice are parties to the proceeding and any other person interested in the estate may be made a party.

§ 636. Presentation of claim.

The statute does not so say, but I have no doubt that the claim must be presented to the Probate Court that makes the appointment. Neither does the statute contemplate that there shall be any other pleadings in the case, than the statement or account that is filed by the executor or administrator. It would, therefore, be proper that the statements contained in the account be of such a character that if they were put in the form of a petition, a demurrer would not lie. The claim ought to be itemized and sworn to. Recognizing the fact that administrators or executors are not educated lawyers, and sometimes do not employ legal counsel, a liberal rule would no doubt be applied in such cases, similar, perhaps, to that in a Justice's of the Peace Court. The claim ought to be presented in a reasonably short time after the administrator's or executor's qualification. This is so for several reasons. It might prevent a troublesome question of the statute of limitation,[13] and it would also assist a speedy settlement of the estate by having such matter settled at as early a date as possible. The following may be used as a form:

APPLICATION.

(*Title.*)

To.....Probate Judge of.....County, Ohio.

C. D., executor (or administrator) of the estate of A. B., deceased, respectively represents to the Court that the estate of A. B. is indebted to him in the sum of.....Dollars, which debt was incurred during the lifetime of said A. B. And that an itemized account attached and marked exhibit A., is a correct statement of said account. (Here if the same be founded upon a promissory note, a copy of the promissory note might be given instead of an exhibit.)

Wherefore said C. D. prays the Court that an order may be made fixing a day for the hearing of said claim, and the giving of notice thereof as required by law, and that upon a hearing thereof that said claim may be allowed as a valid claim against the estate of A. B., and that he may have such other relief as is just and proper.

.....

[13] *In re* Ward, 21 C. C. 753, § 632.

State of Ohio, ...County, ss.
C. D. being first duly sworn says that he is the owner of the claim set forth in the above application and that the same is just, due and unpaid, that there are no offsets against the same, and that the estate of A. B. is justly indebted thereon in the sum of.....Dollars.

....

Sworn to and subscribed before me and in my presence this.....day of .....

§ 637. Entry and notice.

Upon the presentation of this claim the Court must make an order fixing the time of hearing, and make an order requiring the administrator to give notice to the heirs and other interested persons. The entry may be in the following form:

(*Title.*)
This day came C. D., administrator (or executor) of the estate of A. B., and presented to this court his claim against the estate of said A. B. for allowance; and thereupon the Court fixed the.....day of..... at .....o'clock....M., 190.., as the time for hearing the same; and orders that said administrator (or executor) give notice thereof in writing to the following parties: (here insert the names of all the heirs, devisees and legatees and such creditors as the Court may think should be notified), at least twenty days before said time set for hearing.

The following may be used as a form of notice:

To C. D., administrator (or executor).
You are hereby commanded to notify the following persons (here insert names of persons to be notified), that on the.....day of..... you presented to the Probate Court of.....County your claim against said estate, amounting to.....dollars, and that this court has set the time for hearing, the same to be on the.....day of..... at.....o'clock, at the office of the Probate Judge of this county. You are further ordered to serve the said notice at least twenty days before the said time of hearing. .....,
Probate Judge.

§ 638. Entry and notice for non-residents.

If the heirs, legatees or devisees, or a creditor that the Court require to be notified are non-residents of the county, then service must be made by publication, and the entry may be in the following form:

(*Title.*)
This day came C. D., administrator (or executor) of the estate of A. B., and presented to this court his claim against the estate of A. B., deceased, thereupon the Court fixes the.....day of.....at..... o'clock...M., 190.... as the time for hearing the same, and it appearing to the Court that (here mention names of the parties that are non-residents), are non-residents of this county. It is ordered that notice be given

by publication for three consecutive weeks in a weekly newspaper published (or circulating) in this county.

The following may be used as a form of notice, when required by publication:

To E. F., G. H., and I. J., residents of.....County, Ohio, and L. M., a resident of.....County, Iowa.

Persons interested in the estate of A. B., deceased, late of..... County, Ohio, as (here state how interested, whether heirs, devisees, legatees or creditors), will take notice that on the.....day of..... ....., C. D., the administrator (or executor) of the estate of A. B., presented to the Probate Court of.....County, a claim for allowance against the said estate, for the sum of.....Dollars. That said cause will be for hearing on the.....day of....., at .....o'clock...M., 190..., at the office of the Probate Judge of said county.

C. D., Administrator.

The notice whether served or given by publication should have a proof of service made thereon and filed with the Probate Court, with the papers of the case, and made a part of the proceedings.

§ 639. Character of proof required.

It has been said that the claim of an executor or administrator, particularly if a relative of the deceased, is viewed with suspicion.[14] And when the claim is based on a note overdue at the time of the testator's death, the executor must show clearly that he held the note by a title hostile to that of the deceased, unexplained possession being insufficient.[15] In other cases it has been held that where the debt is based on a written obligation, the executor is entitled to the benefit of the usual presumption. He is not bound, therefore, to prove affirmatively that the note has not been paid.[16]

The rule is general that the claimant's own affidavit, verifying his claim, is not, of itself, the proof required. The existence of the debt must be established by legal evidence, in addition to the verification which he may require of another creditor. Thus where the administrator sworn, on his own

[14] Kydd vs. Dalrymple, 2 Dem. 630.

[15] Kuhlman's. Estate, 178 Pa. St. 43; Hoffer's Estate, 156 Pa. St. 473.

[16] Macombers Estate, 11 N. Y. Supp. 198.

behalf without objection, failed to testify that no payments had been made on account of his claim, or there were no offsets against it, the claim was rejected, as these were held to be affirmative facts to be established by the claimant.[17] In this kind of a proceeding the application takes the place of a petition and the proceedings assume the character of a case at law and hence the rules of evidence applicable to any other proceeding at law, should be applied here. If the parties resisting the application plead payment, the burden of proof is upon them.[18]

§ 640. Allowance or disallowance of claim.

If upon the hearing the Court is satisfied that the claim is a just one, it should be allowed to the administrator or executor. Interest may also be allowed, the same as to any other creditor. The following may be used as a journal entry:
(*Title.*)

This day this matter came on to be heard upon the claim presented to this court for allowance by C. D., administrator (or executor) of the estate of A. B. against the estate of A. B., for the sum of..... Dollars, and it appearing to the Court that notice thereof has been given as required by the former orders herein made, this cause came on further to be heard upon the testimony of witnesses and was submitted to the Court. Whereupon the Court finds that such claim is a valid and legal one, and that there is due from the estate of A. B. to said C. D., the sum of.....Dollars, with interest from the.....day of..... ....., and it is therefore ordered that the said claim be allowed as a valid one against the estate of said A. B., and that the said C. D. may retain out of the assets, a sum sufficient to pay the same, provided assets are in his hands applicable to claims of the same character sufficient to pay all in full. If not then said claim to be paid *pro rata* with those of the same class; and that the costs of this proceeding is taxed at..... .....Dollars, be paid out of the funds of said estate in the hands of said administrator.

If the claim is disallowed, an entry should be made containing the findings of the Court, and might in addition contain a provision that the administrator should pay the costs of the proceedings.[19]

[17] Wood vs. Rusco, 4 Redf. 380; Redf. Sur. Prac. 527; Woerner on Admin. 822; Jes. Sur. Prac. 918.

[18] See Estate of Gerke, Goebel, 289; *In re* Ward, 21 C. C. 758, as to evidence incompetent.

See *In re* Runyans Est., 4 N. P. 335; 7 Dec. 236.

Transactions with an agent is as inadmissible as if made by declarant himself. Wehrman vs. Beech, 7 C. C. (N.S.) 216; 28 O. C. C. 128.

[19] See § 1640, Assignments—preferred claims.

§ 641. Hearing. Exceptions. Appeal. "Upon the hearing as to the allowance of such debt or claim, exceptions may be taken to a decision of the court upon a matter of law, by any person affected thereby. Bills of exception may be taken and allowed, and proceedings in error had after a final order or judgment as is provided in other cases." [R. S. § 6101.][20]

§ 641a. Appeal on claims by executor or administrator for debt. "When an executor or administrator asks the allowance of a debt or claim for more than one hundred dollars against the estate of the decedent, an appeal may be taken by any person affected thereby to the common pleas court from an order or judgment of the probate court, allowing or disallowing it, or any part thereof." [R. S. § 6101.][20*]

§ 641b. On appeals from probate to common pleas court. "In appeals from the probate to the common pleas court, the matter so appealed must be tried and decided in like manner, and so near as practicable the proceedings be the same as if the common pleas had original jurisdiction thereof; except that, unless the court orders them, pleadings are not to be filed." [R. S. § 6101.][20**]

§ 641c. Bond. "Within twelve days after the making of such order or judgment, the person so appealing shall give a bond to the state, in such amount as the probate judge prescribes, with one or more sureties to be approved by him, for the use of the person interested therein, conditioned that the appellant will pay all costs awarded against him in the appellate court." [R. S. § 6101.][20†]

§ 642. Error, etc.

It will be observed that the object and purpose of the previous section is to preserve to the parties every right that they would have had if the action had been brought on the claim in a Court of general jurisdiction; and it is, therefore, specifically provided that exceptions may be taken to any decision of the Court upon any matter of law, by any person who may be affected thereby; and that bills of exceptions may be taken and proceedings had as in ordinary cases in error. It, therefore, makes the Probate Court a Court of original jurisdiction in the matter of a claim of an administrator or executor against the estate. Providing both appeal and error, and every objection to the right of trial by jury, etc., upon such a claim is removed,

[20] § 10729 G. C.
[20*] § 10730 G. C.
[20**] § 10731 G. C.
[20†] 10732 G. C.

practice has demonstrated the fact to us that generally the decision of the Probate Court is final in such matters.

§ 643. Appeal.

The second previous section provides as ample a power for appeal from the decision of the Probate Court, as it does for proceedings in error, except that where the amount does not exceed one hundred dollars there can be no appeal. If the cause is appealed it should be tried in the Court of Common Pleas, in the same manner as if the action had been originally brought in that Court. There need not be any additional pleadings unless the Court sees fit to order them. In such a case the executor or administrator would be in the position of plaintiff and those resisting in the position of defendants. If it is desired to take an appeal, the statute must be strictly complied with, and the person desiring to appeal, which may be either the executor or other interested party, must within twelve days after the judgment has been rendered, give a written undertaking to the State of Ohio with one or more sureties to be approved by the Probate Judge, with the condition that the person appealing shall pay all the costs awarded against him, and which bond must be in the amount that the Probate Judge prescribes. If any person desires to appeal, it would be well to fix the amount of the appeal bond in the entry giving judgment.[21]

§ 644. Form of appeal bond.

Be it known, that we, G. H., I. J., and K. L., are held and firmly bound unto the State of Ohio, for the use of (here name the persons interested in the judgment appealed from), in the sum of (here insert the amount fixed by the Court), to the payment of which we do hereby jointly and severally bind ourselves, if default be made in the condition following:

Whereas, C. D., executor of the last will (or administrator of the estate) of A. B., late of.....County, deceased, did, on or about the..... day of....., A. D. 190..., present to the Probate Court of said county, for allowance in favor of said C. D., against the estate of A. B., a certain claim of.....Dollars, for....., and,

Whereas, said court heard the testimony touching said claim on the .....day of....., A. D. 190...; and, thereupon, did, on the same day (or on the.....day of....., A. D. 190..., as may be),

[21] See Downing vs. Downing, 23 C. C. 389; 3 C. C. (N.S.) 623.

allow said claim against said estate, from which decision the said G. H. has appealed to the Court of Common Pleas of said county of.....

Now, if the said G. H. shall pay all costs that may be awarded against him in said Court of Common Pleas, in the proceedings therein to be had concerning said claim, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

Signed by us, this.....day of.....A. D. 190...

(Signature of G. H., I. J. and K. L.)

When said bond is filed in the Probate Court, the judge should make an entry of the fact which may be in the following form:

(*Title.*)

This day came G. H. and filed his bond to appeal this cause to the Court of Common Pleas, which bond is in the sum of.....dollars, with I. J. and K. L. as sureties thereon. On examination whereof the Court finds that said bond is according to law, and with sufficient sureties and in the amount heretofore ordered by the Court. It is therefore ordered that said bond with the sureties thereon be approved by this Court.[21a]

§ 645. Debts due for services rendered to the estate by others.

In addition to the kind of debts mentioned in the first sections of this chapter, which may be due to an administrator or executor, are those made by the executor or administrator in the management of his trust.[22] It is well settled in Ohio, that this kind of a debt is not one for which the estate can be made liable by suit. The executor or administrator assumes a personal liability and then depends upon the Court to allow him for the disbursement. If the administrator wishes to avoid a responsibility, he must expressly stipulate that the creditor shall be paid out of the estate only.[23]

As to what right the creditor may have against the estate for services rendered, there may be some question. Woerner says: "In view of the ultimate liability of the estate for the disbursements made in its behalf by the executor or administrator, and of the duty incumbent upon the Probate Court to pass upon the question of the reasonableness of the charges, as well as of the liability of the estate, it would seem that original jurisdiction to adjudicate between executors or administrators

[21a] This entry might continue and order that a transcript of the proceedings be made which, together with the papers, be filed in the Court of Common Pleas.

[22] See § 506, *et seq.*, Care and management, etc.

[23] Woerner, Admin. 758; Mellen vs. West, 5 C. C. 93; 3 C. D. 46.

and their creditors for services in respect of the estate should, on principle, be vested in the Probate Court, to avoid circuity of action and unnecessary costs and delay." It is also said "That the person rendering services might, whatever his claim against the administrator may be, present it directly to the Court.[24]

Whether such could be done under the Ohio law, is an open question. There seems to be no good reason why a creditor should not have this privilege. As the Probate Court must ultimately pass upon the question whether his claim is such an one as could be allowed against the estate, there seems to be no good reason why the Probate Court should not pass upon this, in the first instance, should the creditor so desire. The administrator or executor certainly could not be affected injuriously thereby and it might be to his benefit, for if such administrator or executor should be compelled in a suit against him by the creditor to pay more than the Probate Court should deem to be a just and reasonable value of such services, he would be the loser. There may be instances when such a course would permit the creditor to protect himself where otherwise he might be in danger of losing his claim. Especially is this true if the administrator or executor be insolvent. In such a case it being a personal obligation of the administrator or executor, a judgment against him would be of no value. It has been held that a Court of Equity might, where the executor or administrator is insolvent, order that such services be paid out of the assets of the estate. But why require that kind of a proceeding, instead of permitting the creditor to apply directly to the Probate Court for an order directing the administrator or executor to pay the claim out of the assets of the estate? In fact if the administrator or executor be insolvent, the creditor rendering such service would be without a remedy. For if the assets are once distributed, he could not recover from the persons receiving the same; and if exceptions were filed

[24] Woerner on Admin. 758.

See § 646, *et seq.*, Time and order of payment of debts, etc.

to the account, and sustained, it could hardly be said to be such a *devastavit* that a recovery might be had against the bondsmen.

In the case of Mellen vs. West,[25] where an administrator employed an attorney and then died, it was held that "if the succeeding representative of the estate is satisfied of the correctness of the charge, and that the Probate Court would sanction it, the amount should be paid by him. But if there is doubt on this point, or the administrator, for any cause refuses to do this, we have no question but that it should be worked out by the decision of the Probate Court, which, if the validity and justice of the claim are shown, might direct its payment by the administrator as part of the costs and expenses of settling the estate."

[25] 5 C. C. 93; 3 C. D. 46.

The question whether or not the Probate Court would have jurisdiction to make such an order is not free from difficulty. Woerner elsewhere states the law to be, that the Probate Court has no right to determine such a question, and that the remedy of the creditor must be sought out in another court. Woerner, Admin., § 162. The question in our State is, whether or not the statute which gives to Probate Courts exclusive jurisdiction to direct and control the conduct of administrators or executors, is broad enough to direct an executor to pay a claim out of the estate for services rendered in behalf of the estate, § 10492 G. C., § 27.

In a recent case (Jones vs. Green, 21 C. C. 97; 11 C. D. 548), it was held that the Probate Court had no authority to order an administrator to specifically perform an agreement alleged to have been made by his intestate. This case is somewhat different from that which would be made to a court asking that the Court direct the administrator or executor to pay a claim, not that the intestate had incurred, but that the administrator or executor has incurred. As stated in the text, such a claim is a part of the settlement of the estate incurred in its management, care and control. There seems to be good reason why the Probate Court might not rightfully exercise jurisdiction in such a case.

The recent case of Smith vs. Rhodes, 68 O. S. 500, sustains the power of the Probate Court to order a debt paid, where the debt was incurred in the administration of the estate. In this case the court required the administrator to file an account of his expenses. This was done. It included an attorney's fee—and the court approved this expense account. The administrator did not pay the attorney, and suit was brought against his bondsmen and sustained.

In the case of Denmead vs. Sharp, 14 Dec. 301, it was held that the Common Pleas Court had no power to compel an administrator to receive payment of an unmatured note, and the Probate Court did have such power. This case is a little different from the case of Jones vs. Green, 21 C. C. 96; 11 Cir. D. 548.

CHAPTER XXXIX.

ORDER AND TIME OF PAYMENT OF DEBTS AND ADMINISTRATOR'S COMPENSATION.

§ 646 Generally.
§ 647 In what order debts to be paid.
§ 648 Can not be paid in other order.
§ 649 Funeral expenses.
§ 649a Funeral expenses, etc. Husband and wife.
§ 650 Amount to be allowed as funeral expenses.
§ 651 Tombstone.
§ 652 Last sickness.
§ 653 Expenses of administration.
§ 654 Compensation allowed executors or administrators. Further allowance. Effect of compensation provided by will.
§ 654a Further allowance.
§ 655 When entitled to.
§ 656 How calculated.
§ 657 Compensation fixed by will.
§ 658 Compensation of joint administrators.
§ 659 Extra compensation.
§ 660 Employment of agent, office rent, etc.
§ 661 Allowance made to the widow and children.
§ 662 Debts due the United States.
§ 663 Taxes, etc.
§ 664 Wages.
§ 665 Debts due general creditors.
§ 666 Previous section (10715) not to affect lien.
§ 667 When executor or administrator may proceed to pay debts without being liable for deficiency of assets.
§ 668 Notice of demands, etc.
§ 669 And if whole estate be paid and afterwards other claims presented, he shall not be liable therefor.
§ 670 If so paid away as to leave insufficient assets to satisfy subsequent claims. How far liable.
§ 670a May prove estate insolvent.
§ 671 If assets are exhausted in paying preferred claims. Executor or administrator not liable for payment of subsequent claim.
§ 672 Interest on claims.
§ 673 Payment to heirs, etc., before final settlement.

§ 646. Generally.

In the treatment of the administration of estates, we have now reached a period, which one distinguished author declares to be the principal function of executors and administrators, that is to pay the debts, and discharge the liabilities of their testators and intestates.[1] Having treated of the appointment of administrators and executors and filing of inventories, the

[1] Woerner on Admin. 755. An administrator may pay debts without liability to those who have not presented their claims within six months after he has given notice of his appointment. § 10741 G. C., § 667.

disposition of personal property and presentation of claims, some authors have considered the subject of the disposition of real estate as a proper one to follow, and such seems to be the order of arrangement of the sections of the General Code. We have deemed it better, whether wisely or not, to consider the subject in logical order, as if the personal estate was all that was to be administered upon; and will consider the sale of real estate in subsequent chapters, after the subject of accounting and distribution has been discussed. It is a well-settled principle of law that personal property is the primary fund for the settling of all the personal obligations of the testator.[2] This order may, however, be changed if a testator clearly designates some other fund to be primarily liable.[3]

In order that equality may exist, the law does not permit a creditor by superior diligence to acquire a superior right, but the estate stands for the payment of all general creditors alike.[4] He may lose his claim by negligence however. A contract to pay a certain debt out of the promisor's personal estate after death, does not confine it to that fund.[5] In the payment of the debts of the testator the law expects that the administrator or executor will always act in the interest of the estate. If he could settle a debt for less than its face value, he must account to the estate for the profit, he can not pay a debt for less than its face value and charge the estate with more than he pays for it.[6] And this rule will extend to an agent acting for the administrator or executor. The payment of debts of the intestate and the order of their payment will be the subject of discussion in the remaining sections of this chapter.[7]

§ 647. In what order debts to be paid. "Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order:

"1. The funeral expenses, those of the last sickness, and the expenses of administration;

[2] Case vs. Hall, 52 O. S. 24; Jes. Sur. Prac. 955.

[3] Bane vs. Wick, 14 O. S. 505. See § 1208.

[4] McDonald vs. Alten, 1 O. S. 293.

[5] Judy vs. Louderman, 48 O. S. 562.

Cox vs. John, 32 O. S. 532.

[7] See § 705, Filing account; § 732, Notice; § 895, Sale of real estate; § 904, Proceeds of real estate; § 959, Insolvent estate; §§ 694-695, Payment of legacies; § 755, Distribution.

"2. The allowance made to the widow and children for their support for twelve months;

"3. Debts entitled to a preference under the laws of the United States;

"4. Public rates and taxes, and sums due the state for duties on sales at auction;

"5. To every person who performed manual labor in the service of the deceased, before payment of the general creditors, the full amount of wages due to such person for such labor performed within twelve months preceding the decedent's death, not exceeding one hundred and fifty dollars;

"6. Debts due to all other persons." [R. S. § 6090.] [8]

"If there be not enough, after paying any one of such classes, to pay all the debts of the next class, the creditors of the latter class shall be paid ratably in proportion to their respective debts. No payment shall be made to creditors of one class, until all those of a preceding class or classes, of whose claims the executor or administrator has notice, are fully paid." [R. S. § 6090.] [8*]

§ 648. Can not be paid in other order.

This statute, as to the priority of debts, is mandatory. It is intended to be a direction to the administrator or executor as to the manner of performance of his duty, and it prescribes the order of preference to be observed by him in the payment of

[8] § 10714 G. C.

[8*] § 10715 G. C.

The order in which debts are payable out of a decedent's estate is, at common law, as follows: "First, debts due the crown by record of specialty; second, certain debts, peculiar to the English laws and customs, such as debts to the postoffice for letters, money due the parish from deceased overseers of the poor, funds in the hands of officers of friendly societies, regimental debts, etc.; third, judgments of courts of record (except those in foreign countries), and decrees in equity rendered against the deceased in his lifetime; fourth, recognizances before courts of record or magistrates, and securities by statute, such as the statute merchant, statute staple, and the like; fifth, debts by special contract under seal, and rent; sixth, simple contract debts, those due the crown taking precedence of those due any subject, and damages for injuries to real or personal property of another." Woerner on Admin. 769.

If an administrator having knowledge of a valid claim against an estate, pays all other claims, thereby exhausting the fund, he is liable. *In re* Wakefield Est., Goebel 5.

A claim for alimony under the decree of a court of another state does not bind property in this state as a preferred claim, unless asserted in this jurisdiction in the lifetime of the decedent. Murray vs. Murray, 21 Dec. 807.

A provision in a will that "out of my estate my children shall pay my funeral expenses and all my debts," not only includes debts which the testator owed at the time of his decease, but all debts, such as costs of administration of the estate. Harbeson vs. Mellinger, 2 O. App. 75; 18 O. C. C. (N.S.) 504; 35 O. C. C. 196.

debts. This is its express object, and the administrator or executor, when he proceeds to discharge his duty, is bound to obey its directions.[9] Even if the Court direct otherwise the administrator may disregard it.[10] If the administrator disregard the order prescribed, and the estate prove insolvent, he will be liable to any class of creditors, to the extent of their loss, who thereby do not receive what they would have received if the proper order had been observed.[11]

Such is the law in every State of the union as well as in England,[12] and an administrator or executor would not only be personally liable, but would be liable to suit on his bond. A failure to observe the proper order, results usually from a want of proper realization of the exact condition of the estate. If an administrator or executor proceeds in any other manner than authorized by law, he always assumes a risk. A distinguished author well says how this rule, of the order of payment, is very often violated.[13]

The above section of the General Code requires that every executor or administrator shall proceed with diligence to pay the debts of the decedent. But such diligence is to be made in

[9] Matter of St. John, 1 Tucker, 126; Jessup's Sur. Prac. 948.

[10] Jenkins vs. Jenkins, 63 Ind. 120.

[11] Cunningham vs. Cunningham, 94 Ind. 557.

[12] Woerner on Admin. 783.

An executor has no power, as such, before final settlement, to turn over to one creditor of the estate notes held by the estate; without an order of the court, and a person holding them has no title. Surety Co. vs. Houghton, 22 O. C. C. 138.

Where property of decedent has come into ones possession after the death of decedent, no right of setoff exists in favor of that person against the executor or administrator. Downer vs. Savings & Loan Co., 16 O. C. C. (N.S.) 378.

[13] It may not be out of place, however, to remark, that the violation of this rule of law is rarely attributable to bad faith, or a conscious disposition to unduly favor one creditor to the prejudice of another; it arises sometimes out of sheer ignorance of the law, and at other times in consequence of thoughtlessness and lack of caution and foresight. It happens but too often that the assets of an estate fall far short of the expectations of heirs and personal representatives, even after the inventory and appraisement have been filed and more often still, that the liabilities turn out to be much greater than they supposed. Many estates prove insolvent, which are at first looked upon as ample to pay all debts and leave handsome portions to the heirs; yet executors and administrators often close their eyes to the possible, in many cases imminent, consequences of paying debts indiscriminately. Widows, in particular, zealous to vindicate the good name of departed husbands, eagerly pay all debts as fast as presented, and as long as they have anything to pay with, frequently involving loss to

payment in the order provided by statute. It also means that he is not required to proceed to the payment of all the debts until the full extent of the indebtedness of the deceased has been ascertained.

By sections of the General Code [14] it is provided when an administrator or executor may pay claims without responsibility, for any demands that may be afterwards presented. Other sections allow an administrator or executor to make distribution if claims are not presented after eighteen months have elapsed from the date of his bond.[15]

§ 649. Funeral expenses.*

The first in order of payment are funeral expenses, those of last sickness, and expenses of administration. These are each entitled in a like degree to be first paid, although in some States they come in a different order. In this section the first of these three will be discussed. The administrator is entitled to credit for all moneys properly expended for the funeral expenses of the deceased,[16] but not if they were reimbursed from another source.[16*] He may pay proper and reasonable funeral

other *bona fide* creditors, themselves or their bondsmen. Simple obedience to the law is sufficient to avoid such danger. Provisions exist in most American States whereby the amount payable to each creditor is adjudged by the Probate Court having jurisdiction of the estate. Payment under such order is a protection to the administrator and simple prudence requires that no debts be paid until such order is obtained. Woerner on Admin. 783.

[14] §§ 10741, 10742, 10743, 10744, 10745 G. C., §§667, 669, 670, 671.

[15] § 10746 G. C., § 613. See § 705, Accounting.

[16] The Probate Court has no power to direct the administrator to pay a claim. *In re* Geo. H. Miller Est., 12 Dec. 562; Crapo vs. Armstrong, 61 Ia. 697; *In re* Miller, 4 Redf. 302; Allen vs. Allen, 3 Dem. 524; Spire vs. Lovell, 17 Ill. App. 559.

* Cited, *In re* Kirchner, 6 N. P. (N.S.) 459; 52 Bull. 107; Kroll vs. Close, 82 O. S. 193.

While funeral expenses are mentioned first in the first class, it may be questionable whether they have any priority over the other two—last sickness and costs of administration. If there is not enough to pay all in the first class in full, then it is probable they should prorate. It is a general practice that, first of all, costs of administration must be paid, and on the theory that they are necessarily incurred to enable a fund to be preserved out of which funeral and expenses of last sickness can be paid. See § 645.

[16*] Estate vs. Hyneman, 11 Phila. 135.

The immediate duty of burying the body rests upon the husband or the wife, or other relative of the decedent, or may rest upon a stranger under whose roof the death occurred. He cannot keep the body unburied, or by exposing it to violation, offend the feelings or endanger the health of the living. By whomsoever the duty is performed, the

expenses without the claim being first allowed by the Court against the estate; because it is of necessity to secure an early burial of the deceased.[17] The widow is entitled to be reimbursed for money advanced to pay such expenses, even though she at the time declare that she will make no claim on the estate.[18] A friend, however, voluntarily rendering aid, is not entitled to pay; such as searching for the remains of the deceased, writing and sending advertisements to the newspapers for the funeral, requesting the clergyman to perform the burial services, placing the corpse in his own house and permitting the funeral services to be held there.[19]

estate of the deceased is ultimately liable to defray the necessary reasonable expenses of the burial. It is analogous to the duty and obligation of a father, to furnish necessaries to a child and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits to do. It is not usual, and in most cases, it is not possible, for letters either testamentary or of administration upon the estate to be applied for and granted before the funeral of the decedent, so that the executor or administrator as such is very rarely called upon to superintend the funeral ceremony or direct the necessary expenditure of money. It seems to be settled that the reasonable and necessary expenses of interring the dead body of a decedent are a charge against his estate, though not strictly a debt due from him; so that his personal representative may be sued, as such, for their recovery. Redf. Surr. Prac. 437.

[17] But such claims should be presented for allowance and rejection the same as any other claim. *In re* Geo. H. Miller, 12 Dec. 562; Samuel vs. Thomas, 51 Wis. 549; Gregory vs. Hooker, 1 Hawks 394; Patterson vs. Patterson, 59 N. Y. 547; Wilson vs. Shearer, 9 Met. 504; Palmes vs. Stephens, 2 M. Charlt. 56; Rappelyea vs. Russel, 1 Daly 214; Regina vs. Stewart, 12 Ad. & E. 773; McClellen vs. Eilson, 44 Ohio St. 184; Dampier vs. St. Paul, etc., Co. (Minn.), 49 N. W. Rep. 286.

[18] Frances' Estate, 75 Pa. St. 220; Sullivan vs. Horner, 41 N. J. Eq. 299.

[19] Hewitt vs. Bronson, 5 Daly 1; *In re* McHugh's Estate, 152 Pa. St. 442; S. C., 31 W. N. C. 416; 25 Atl. Rep. 875.

Where a third person, *e. g.*, the mother of the deceased, officiously, in the presence of the husband of deceased, assumed entire control of the arrangements and sent for the undertaker, telling him to spare no expenses, it was held that she became personally liable to the undertaker for the funeral expenses, and that both the husband and the estate were relieved from the obligation otherwise imposed on them by law. Redf. Sur. Prac. 438.

The wife has control of the burial of her husband's body. A man cannot dispose of his body by will. A Court of Equity will decide controversies over the burial of deceased persons. Herold vs. Herold, 3 N. P. (N.S.) 405; 16 Dec. 303.

See vol. 73, Cen. Law Journal, p. 39, for article on "Property Rights In Human Bodies."

If there is not sufficient assets to pay the expenses, the administrator is not personally liable.[20] But it has been held that the administrator, if he order the services, is personally liable.[21] This is especially true if he have plenty of assets and refuse or fail to pay the expenses.[22] Mourning apparel for the family is not a proper charge.[23] But carriage hire in cities and towns to carry the family and friends to the place of interment are proper charges,[24] although not from one town to another and back.[25] Reasonable expenses for taking up the body and removing it to another place if the first place is found improper, are allowable,[26] but not if the first place of burial was proper.[27] The expense of communicating the news of the death of the deceased to his family is a reasonable charge,[28] and also the expense of the widow and heirs traveling to see him at his

[20] Hapgood vs. Houghton, 10 Pick. 154; Adams vs. Butts, 16 Pick. 343; Gregory vs. Hooker, 1 Haucks 394; Parker vs. Lewis, 2 Dev. L. 21; Trueman vs. Tilden, 6 N. H. 201; Campfield vs. Ely, 13 N. J. L. 150.

[21] Tracy vs. Frost, 57 Hun 591; S. C., 11 N. Y. Supp. 561.

[22] Dampier vs. St. Paul Trust Co. (Minn.), 49 N. W. Rep. 286.

[23] Went. Off. Exec. 259. *contra* Wood's Estate, 1 Ashm. 314; Allen vs. Allen, 3 Dem. 524.

Thus it was held in the days of William and Mary, "that for strictness no funeral expenses are allowable against a creditor, except for the coffin, ringing of the bell, parson, clerk and bearers' fees, but not for the pall or ornaments." "To which," says Dr. Burn, "the expenses of the shroud and digging the grave ought to be added." Feasting and banqueting were deemed incongruous with the solemnity, and expenses for festivals were not allowable out of insolvent estates. Woerner on Admin. 760.

It has sometimes been held in this country that the personal representative may reckon in his account a moderate expense for mourning apparel for the widow and family of the deceased, as part of the expenses of the funeral. Wood's Estate, 1 Ashmead 314. And this seems to us not unreasonable. It seems far more intimately connected with the decent performance of funeral rites than the same amount expended in a monument, which is now almost invariably allowed, because that is one of the demands of public opinion. 3 Redf. Wills 246.

[24] Donald vs. McWhorter, 44 Miss. 124.

[25] Lund vs. Lund, 41 N. H. 355.

So are suitable burial plats (Chalker vs. Chalker, 5 Redf. 480), and even vaults. McGlinsey's Appeal, 14 S. & R. 64. Mourning rings to the extent of £93 have been allowed in England. Paice vs. Archbishop of Canterbury, 14 Ves. 364

[26] Allen vs. Allen, 3 Dem. 524.

[27] Watkins vs Romine, 106 Ind. 378.

[28] Hasler vs. Hasler, 1 Bradf. 248.

request, though they did not reach him till after his death.[29] So the expense of bringing the body home when death occurs abroad, and of a person to accompany and care for it.[30]

The estate is not liable for the funeral expenses of the widow of the deceased,[31] but where the husband, wife and child perished in the same accident his estate was held liable for all the expenses.[32] And so for a minor legatee.[33] The wife's estate, and not his, is liable for her funeral expenses.[34] The expenses of a post-mortem examination in the interest of science is not a valid claim against the estate.[35] Nor is a dinner, furnished by the person in whose house the funeral was held, to the guests, and food for their horses, after the return from the cemetery, according to the custom of the neighborhood.[36]

A donation of $250 made by an executor to his testator's commandery for parading at the funeral is not a proper charge against the estate, where it does not appear that the commandery required the payment of that sum, or any other, as a condition of their participation in the funeral.[37] The expenses of a wake, if not unreasonable, constitutes a proper item of funeral charges; as, for example, where the banquet provided consisted only of cheese, crackers and tobacco.[38] Where a will directed that the testator's funeral expenses should not exceed $100, and the will was not received by the executor until after the funeral, it was held error for the Court not to allow reasonable and proper charges in excess of $100.[39] Claims founded in the expenses

[29] Jennison vs. Hapgood, 10 Pick. 77.

[30] Sullivan vs. Horner, 41 N. J. Eq. 299.

[31] Lawal vs. Kreidler, 3 Rawle 300.

[32] Sullivan vs. Horner, 41 N. J. Eq. 299.

[33] Butler's Estate, 9 N. Y. Supp. 641; S. C., 1 Con. Sur. 58.

[34] Constantinides vs. Welsh, 146 Mass. 281; McClellan vs. Filson, 44 Ohio St. 184; Freeman vs. Colt, 27 Hun 447; McCue vs. Garvey, 14 Hun 562; reversing Garvey vs. McCue, 3 Redf. 313; Kessler vs. Hessen, 19 Abb. N. C. 86. *Contra*, Staple's Appeal, 52 Conn. 425; Galloway vs. McPherson (Mich.), 35 N. W. Rep. 114.

See § 649a.

[35] Smith vs. McLaughlin, 77 Ill. 596.

[36] Shaeffer vs. Shaeffer, 54 Md. 679.

[37] *In re* Reynolds, 124 N. Y. 388; S. C., 26 N. E. Rep. 954, affirming 9 N. Y. Supp. 949.

[38] Johnson's Estate, 8 Pa. Co. Ct. R. 1.

[39] *In re* Galland Estate, 28 Pac. Rep. 287; S. C., 92 Cal. 293.

Judge Woodmansee, of Cincinnati Common Pleas Court, has recently held that, if the wife has no separate estate, the husband is liable for the wife's funeral expenses, even though she was living separate and apart from her husband, and at the time of her death had a divorce suit pending, in which temporary alimony had been allowed.

incurred by relatives of the deceased in attending the funeral, their services and time, are not to be favored in settling a decedent's estate; for these are presumably offices of respect and tenderness, gratuitously rendered, and neither purchased nor solicited.[40]

§ 649a. Funeral expenses, etc. Husband and wife.

By reason of the change of the common-law rule of the contractual rights of the wife in the control and management of her separate estate, some confusion has arisen in cases where the wife dies owning property, as to the liability of the husband to pay her funeral expenses and expenses incurred during her illness. In an early case it was held that where a married woman dies leaving property, her estate is primarily liable for her funeral expenses, and where the husband pays the same he may recover them from her administrator.[40a]

Later it was held that a husband who has paid the funeral expenses of his wife, both his and his wife's estate being possessed of ample means, is not entitled to reimbursement from her estate.[40b]

Along in the same line, it was held that burial services and expenses connected with the death of his wife, are part of the obligation of support imposed on a husband by sec. 7997, G. C., and at common law, and hence a contract of separation between husband and wife releasing him from all claims for her support and maintenance, does not relieve him from payment of her burial expenses regardless of any separate estate of the deceased wife.[40c]

In another case it was held that a husband, notwithstanding his wife is living separate and apart from him and an allowance made to her of alimony *pendente lite,* is liable for her funeral expenses upon her death, while proceedings for divorce is pending.[40d]

Again it was held that unless it appears that a wife by special contract bound her separate estate therefor, a physician rendering her medical service during her last illness may proceed against the husband without first presenting the same to the administrator of her estate and have it paid therefrom.[40e]

[40] Lund vs. Lund, 41 N. H. 355; Schoul. Exrs. 421.

[40a] Clauson vs. Briggs, 36 O. C. C. 582 (1907); 16 O. C. C. (N.S.) 225.

[40b] Phillips vs. Tolerston, 20 Dec. 249; affirmed no op., 82 O. S. 403 (1910).

[40c] Humphrey vs. Huff, 35 O. C. C. 117 (1914); 20 O. C. C. (N.S.) 178.

[40d] Eveland vs. Sherman, 21 Dec. 726; 9 N. P. (N.S.) 559.

[40e] Withrow vs. Boone, 16 N. P. (N.S.) 506; 25 Dec. 402.

These decisions seem to finally settle the question when the husband has voluntarily paid the funeral expenses, etc., when another who has furnished them seeks to compel the husband to pay them. But if the deceased wife has a separate estate, and the claim is presented to her administrator, should he pay it, or compel the creditor to recover the same from the husband?

In a case heretofore referred to [40f] the court says:

"While the wife's estate, if she had one, may be liable for her funeral expenses, yet if she had no estate the husband is liable for the funeral expenses. In other words the undertaker has recourse against both the wife's estate and the surviving husband for the reasonable funeral expenses."

The case of McClellen & Filson,[40g] rendered before the passage of the present statute in relation to husband and wife, is instructive. In this case the wife died testate leaving an estate of her own, and a husband surviving her who also had property. A son was appointed executor and entered upon the discharge of his trust; as such executor he paid, as expenses of the last sickness, physician's bills, also expenses of her funeral and for a tombstone. The physicians who attended were called by the son on request of his mother; the coffin and other purchases for the funeral were made by the son. It did not appear that the husband took any action in employing either the physician or undertaker. Exceptions were filed to the executor's account by a legatee under her will. In deciding the case the Supreme Court says:

"We think the executor was justified in paying the funeral expenses and those of last sickness, and that he should have been allowed for such items in his settlement."

Unless, therefore, it clearly appears that the husband has contracted the bill and the claim is presented to the executor, the executor should pay it. And there seems to be no good reason why the wife's estate should not pay all these claims, even when the husband has contracted them, and if the executor does pay them, the court ought, and the author believes will allow them in his settlement.

Of course a wife's estate can not be held for the expenses of her husband's funeral, if he have an estate of his own, unless she has by contract obligated herself so to do.[40h]

If the husband has no estate is the wife liable? This has never been decided in Ohio. It would seem that the duties placed on husband and wife by statute, are somewhat reciprocal:

"If the husband is able he must support his wife; if he is unable, the wife must assist him so far as she is able." [40i]

"They contract toward each other obligations of mutual respect, fidelity and support." [40j]

[40f] Eveland vs. Sherman, 21 Dec. 726; 9 N. P. (N.S.) 539.

[40g] 44 O. S. 185.

[40h] 21 Cyc. 1446; 13 Cyc. 274.

[40i] § 7997 G. C.

[40j] § 7995 G. C.

The author believes that under these statutes the wife is liable for the funeral expenses and those incurred during her husband's last illness, even where she has not directly contracted for them, and that the courts will finally so hold, where the husband has no estate.

Of course where by will the funeral expenses are made a charge on the estate, they should be paid therefrom, even though the surviving consort might be liable.[40k] A widow as the heir and next of kin of her deceased husband is by law to dispose of his body in a reasonable and sanitary manner.[40l] A son has a quasi property right in the body of his dead mother.[40m]

§ 650. Amount to be allowed as funeral expenses.*

A number of circumstances enter into the question as to what will constitute a proper allowance for funeral expenses. Thus, whether the estate be solvent or insolvent, whether a person be high or low in society, as well as religious faith, fraternal ideas and family connection. It has never been questioned that the funeral expenses are to be restricted to the amount necessary to bury the decedent in the style usually adopted for persons of the like rank and condition of society.[41]

In early times a stricter rule was followed as to insolvent estates, than at this date. Courts have constantly inclined in a liberal direction in this matter until now there is very little differance where the expenditure has not been extraordinarily great in amount considering all the circumstances, between a solvent and insolvent estate.

"The circumstances determining what is reasonable in such cases," says Woerner, "are numerous, and the degree of importance attached to each is incapable of exact measurement, impressing themselves more or less strongly on different minds. Public opinion and general expectation, fashion, the feelings of friends and neighbors, the age, standing, property, the habits of life of the decedent, as well as the standing and rank in society of the surviving family, must all be considered." But large expenditures for burials, disproportioned to the assets of an estate should not be encouraged.[42]

[40k] Where the consort of a deceased husband or wife received the entire estate of said decedent by virtue of a devise for his or her life, for his or her support, with a remainder over, and died leaving no estate, the expenses of his or her last illness and final expenses, are a legal charge against the estate passed to him. Kennedy vs. Price, 23 O. C. C. (N.S.) 12; affirmed no p. 83 O. S. 472.

[40l] Evans vs. Evans, 23 Dec. 375, Injunction not allowed in this case to prevent her from cremating the body.

[40m] 59 Bull. 340.

[41] Woerner on Admin. 764, citing Redf. on Wills 243; Wms. Ex. 968; Schoul. on Ex. 421; Willard on Ex. 272; Kelley, Pr. Guide, 220.

* Cited, Kroll vs. Close, 8 O. L. R. 70; 82 O. S. 193; 52 Bull. 107.

[42] Estate of McKenna, 1 Leg. Gaz. Rep. 12.

Says Brewster, J.: "The assets of an estate should not be squandered in ostentatious displays for the gratification of the weakest of all

The following from the same distinguished author has often vividly presented itself to persons who have had experience in dealing with estates of decedents. "If greater economy were insisted on, in small as well as great estates, many a widow and heir struggling under the privation of bitter poverty would have reason to be thankful for being prevented from wasting a substantial part of their means upon the fruitless pomp and ceremony of an extravagantly costly funeral." [43]

Foolish and extravagant funerals by those not immediately concerned in the estate will not bind the administrator or executor and the immediate family of the estate.[44] In determining what is reasonable, an undertaker is chargeable with only such knowledge as to the decedent's property, etc., as is apparent upon reasonable observation, and is entitled to payment of his demand in full, if in accordance with decedent's apparent condition, although the estate prove insolvent.[45] However, undertakers should be held strictly accountable in this matter and not allowed to present a bill, which their knowledge of the affairs of the decedent, should have informed them was greater than in justice to all, should be expended, even though the family insisted upon such expenditure.[46]

vanities." Bradley's Estate, 11 Phila. 87.

[43] Woerner on Admin. 764.

[44] Schoul. 421.

[45] *In re* Rooney, 3 Redf. 15.

[46] Burial expenses amounting to $270 are not unreasonable where the decedent left an estate of $800. Rittle vs. Huntley, 22 N. Y. Supp. 519.

The standard of reasonable burial expenses is established by local and contemporary usage; for religious and humane sentiment carries the cost far beyond what mere sanitary rules might prescribe, and that sentiment should not be outraged.

The religious persuasion of the deceased, or, perhaps of his immediate family, may be fairly considered in determining the character and terms of costs in the funeral; thus, Jewish, Christian and Pagan usages differ on these points; likewise Catholic and Protestant, nor do all Protestant sects agree among themselves. National habits, and those of one's birthplace besides, deserve consideration whatever be the last domicile.

The standard varies essentially, however, with the age and locality; as between city and country or polished and simple communities; and, in general, according to the testator's station in life; all this aiding, doubtless, in fixing a scale of prices which, even in such simple items as the cost of a coffin, may vary greatly. Schoul. on Ex., § 421.

It has been held that an undertaker's bill of $201, where the estate was $798, was unreasonably high, and it was cut down to $150. *In re* Karschner, 6 N. P. (N.S.) 459; 52 Bull. 107; affirmed Kroll vs. Close, 81 O. S. 191.

Where it is said "It is the duty of the Probate Judge, upon the hearing of an administrator's account, whether exceptions have been filed or not, to scan closely the amounts claimed to have been paid for funeral expenses, and if unreasonable

§ 651. Tombstone. "The court in settlement, also may allow as a credit to the executor or administrator, a just amount expended by him for a tombstone or monument for the deceased, and for a just amount he has paid to a cemetery association or corporation as a perpetual fund for caring for and preserving the lot on which the deceased is buried. It shall not be incumbent on an executor or administrator to procure a tombstone or monument or to pay any sum into such fund." [R. S. § 6185.][47]

Even in the absence of a statute under the phrase "funeral expense" the costs of a monument might be included.[48] The former statute provided that the administrator should not be allowed to interfere with the heirs of the deceased in erecting one. The present section does not contemplate the erection of a monument for any person other than the deceased.[49] The statute further seems to give to the administrator or executor, the discretion whether or not the expenditure shall be made. If it is made, however, the Court shall pass upon its reasonableness. "He should not," says a distinguished author,[50] "before ascertaining the amount of the estate, purchase a larger burial lot than is necessary Although the expenses of the tombstone has been considered a funeral charge, yet, where the estate is insolvent it can be allowed, if at all, to a very moderate amount only." The expenditure may be made in a reasonable amount even though the estate be insolvent.[51] However, the rights of creditors should not be defeated or jeopardized by the allowance of a credit for extravagant monuments or tombstones.[52]

and extravagant, should be disallowed, even against legatees and next of kin."

[47] § 10832 G. C.

[48] See Comments, 10 Bull. 338.

[49] Catlin vs. Huestis, 11 C. C. 120; 5 C. D. 23; Morgan vs. Morgan, 83 Ill. 196. Cited *In re* Lohnes, 57 Bull. 125.

Of course, the heirs may erect one if they so desire. Curtis vs. Bank, 39 O. S. 581.

[50] Redf. Surr. Prac. 440.

[51] 10 Bull. 338.

[52] Woerner on Admin. 761.

The Probate Court has no power to order an administrator to purchase a monument, under the general authority to control and direct the conduct of administrators, nor under § 10832, in absence of settlement to pass upon such expenditures. *In re* Ferguson, 6 N. P. (N. S.) 417; 18 Dec. 374; affirmed 81 O. S. 58.

And is without jurisdiction, in advance of settlement, to entertain an application to fix maximum that may be expended. See McMahon vs. Ambach, 79 O. S. 103.

Matter of Erlacher, 3 Redf. 8. In that case, the estate amounted to $2,625.78. Held, that the administrators should be allowed only $250 of $670 expended by them for a monument and inclosing the burial plot. In Matter of Wood (3 Redf. 9 n.), it appeared that the estate amounted to less than $2,800, and that $700 was charged by the administratrix for burial lot and monument, and $200 additional was placed to the account of funeral expenses. It was held, that the charge for burial lot and monument was excessive. In Matter of Mount

In making a selection for a tombstone, it certainly is proper for the administrator or executor to confer with the family as to the kind and character of a stone to be put up, and even if the estate be insolvent, one of moderate cost, taking into consideration the standing and character of the deceased, ought to be allowed. If the estate is solvent the administrator should proceed and make such expenditure as will satisfy the general desire of the family.[53]

§ 652. Last sickness.

The second kind of expenses that is entitled to a first preferment, is the expense incurred during the last illness. A consideration of this question divides itself into two parts, first, what kind of expenses is included, and second, what is meant by the term "last illness." As to the first it may be said, that it would include doctor bills, medicines, nurse hire, food, clothing and place of habitation; and generally would include all bills for care and attention which were proper to give to the decedent, that degree of care and attention which the usage of society and the laws of humanity require, considering the person's station in life. The term "last sickness" is a

(3 Redf. 9 n.), it was shown that, out of an estate of $983.30, the administratrix paid $425 for funeral expenses, besides $60 for clergyman's fee and music and $78 for a gravestone. Held, that only $200 should be allowed for funeral expenses and $50 for a gravestone. In another case, it was held that, as against decedent's next of kin, an expenditure of $351 for a burial lot is not unreasonable, where the estate amounts to $13,000; but as against creditors, the expenditure would not have been allowed, it seems. (Valentine vs. Valentine, 4 Redf. 265). Funeral expenses incurred by an executor to the amount of $60 will not be held excessive where the executor acted in good faith, though testator's estate was not sufficient to pay in full the statutory exemptions of the widow. (Matter of Hildebrand, 23 N. Y. Supp. 148). An expense of $300 incurred by an executor for testator's tombstone is reasonable where the estate is valued at more than $6,000, and the rights of creditors are not impaired. (Matter of Howard, 23 Id. 836). Patterson vs. Patterson, 59 N. Y. 574; Wood vs. Vandenburgh, 6 Paige. 277; Ferrin vs. Myrick, 41 N. Y. 315; Owens vs. Bloomer, 14 Hun. 296. In the last case, the estate did not exceed $8,000. An expenditure of $500 for a headstone was held to be extravagant, and was not allowed as against the heirs. Redf. Surr. Prac. 440.

[53] A testator who directed by his will that a suitable monument should be erected for his grave, left a large fortune, in great part to charities; and $6,000 was held not an unreasonable amount to expend for the monument. Cannon vs. Apperson, 14 Lea. 553.

difficult one to define. It probably does not mean such a limited period of time before death as is required in the case of making a nuncupative will. Some Courts have held that it practically means *in extremis* and not lingering illness.[54]

In another State it has been held that it would include sickness no matter how long its duration.[55] We can probably get our best idea as to what the phrase should include by considering the reason for making such claims preferred in the settlement of a deceased person's estate. It was no doubt a humanitarian purpose, that induced the passage of the Act, the same that gives to the widow and children a right to their year's allowance, before the payment of general creditors. If a person be sick, humanity requires that he be given attention, and that he should have such care, medical and otherwise, as an enlightened age demands. By pledging his property to the payment of such claims, the same will be more readily secured. Possibly if such were not the law, a person might not receive the attention that illness requires, for it is well known that sure pay procures speedy attention. Besides it may properly be considered that a man's estate should first give him the care that illness requires, even though other debts may be excluded. And there is no reason, therefore, why a continued illness, even if extending over several years, if it is the illness from which the decedent died, ought not to come within the terms of the statute. If there is a definite period of health or a reasonable degree of health between one sickness and another sickness, the former could not properly be included within the terms of "last illness." It would be well for an administrator in paying a bill of this character, where he had any doubts on the subject, to require the creditor to state in his affidavit that the services were rendered during the last illness of the deceased.[56]

[54] See Reese's Estate, 2 Pearson 482; Duckett's Estate, 1 Kulp. 227.

[55] Huse vs. Brown, 8 Me. 167.

[56] See § 1160, last sickness.

The doctrine announced in Hinkle vs. Sage, 67 O. S., that there is no obligation on a member of a family to pay another for services rendered, held not to apply where a brother in poor health, abundantly able to pay for his board, without invitation going to live with a married sister having no means of her own. Thompson vs. Jones, 33 O. C. C. 182.

The plaintiff can not recover unless it be established that there was an express contract on one side to perform the service for compensation and upon the other side to accept service and pay for same. Merrick vs. Dilzler, 91 O. S. 256. See Crawford vs. Merrell, 33 O. C. C. 104; Edgar vs. Shock, Admr., as to when evidence suffici ½ to establish contract, 37 Cyc. 603.

§ 653. Expenses of administration.

The third in the list of claims entitled to a first preference, is, expenses of administration. Within this term is included every expense incurred by the administrator or executor in the proper discharge of his duty, in the administration of his trust. It would include Probate Court expenses, including the probation of the will, granting letters, notice of appointment in the newspaper, making an inventory, paying appraisers, filing the sale bill, filing an account and order of distribution. If real estate be sold it would include the ordinary costs attached to such a proceeding. As a general rule it may be said, that the administrator is primarily responsible for the payment of these Court costs; and that they are to be paid first, but the statute seems to place them on an equality with funeral expenses, and expenses of last illness. If there is any litigation had, concerning matters in which the estate was interested, the costs incurred in that respect, if the administrator acted within the proper scope of his authority, would also come within *"the expenses of administration."* The employment of help, the gathering of crops, and securing of proper counsel,[57] and as before said whatever expenses the administrator incurs in a proper discharge of his duties, in the just and rightful administration of an estate, are expenses to be included within this provision. It likewise includes compensation to the administrator. These matters will be considered in subsequent sections.

§ 654. Compensation allowed executors or administrators. Further allowance. Effect of compensation provided by will. "Executors and administrators may be allowed commissions upon the amount of personal estate collected and accounted for by them, and of the proceeds of real estate sold by order of court to pay debts, or under directions of the will, which must

[57] Chapt. 29, § 506 *et seq.*, Care and management of estate.

As these expenses are necessary to get the estate in condition to pay claimants, the expenses of administration ought to be paid first —before funeral and last illness.

§§ 508-9-10, as to attorney fees, etc. See § 904, Real Estate.

The court has power to order an expense account to be filed preparatory to the general account. Smith vs. Rhodes, 68 O. S. 500. See § 645.

Costs connected with the administration of the estate are debts of the estate. Harbeson vs. Mellinger, 2 O. App. 75; 35 O. C. C. 195.

be received in full compensation for all their ordinary services, as follows: for the first thousand dollars, at the rate of six per cent; all above that sum, and not exceeding five thousand dollars, at the rate of four per cent, and all above five thousand dollars, at the rate of two per cent." [R. S. § 6188.][58]

§ 654a. **Further allowance.** "Further allowance shall be made as the court considers just and reasonable for actual and necessary expenses, and for extraordinary services, not required of an executor or administrator in the common course of his duty. When provision is made by the will of the deceased, for compensation to an executor, that shall be a full satisfaction for his services, in lieu of such commissions or his share thereof, unless by an instrument filed in the court he renounces all claim to the compensation given by the will." [R. S. § 6188.][58*]

§ 655. When entitled to.

In some States the compensation of an executor or administrator, like guardians in this State, depends upon the allowance made by the Probate Court. With us, however, this compensation is fixed and the Probate Court has nothing to do with it, except where extraordinary services have been rendered. An administrator or executor is legally entitled to the statutory commissions on the amount of the personal estate collected and accounted for by him, and of the proceeds of the real estate sold under an order of the Court for the payment of debts, although he may have failed to charge himself with all the assets received by him, or has asked for credits for sums not paid by him. Even if there be unfaithful administration of the estate, it will not deprive an executor or administrator of a right to compensation for his services, so far as they have been beneficial to the persons interested in the estate.[59]

[58] § 10837 G. C. See § 895, Sale of real estate. § 1643, Assignments.

[58*] § 10838 G. C.

Where real estate forming part of a residuary estate is sold under an agreement between the heirs, and not under direction of the will, an executor is not entitled to commission on the proceeds. Union Bank vs. Smith, 4 C. C. (N.S.) 237; 26 O. C. C. 317.

Personal estate, upon which the executor is entitled to commission, includes all that he has reduced to money and accounted for. Union Bank vs. Smith, 4 C. C. (N.S.) 237; 26 O. C. C. 317; affirmed 74 O. S. 505.

A trust company, under an invalid statute, allowed. *Id.*

[59] Campbell vs. McCormick, 1 C. C. 504; 1 C. D. 281.

We think it was the intention of the legislature to withdraw this matter from the discretion of the Court, and to have it fixed so that the administrator or executor might rely on receiving what the statute

§ 659, Extra expenses.

In some states it is held that where he makes a distribution in kind, he is not entitled to commission on such distribution. But the contrary has been held, where certificates of stock came into the hands of the administrator, and were by him held until final distribution and then turned over to the widow as sole legatee.[60]

In another case it was held that where an administrator sold real estate and the judgment creditor accepted the purchaser's note, that the administrator was entitled to his commission although no money passed through his hands.[61]

It has also been held that where the testator directed certain legacies to be paid by his executor, and devised certain lands to A., charged with the payment of the legacies and costs of administration, so far as funds might be needed by the executor for the payment of the same, and A. paid and took receipts from the legatees, that the executors were not entitled to a commission on the legacies.[62]

provides for, and to have a uniform rate of compensation throughout the State, and not have the amount of such commissions to vary with the views or feeling of the Court called upon to act in the matter. So far as we are advised this has been the uniform practice in this State. This is the first time that we have known an administrator to be deprived of his statutory commissions, even when it appeared that he had been derelict in his duty to the estate. Campbell vs. McCormick, 1 C. C. 504.

It is held in numerous cases that compensation must be refused if the administrator has been guilty of willful default or gross negligence in the management of the estate, whereby the same has suffered loss. This principle is adhered to in some of the States in which the compensation is fixed by statute, denying any discretion in the matter to the Courts on the ground that the statute gives compensation for faithful administration only. But it would seem that the language of the statute in most States fixing the compensation of executors and administrators precludes all discretion in this respect. The Court can neither add to nor detract from, nor in any wise vary, the compensation directed to be allowed by the statute; it can never allow nor disallow commissions scaled by the degree of skill or of vigilance, of good or of bad faith, displayed in the management of the estate, unless such discretion is vested in the Court by statute. Woerner on Admin. 1164.

[60] Estate of Duddy, Goebel, 130; 7 N. P. 589. This was followed in a recent Cincinnati decision, 47 Bull., 286.

[61] Stone vs. Strong, 42 O. S. 53.

[62] Williams vs. Williams, 8 O. S. 301.

Where the estate was indebted, and the heirs by an agreement with the creditor conveyed real estate to the crditor in discharge of the debt, it was held the administrator was not entitled to charge his commission.[63] The executor or administrator of a surviving partner, who dies with partnership assets in his possession, and while he is engaged in settling his partnership business, is entitled to receive compensation out of the partnership funds for his service, and performance of his duties, in behalf of the settlement of such partnership affairs.[64]

Where an administrator sells real estate that is encumbered with a mortgage, he is entitled to commission to be first paid before applying the proceeds to the mortgage or other liens. However, if the mortgagee buys in the property, upon so much of the proceeds as is required to meet the mortgage indebtedness, no commission can be allowed.[65]

The rule excludes commissions on advancements,[66] all uncollectible debts,[67] and property lost or perished.[68] And where the administrator is charged with and delivers over to the widow the household furniture which is by law set apart for her, he should be allowed commissions on its appraised value;[69] but when such property does not pass through his hands, as where it is collected and retained by the widow, no commission

[63] Piatt vs. Longworth, 27 O. S. 183.

[64] Dayton vs. Bartlett, 38 O. S. 357.

[65] Stone vs. Strong, 42 O. S. 53.

Compensation of an executor can not be reached by his creditor by attachment, by creditor's bill or otherwise, before it is allowed by the Probate Court. It would embarrass the settlement of estates and invade the jurisdiction of the Probate Court. Overturf vs. Gerlach, 62 O. S. 127.

An executor or administrator who fails to file an account within 30 days from the time he is notified by the Probate Judge can get no compensation for his services, unless the Court enters on its journal that such delay was reasonable and necessary. § 10606 G. C., § 10618 G. C. See § 1643.

[66] Metcalfe vs. Colles, 43 N. J. Eq. 148; Barbite's Appeal. 126 Pa. St. 404.

[67] Mayberry's Appeal, 33 Pa. St. 258; Succession of Foulkes. 12 La. An. 537; Moffat vs. Loughridge, 51 Miss. 211; Vanderford's Appeal, 12 Atl. R. (Pa.) 491; Kester vs. Lyon. 40 W. Va. 161.

[68] Eversfield vs. Eversfield, 4 Har. & J. 12.

The general weight of authority is that the executor is not entitled to commission on specific legacies or on property delivered over in kind. 18 Cyc. 1147.

[69] Mayberry's Appeal, 33 Pa. St. 258. This does not apply to property set apart and not deemed assets of the estate and not appraised.

is allowable thereon.[70] Nor are commissions allowed on his own debt.[71]

§ 656. How calculated.

The commission is to be calculated on the amount of personal estate[71a] collected and accounted for; and the proceeds of the real estate sold either by order of the Court or by directions of a will. On the first $1,000 it is 6 per cent., and on the next $4,000, 4 per cent., and on the remainder, 2 per cent.

If proceeds of real estate and personal property come into the hands of the administrator or executor, the calculation is first to be made on the personal property. That is, if the personal property amounted to $1,000 and the real estate to $2,000, the commission would be 6 per cent. on the $1,000 of personalty and 4 per cent. on the $2,000 of realty.[72]

In no case, however, can an executor's or administrator's compensation be allowed in a greater amount than that fixed by the statute on the entire amount collected, etc., and if there is more than one administration, the commission can be charged but once. For instance, if an administrator was appointed, and administered on $1,000 of the property, then died and an administrator *de bonis non,* administered on the remaining $2,000, the administrator would be entitled to 6 per cent. of the $1,000 on that which he administered, and the administrator *de bonis non* 4 per cent. upon the remainder.[73]

§ 657. Compensation fixed by will.

It will be observed that secs. 10837, 10838 G. C. (§ 654) provide that if a provision is made in the will for compensation of an executor, that the same shall be deemed a full satisfaction for his services, unless he shall by an instrument filed in the Court,

[70] Estate of Sharp, 11 Phila. 92.

[71] Barhite's Appeal, 126 Pa. St. 404; Hoffer's Estate, 156 Pa. St. 473; Woerner on Admin. 1167.

I see no reason for this and doubt if it be Ohio law. See § 594, Arbitration; § 750, Distribution; § 1490, Gdns. compensation; § 1642, Assignee's commission.

[71a] In Bank vs. Smith, 26 O. C. C. 317; 4 O. C. C. (N.S.) 237; affirmed 74 O. S. 305, it was held that the phrase "personal estate," § 6188 G. C., § 654, which allows full compensation upon the amount of the personal estate collected and accounted for by them, includes stocks, bonds and other securities belonging to the estate, and an executor is entitled to statutory commission thereon. In the opinion it is said the words "personal estate" are broad enough to include stocks, bonds and other securities, and when collected and accounted for by the executor he is entitled to his statutory commission.

[72] Stone vs. Strong, 42 O. S. 53.

[73] *In re* Waring, Goebel 146; 5 Dec. 4151; 7 N. P. 553.

§ 207, Division of commissions.

renounce all claim to such compensation. Where a will provided "that in consideration of the legacies herein given to said sons, that no fees, commission or charges for administering upon my estate shall be paid to them or either of them, except for expenses actually incurred." It was held that they were not entitled to commission.[74] Likewise a person may make an agreement to serve without compensation, which will be binding.[75] So is an agreement as to the amount of compensation.[76] Unless a will otherwise declares, a legatee serving as administrator is entitled to both his legacy and pay for his services.[77] If a legacy be given in lieu of compensation, the Court cannot defeat the provisions of the will.[78] Where testator by his will provides for continuing his business after death by his executors, one of whom is a copartner, in conjunction with another surviving partner, neither executor nor surviving partner will be allowed compensation for carrying on the same; no provision having been made therefor in the will.[79]

If the administrator serve as a trustee of the estate, and perform *two distinct acts of service*, he is entitled to pay for services in both capacities, or double compensation.[80] But if the functions of a trustee are so blended with those of the administrator as to be inseparable, the act is deemed that of the administrator, and compensation will be allowed to him only in that capacity.[81] If it is evident from the will that the com-

[74] Rote vs. Warner, 17 C. C. 342; 9 C. D. 536.

[75] Bate vs. Bate, 11 Bush. 639; *In re* Hopkins, 32 Hun. 618; Estate of Davis, 65 Cal. 309; McCam vs. Plewit, 2 McC. Ch. 90.

[76] Bowker vs. Pierce, 130 Mass. 262. But see Ross vs. Conwell, 7 Ind. App. 375; People, etc., Co. vs. Werner, 6 Ind. App. 614; S. C. 34 N. E. Rep. 105.

[77] *In re* Mason, 98 N. Y. 527; Aspinwall vs. Pirnie, 4 Edw. Ch. 410; Estate of Guier, 1 Ashm. 317.

[78] Matter of Gerard. 1 Dem. 244; Matter of Kernochan, 104 N. Y. 618; Haine's Accounting, 8 N. J. Eq. 506; Secor vs. Sentis, 5 Redf. 570.

[79] *In re* Taft's Estate, 8 N. Y. Supp. 282; S. C. 55 Hun. 603.

[80] Baker vs. Johnston, 39 N. J. Eq. 493; Laytin vs. Davidson, 95 N. Y. 263; Johnson vs. Lawrence, 95 N. Y. 154; Sanderson vs. Pearson, 45 Md. 483; *In re* McCredier's Estate, 77 Hun. 111; S. C. 28 N. Y. Supp. 305.

Where the executor died before filing an account and an administrator *de bonis non*, etc., was appointed, but one commission could be charged equitably apportioned between them. Bates vs. Creel, 2 O. App. 64.

[81] Johnson vs. Lawrence. *supra;* Phoenix vs. Livingston, 101 N. Y. 451; Little vs. Little (Mass), 36 N. E. Rep. 795; Everson vs. Pitney, 40 N. J. Eq. 539; S. C. 42 N. J. Eq. 461.

pensation given is to cover all his allowance, double compensation will not be allowed.[82] If a will declares that the legacy given to the executor shall be in lieu of all compensation, or that he shall serve without any, and he decline to accept the office, the administrator with the will annexed appointed in his place will be entitled to compensation.[83]

§ 658. Compensation of joint administrators.*

Joint administrators are entitled to no more compensation than if there were only one of them administering.[84] If one be given a legacy as his compensation the other is entitled to only one-half of what they jointly would be entitled to receive.[85]

The Court should apportion the pay for services among the administrators according to the services rendered by each one.[86] But the presumption is that each is entitled to an equal share; and if any of them claims a different division he must show cause for it.[87] No one can object to the division except the administrators.[88] If the Court make a gross allowance it cannot thereafter compel a division.[89] They may agree to a division of the amount to be allowed and it will be binding.[90] An agreement whereby one administrator renounces his right to letters in favor of his co-executor, in consideration of being paid one-half of the Courts' allowance, is valid.[91]

Where all the statutory fees allowed executors have been re-

[82] Shippen vs. Burd, 42 Pa. St. 461; Lansing vs. Lansing, 45 Barb. 182; Ward vs. Ford, 4 Redf. 34; *In re* Mason, 98 N. Y. 527; Ross vs. Conwell, 7 Ind. App. 375; People, etc., vs. Werner, 6 Ind. App. 614.

[83] Ross vs. Conwell, 7 Ind. App. 375; People vs. Werner, 6 Ind. App. 614.

[84] See § 207, Division of commission; Phillips vs. Richardson, 4 J. J. Marsh 212; Walker's Estate, 9 S. & R. 223; Valentine vs. Valentine, 2 Barb. Ch. 430.

[85] Lee vs. Lee, 6 Gill & J. 316; Succession of Edwards, 34 La. Ann. 216.

Where one executor resigns after the estate is partly administered upon, the commission should be equitably divided. Thurston vs. Ludwig, 4 O. App. 486.

Where there are two, the court should apportion the commission. Meyers vs. Hopkins, 7 C. C. (N.S.) 240; 28 C. C. 209.

[86] Squier vs. Squier, 30 N. J. Eq. 627; Pomeroy vs. Mills, 40 N. J. Eq. 517; Carver vs. Hallett, 26 Ala. 722.

[87] Shaw vs. Betts, 3 Cent. Rep. 592.

[88] Claycomb vs. Claycomb, 10 Gratt. 589.

[89] Mount vs. Slack, 39 N. J. Eq. 230.

[90] Astor's Estate, 5 Whart. 228; Walker's Estate, 9 S. & R. 223.

[91] Ohlendorf vs. Kanne, 66 Md. 495; Bassett vs. Miller, 8 Md. 548. See Ballard vs. Mack, 17 O. C. C. 839; 31 O. L. R. 249.

ceived from the estate and retained by one of several co-executors, equity has jurisdiction of a suit by the others against him for an accounting.[92]

§ 659. Extra compensation.[92a]

1. The statutes of the State bearing upon the settlement in the Probate Court of the estates of deceased persons, taken together, show that the allowance to an administrator for extraordinary services in the settlement of the estate is part of the statement of his account, and is to be considered by the court accordingly.

2. Whether the allowance is in fact made at the time of or prior to the filing of a settlement account, such allowance can not take effect as prejudicing the rights of others interested in the settlement of the estate who have not had notice until the court, after legal notice, acts upon the settlement account itself.

3. Exceptions to such allowance, in the account by creditors constitute a direct attack on the allowance, and not a collateral attack, and the allowance is then subject to review upon the exceptions the same as any other disputed item of the administrator's account.[92*]

In addition to the *per centum* fixed by the statute, the Court may allow what it shall consider just and reasonable for actual and necessary expenses, and for any extraordinary services not required of an executor or administrator in the common course of his duty. A construction of this part of the provisions of sec. 6188 R. S. is almost daily brought to the attention of the Probate Judge, and in truth, it must be said, that administrators and executors are sometimes inclined to take advantage of this provision and the liberality of the Court, to secure that to which they are not entitled. It is the object and purpose of the statute in fixing the *per centum* to be allowed upon the estate collected and accounted for, in that manner, to compensate the executor or administrator for all the services which are ordinarily required in order to convert the estate into money and distribute the same. This would include the expenses incurred going to and from the Probate Court for the purpose of getting out letters, filing inventories, sale bills, accounts, and such like matter. It would also include ordinary efforts to collect accounts or notes due the estate, and sell the personal property or real estate if it be required. If a trip to another State was necessary to attend to some matter, this might be considered an extraordinary expense, or if it was found proper to have the will of the decedent construed, or if there was real estate which required looking after for a short time.[93] Extra

[92] Speirs vs. Wisner (Mich.), 50 N. W. Rep. 654; *Contra*, Carver vs. Hallett, 26 Ala. 722.

[92*] McMahon vs. Ambach, 79 O. S. 110.

[92a] See statute, § 654.

[93] *In re* Wolf, 4 N. P. 336; 7 Dec. 220. See § 1644, As to assignees.

See § 508 as to attorney fees, etc.

See next section.

compensation will not be allowed especially where an unusual amount of time was expended in settling a difference growing out of a misunderstanding between the executors.[94]

Likewise it has been held that where an executor refused to obey the order of the Court to file an account, although served with five citations, he should not receive an allowance for extra services.[95] Where extraordinary expenses are incurred in securing the appointment, they may be allowed, as where an administrator went to New Orleans, and had the will set aside.[96] Claims made by the executor or administrator, for extra compensation for his individual services, in connection with the administration of his trust, should be scrutinized with the strictest care. If they are such that do not properly come within the ordinary duties of an administrator, they should be allowed, for the law does not expect the trustee to render services without compensation. But it should also be remembered that the statute fixes a sum which it considers a proper and full payment for all services that may be rendered in the administration of the estate, unless something is required beyond the usual requirements of a proper administration. Where extra compensation is asked, to reimburse an administrator or executor for expenses incurred, a more liberal rule might be applied than if the executor was asking extra allowance for himself. An executor or administrator might be allowed a claim for serv-

[94] *In re* Johnson, 4 N. P. 156; 7 Dec. 1.

Two very interesting cases have been reported from the Common Pleas Courts in Ohio, in relation to both extraordinary services allowed to executors and administrators, and to their attorneys. The case of *In re* McAlpin, 38 Bull. 231; 8 Dec. 655, has been referred to, and the syllabus is quoted in a previous chapter. § 508.

The other case is that of Chatfield & Woods vs. Swing & Mellen, 7 A. L. R. 326. In this case the executors were also attorneys, the estate amounted to $171,000 and they presented a bill for extraordinary services of $24,000. The Court in passing upon the matter goes into the question very thoroughly as to what are extraordinary services, and what should be included within the common course of administration, for which the commission allowed by statute, should pay the executors in full. While conceding that an executor might be allowed counsel fees for his own services, the bill was reduced to $4,000. In this case it was held that the giving of a large bond did not warrant an allowance as extraordinary services, nor the filing of a petition to sell real estate, where nothing else was required, nor the public sale of chattels, nor collection of dividends on stock, nor the appraising of and sale of lands as an entirety, but that preparation of papers for private sale of personal property, or the sale of real estate where care is required, and where suit to construe the will is required, and where lands were subdivided, and where constant attention is required, extra compensation may be allowed.

[95] Cairns vs. Hedges, 2 C. C. 103; 1 C. D. 387.

[96] Huston vs. King, 3 Bull. 1147.

The executor is not bound to assume the defense of a will, but if he does so in a disinterested effort to maintain it, to effectuate the intention of the testator, he may be allowed his expenses. But where he is a legatee, and that a special bequest to him invites the attack, it will not be allowed. Weir vs. Weir, 7 C. C. (N.S.) 596; 28 O. C. C. 199.

Even if by agreement with the parties, it is sustained. Union Bank vs. Smith, 4 C. C. (N.S.) 237; 26 O. C. C. 317; affirmed 74 O. S. 505.

ices rendered in behalf of the estate by others, even if they were such services that he himself should have rendered in the ordinary administration of an estate.[97]

An executor who necessarily incurs expense in searching the title of land belonging to his testator's estate for the purpose of paying off and obtaining an assignment of a mortgage thereon should be allowed the sum so paid in the settlement of his accounts.[98]

Executors who have invested trust funds in a bond and mortgage which are perfectly good, are not entitled, on final accounting, to the expenses incurred by them on a sale and transfer of such bond and mortgage before maturity to a third person.[99]

Where a will provides that the expenses of administration shall be charged upon, and paid out of, the estate of the testator, both real and personal, the administratrix, to whom one-half of the estate has been devised for life, and who is the assignee of the other half, is not personally liable for such expenses.[100]

Where an executor failed to render an account until forced to do so by process of Court, and various items of the account filed by him were contested and disallowed, he cannot reimburse himself from the estate from expenses caused by such contest.[101] The expenses of hunting up the heirs cannot be charged to the estate.[102] Nor the expense of looking out for one's own interest.[103]

[97] Though an executor will be allowed his bill for reasonable and necessary livery expenses, he will not be allowed for the use of his own horse and wagon in collecting the assets of decedent's estate. *In re* Ingersoll, 6 Dem. Sur. 184.

[98] *In re* Bettels, 4 N. Y. Supp. 393.

[99] *In re* Lamb's Estate, 21 N. Y. Supp. 343; S. C. 66 Hun. 631.

[100] Boynton vs. Laddy, 10 N. Y. Supp. 622; S. C. 57 Hun. 589, 594.

The cost of raising a fund, including counsel fees, auctioneer's charges, commissions, etc., fall upon the fund, and are chargeable as "costs of administration." Teaf's Estate, 7 Pa. Co. Ct. Rep. 463.

[101] *In re* Goetschius' Estate, 23 N. Y. Supp. 975; S. C. 3 Misc. Rep. 155.

[102] *In re* Glynn's Estate, 58 N. W. Rep. 684.

[103] Id.

Entitled to railroad fare and hotel bills while traveling in discharge of duties; also telephone bills. But not a per diem and expenses in traveling in the community where the estate is located. *In re* Pollock, 60 Bull. 273; 17 N. P. 495.

The mere fact that the allowance to an administrator for extraordinary services rendered his estate seems somewhat large will not warrant the Circuit Court to error in reversing the Probate Court, the Common Pleas Court on appeal hav-

§ 660. Employment of agent, office rent, etc.

As a general rule administrators and executors are not authorized to employ agents to do such things as they ought to do themselves. That is, to keep their accounts, to collect bills, etc. Nor would they be entitled to charge for office rent. But cases are easily conceivable where the magnitude of the estate, or the complication of its affairs, would amply justify the payment of office rent.[104] One of the most common instances of employment in the management of estates, is that of an attorney. Such employment has been considered in a previous chapter.[105]

It will be the purpose of this section to give some instances of what have been considered proper expenses. Of course in all these instances, the administrator or executor is primarily liable, unless expressly stipulated to the contrary, when the services were rendered. An executor is not entitled to credits for clerk hire, where the evidence does not show payment to a clerk, but a retention of funds by the executor for services performed by himself as clerk.[106]

Usually an administrator is not entitled to credit for sums paid for clerical services rendered in his capacity as executor.[107] The employment or payment of agents by an executor to collect the rents of, and manage certain real estate belonging to his decedent's estate is not wasteful or extravagant, where such real estate consists of a drug store with apartments above.[108] It is proper to allow an administrator for rent of an office hired

ing fixed the same amount. Prentiss vs. Woods, 20 O. C. C. (N.S.) 380.

Before an administrator can be allowed extra compensation he must show his right. Piatt vs. St. Clair's heirs, W. 526.

[104] Redf. Sur. Prac. 451.

[105] § 508.

Whatever services were rendered as indicated to be proper in § 506 would be a service for which the estate would be liable.

[106] *In re* Butler's Estate, 1 Con. Sur. 58; S. C. 9 N. Y. Supp. 641.

[107] *In re* Beache's Estate, 22 N. Y. Supp. 1079; S. C. 1 Misc. Rep. 27.

Where a resident executor removes from the State before settlement of the estate, he will not be allowed for payment to any agent in completing the unfinished business, performance of which by himself was rendered impossible by his absence, or for traveling expenses incurred in returning to the State. *In re* Ingersoll, 6 Dem. Sur. 184.

[108] Wells vs. Disbrow, 20 N. Y. Supp. 518; S. C. 65 Hun. 625.

by him exclusively for the business of the estate, when the use of such office is reasonably necessary for the transaction of such business, and also for payments made by him for reasonable and necessary services rendered in prosecuting claims belonging to the estate, and for money paid in compromise of doubtful claims against the estate.[109] The administrator is entitled to the costs of preserving the crops belonging to the estate,[110] and expenses incident thereto,[111] and for feeding and caring for stock,[112] and gathering crops.[113]

A direction in a will to raise crops does not authorize the purchase of property and animals not necessary to such raising.[114] The expenses of a broker to sell real estate may be allowed if necessary;[115] or an auctioneer.[116] The costs of refreshments furnished those at the sale will not be allowed.[117] Traveling expenses not included in commissions,[118] will be allowed if necessary to the transaction of the business of the estate.[119] The costs of an audit caused by unfounded charges of an executor are properly charged to him.[120]

[109] Newal vs. West, 149 Mass. 520; S. C. 21 N. E. Rep. 954; Glover vs. Holley, 2 Bradf. 291; Hawley vs. Singer, 3 Dem. 589; Clarke vs. Cotton, 2 Dev. Eq. 51.

[110] Nimmo vs. Com., 4 Hen. & M. 57; Lee vs. Lee, 6 Gill & J. 316; Byrd vs. Wells, 40 Miss. 711; Wattles vs. Hyde, 9 Conn. 10.

Succession of Wederstradt, 19 La. Ann. 494.

[111] Bomford vs. Grimes, 17 Ark. 567; Bantz, 52 Md. 686; Edelen vs. Edelen, 11 Md. 415; Myrick's Estate, 38 La. Ann. 611.

[112] Branham vs. Com., 7 J. J. Mar. 190.

[113] *In re* Turpin's Estate, 7 N. P. 569; 5 Dec. 410.

[114] Johnson vs. Henagan, 11 S. C. 93.

[115] Dey vs. Codman, 39 N. J. Eq. 258; Ballentine's Estate, Myr. 86

[116] Pinckard vs. Pinckard, 24 Ala. 250; Garrett vs. Garrett, 2 Strobh. Eq. 272; Shepard vs. Shepard, 19 Fla. 300.

See § 1644, assignee's commission Ingham vs. Lindeman, 37 O. S. 218, where an assignee was not allowed an auctioneer.

[117] Griswold vs. Chandler, 5 N. H. 492.

[118] Stephenson vs. Stephenson, 3 Hayw. 123.

[119] Clarke vs. Blount, 2 Dev. Eq. 51; Pinckard vs. Pinckard, 24 Ala. 250; Wendell vs. French, 19 N. H. 205; Dey vs. Codman, 39 N. J. Eq. 259; *In re* Rose's Estate, 80 Cal. 166; S. C. 22 Pac. Rep. 86.

[120] Appeal of Barheite, 126 Pa. St. 404; S. C. 24 W. N. C. 64; 17 Atl. Rep. 617.

§ 661. Allowance made to the widow and children.

A claim entitled to be paid after the funeral expenses, those of last sickness, and expenses of administration, is the allowance made to the widow and children for their support for twelve months. The nature, character and law relating to such allowance has been discussed in a previous chapter.[121] Sufficient here to say, that such an allowance is not a preference over a mortgage or judgment liens.[122] Such property as is specifically set apart to the widow passes at once into her possession, and it is the duty of the administrator or executor, as soon as he has in his hands assets sufficient to pay the funeral expenses, expenses of last illness and costs of administration, to apply enough of the remaining assets to satisfy this debt. For the allowance made to a widow and her children for her year's support, is a debt, and real estate may be sold to secure its payment.[123]

§ 662. Debts due the United States.

The third in order of preference, are debts due the United States. The following are the two sections of the Revised Statutes of the United States which provide generally as to such preferences.

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."[124]

[121] § 319 *et seq.*

[122] Jones vs. Allen, 6 N. P. 518. See also Whitley vs. Weber, 2 C. C. 336; 1 C. D. 517; See § 332.

[123] Allen vs. Allen, 18 O. S. 235;

[124] § 3466, U. S. Revised Statutes.

This priority, however, does not operate as a lien upon the property of the debtor, nor in derogation of a lien existing before his death, nor of the widow's allowance under the State law, and necessarily depends upon notice being given to the executor or administrator either by action against him or otherwise in default of which payment to other creditors cannot make him liable as for devastavit. And the priority extends only to the net proceeds of the property of the deceased after payment of the necessary expenses of administration, including taxes and funeral charges, but not expenses of last illness.[126]

§ 663. Taxes, etc.

Public rates and taxes, and sums due the State for duty on sales at auction, is the fifth in order of preference. It is a general rule, that taxes whether on real estate or personal property, which are assessed or payable at the death of the decedent, are to be paid by the administrator or executor out of the personal property. Taxes assessed on real estate after the death of the owner, are to be paid by those receiving the inheritance. There may be taxes which the administrator or executor is required to pay which are not included within this preference.[126a] Thus it has been held,[127] that the term *taxes* does not include *assessments* made by a municipal corporation under authority, derived from the legislature; and although such an assessment, which was confirmed at the time of the decease of the testator, is a personal debt, and should be paid out of the personal estate, it is not entitled to *any priority before* other

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid." § 3467, U. S. Revised Statutes.

[126] Woerner on Admin. 772.

[126a] The administrator or executor must see that the inheritance tax is paid. § 349. State vs. Bonding Co., 16 N. P. (N.S.) 297; 23 Dec. 609.

See § 10662 G. C., § 300b.

Where a life tenant died in October the taxes payable in December are a claim on the life tenant's estate, and if the executor does not pay them the remainder man may and recover them from the executor. Robinson vs. Bouler, 18 C. C. (N.S.) 372.

[127] Seabury vs. Bowen, 3 Bradf. 207; Redf. Sur. Prac. 549.

See §§ 511, 1292, 1392.

If the testator died on the day preceding the second Monday in April, the heir or trustee, and not the executor, should pay the taxes. In Est. of O'Brien, 2 N. P. (N.S.) 421; 14 Dec. 319. It would have been different it he would have died a few days later.

debts. It would, therefore, seem that the taxes which are intended by the law to be preferred, are those which are collected for State and county purposes generally. The question sometime arises as to the time when these taxes become fixed, so as to charge the administrator or executor with their payment. By statutory provision, personal property is required to be listed on the second Monday of April,[128] and a lien for State taxes attaches on the same day.[129]

As is well known, the rate of taxes is not fixed until a later date. The State auditor gives notice of the rate required for State purposes on the first Monday of June,[130] and the county commissioners at the June session fix the amount to be raised,[131] and township trustees on or about the 15th day of May, determine the amount that they deem necessary for township purposes.[131*]

As to real estate, the amount is not charged on the auditors duplicate until the first of October. If a person dies after the second Monday of April, and before October first, should the personal representative or the heir pay the taxes on the real estate? Just at what time this period becomes fixed so as to charge an executor or administrator, has not been passed upon by our courts. In one case, however, it was held, that the assessment of taxes was so far complete by the second Monday of July that the name of the person assessed for the year could not be changed; and hence if the owner died on that date the taxes were properly chargeable against his representative.[132]

In New York, property is to be listed between the first Monday of September and the first Monday of January. There it was held that the party who owned the property between that date, and died after the first Monday in January, although the rate had not been finally fixed, his estate would be chargeable.[133]

[128] § 5375 G. C.
[129] § 5671 G. C.
[130] § 5626 G. C.
[131] § 5627 G. C. and § 5630 G. C.
[131*] §§ 5646, 5647 G. C.
[132] Loomis vs. Van Phul; cited in Morrison vs. Bruce, 1 Dec. 190.

Recent decision of Hamilton Common Pleas, *In re* Est. of Mary O'Brien, it is held that where the owner died testate the day on which the taxes became a lien, but which were not ascertained or levied at the time, having appointed an executor and also a trustee of a portion of the real estate, the trustee thereupon became the owner of the real estate, and he, and not the executor is liable for the taxes. Loomis vs. Van Phul, 14 Dec. 319; reported in 2 N. P. (N.S.) 423; 15 Dec. 37.

In re Lones, 57 Bull. 172, it is held by the Probate Court of Columbiana county that taxes against a decedent's real estate accrue and are payable from October 1st, not second Monday of April, hence are chargeable against the heir and not the administrator. In this case a number of authorities are cited, but there seems to be no better reason for fixing October 1st than the second Monday in April. The heir does not generally get full possession on the death of the ancestor. If when the ancestor died the land was seeded, the entire crop would go to the administrator, even though it did not mature for nine months. However, the date of October 1st being in the fall when nearly all the crops are matured, it might be better for that reason than April. But the decisions are not uniform nor in accord. Where a life tenant died in October, 1909, it was held the administrator must pay the

In view of these decisions it may properly be considered, that if the person be living on the second Monday of April that his estate will be chargeable with all taxes to be assessed for that year. As to the lien of assessments, our Supreme Court has recently made an interesting decision.[134]

Installments of assessments for municipal improvements which are certified to the county auditor and are due and payable within the year next after the last day of September in any year, should be placed upon the duplicate of the county for such year and collected as other taxes; the installments not so due and payable, should not be placed upon the annual duplicate until they become so due and payable.[134a]

Installments which are properly entered upon the annual county duplicate should be collected the same as other taxes, and in case of a judicial sale of real estate, or a sale by administrators, executors, guardians or trustees, made after the last day of September in any year, such installments as stand unsatisfied upon such duplicate should be paid out of the proceeds of such sale. It has generally been held, that a claim for taxes is such a one as should be paid by the personal representative even without presentation to him, or allowance by the Court, but that it may also be proved up as a claim against the estate in the Probate Court like other demands.[135]

§ 664. Wages.

The fifth in order of preferment is the wages which are due to a person who has performed manual labor in the service of

taxes due December 26, 1909. Robinson vs. Bouler, 18 O. C. C. (N.S.) 272.

[133] Matter of Balcock, 115 N. Y. 450; Jes. Sur. Prac. 944.

[134] Makeley vs. Whitmore, 61 O. S. 587.

See §§ 895, 904.

[134a] Where decedent during his lifetime effected insurance in a mutual fire insurance company his estate is liable for assessments up to the time of his death and jointly with the heirs thereafter during the life of the insurance. *In re* Lones, 57 Bull. 123.

[135] See Gager vs. Prout, 48 O. S. 89, where the matter is discussed as to the correction of false returns. §§ 10660, 10665 G. C., presented in § 300, provides for placing property on the duplicate, which has been omitted; and that such taxes are a debt of the deceased, and shall have the same priority as other taxes in distribution or payment of inferior debts or claims that shall relieve the administrator or executor from liability to pay such taxes. See also § 511, as to taxation. See § 904.

A guardian or executor, etc., is entitled to a lien on the land for his expense or money paid in listing property for taxation, or paying taxes thereon. § 5687 G. C.

Executors who hold property for a term of years and required to pay taxes, are owners, and should be notified when assessment is made. Roberts vs. Bernard, 8 C. C. (N.S.) 422; 29 O. C. C. 725.

Funds in the hands of an administrator, even though under order to

the estate and during the life time of the decedent, where the same has been performed within twelve months preceding the death of the decedent, the amount allowed shall not exceed $150. It will be observed that there are several essentials to entitle a person to this preference. First, it must be manual labor; second, it must have been rendered to the deceased during his life time, and third, it must have been performed within twelve months previous to the time of the decedent's death; and if these three essentials are established, the claim can be allowed as a preference to the amount of $150. If such a claim exceeds $150, the remainder would come in the same class as debts due to general creditors. There may be some difficulty sometimes in determining just what is included within the term "manual labor." It usually signifies labor with the hands as distinguished from intellectual labor. Under an act giving the preference to employees, it has been held that a tram car driver is not a person engaged in manual labor. Likewise, that an omnibus conductor was not a person engaged in manual labor.[136]

§ 665. Debts due general creditors.

If the administrator or executor has sufficient assets of the estate to pay those creditors preferred by sec. 10714-5, G. C., as dis-

pay on certain mortgages, is taxable. Gregg vs. Harimon, 4 N. P. (N.S.) 214; 16 Dec. 549.

[136] 14 Am. & Eng. Ency. of Law 255.

"It is said that manual labor includes any work done with the hands. But writing, for instance, is clearly not manual labor within the meaning of the Act, but yet it would come under the definition contended for, if it were a good one. Again, can it be said that a telegraph clerk is a manual laborer, or a hair cutter? Clearly not. Is, then, a driver to be taken to come within the meaning of the clause merely because he works with his hands? I can see no distinction between his case and those I have taken as examples—namely, a telegraph clerk, a writer, or a hair cutter. All have manual work to do, but that does not necessarily make them come under the term "laborers," and I can not see that a driver is a man "engaged in manual labor," to whom the act is intended to apply.

Grantham, J., said: "It is very difficult to draw a clear and definite line as to how much and what classes of work are included in the words 'manual labor'; but I think that these words were inserted in the section with a view to being applied to those whose labor is laborious without being intellectual. The ordinary definition of labor is continuous work without any necessity for very much thought. Unless, therefore, driving can be said to be labor of such continuous kind requiring little thought, it does not come within the meaning of the Act."

See *In re* Kohanzi, where the administrator paid laborers in a going concern, 16 N. P. 337.

cussed in the previous sections, the remainder is to be applied to other creditors. The statute further provides, that if after paying one of said classes and there is not enough to pay the debts of the next class, the creditors of said next class shall be paid ratably in proportion to their respective debts, but that no payment shall be made to creditors of any one class until those of the preceding class or classes of whose claims the executor or executors shall have had notice shall be fully paid. If the administrator makes payment upon a claim in any one of these classes before the expiration of six months, he does so at his peril. After the expiration of six months, however, he can make payment without being liable to a creditor of a preceding class.[136a] It is not the intention, however, of the legislature, by giving the preference to creditors to interfere in any respect whatever with liens existing and attaching to the property of the deceased, be the same, either real or personal. As to personal property, the law has placed this matter beyond question by the following section of the General Code.[137]

§ 666. Previous section (10715) not to affect lien. "Nothing in the next two preceding sections shall affect any lien, legal or equitable, which a creditor or other person had upon the personal estate of the deceased during his lifetime." [R. S. § 6091.] [138]

This section preserves the rights of parties as existing at the time of the death of the decedent. It would perhaps have been unconstitutional to have attempted to take away rights of this character, property subject to a lien of any character should be sold, the lien paid and the remainder placed to the credit of the general fund. The rights of lien holders to the proceedings of real estate will be discussed when treating of

[136a] See §§ 645 and 667.

See Schell vs. Bernhard, 24 Dec. 182; reversed 36 O. C. C. 39.

A person dying, owning and in possession of property which he had mortgaged, the interest of the mortgagee is transferred to the fund, etc. Lingler vs. Wesco, 79 O. S. 225; 3 N. P. (N.S.) 653; 16 Dec. 474.

See McDonald vs. Aten, 1 O. S. 293; Grovenor vs. Austin, 6 O. 103; Lessee vs. Reed, 5 O. 221.

[137] Debts owed by the deceased in a fiduciary capacity have no preference over general creditors. Green vs. Brooks, 25 Ark. 318; Fox's Estate, 92 N. Y. 93.

But specific property or funds held by him in a trust capacity must be turned over to his successor in the trust. Governor vs. Hooker, 19 Fla. 163; Rowley vs. Fair, 104 Ind. 189; Nat. Bank of Troy vs. Stanton, 116 Mass. 435.

See § 632.

[138] § 10716 G. C.

A chattel mortgage unfiled might be a good lien as against the heirs of the deceased, but would not be good against creditors. Kilbourne vs. Fay, 29 O. S. 264.

the sale of real estate. Suffice it to say that the holder of a claim secured by a lien may also present his claim to the administrator or executor, duly verified as any other claim, and have it paid out of the funds in the hands of the administrator or executor. The lien is merely security for the payment of the debt, and the holder may waive the right to proceed against such security.

§ 667. When executor or administrator may proceed to pay debts without being liable for deficiency of assets. "If an executor or administrator, notice of whose appointment has been given as provided in this chapter, does not, within six months thereafter have notice of demands against the estate, which will authorize him to represent it insolvent, after the expiration of such six months, he may proceed to pay the debts due from the estate. He shall not become personally liable to any other creditor in consequence of such payments made before notice of his demand, although the remaining estate be insufficient to satisfy such creditor." [R. S. § 6109; 102 v. 202.][139]

§ 668. Notice of demands, etc.*

There are several essentials required before an administrator or executor can proceed to pay debts of the decedent without liability to creditors who have not presented their demands. In the first place, the period of six months must have elapsed since the administrator or executor gave his bond or received his letters of appointment. This depends, however, upon the further fact that he has given his notice of appointment,[140] for at no time can he escape a liability to general creditors, if he neglects to give such notice of appointment. Another essential is, that sufficient demands have not been presented to him, to cause him to declare the estate insolvent,[141] for if the estate be insolvent, then it must be paid out as provided for the settlement of insolvent estates. The question arises, what is a sufficient notice of a creditor's demand that will bind the executor and make him responsible, if he pro-

[139] § 10741 G. C.; applied Harris vs. O'Connel, 85 O. S. 136.
Administrator may recover from heir if he distributes more to heir than heir is entitled to. Rogers vs. Weaver, 5 O. 536.

[140] See § 543 *et seq.*

[141] See § 959 *et seq.* on Insolvency of estates.
See § 903.

* Cited Bray vs. Darby, 82 O. S. 47.

ceeds to make payment without recognizing or considering such a demand.

In a previous chapter[142] this matter has been pretty thoroughly considered, and a quotation from Woerner, there, places the responsibility upon the creditor, to strictly comply with the provisions of the statute; and that in order to hold an executor or administrator responsible, the claim must be presented to the administrator as required by statute.[143]

The mere fact that an administrator or executor has knowledge that there is a demand, will not be sufficient; for aught that he knows it may never be presented for payment. But if a claim is presented to him under such circumstances that would lead an ordinarily prudent man to believe that the creditor meant to assert his claim against the estate, the administrator or executor ought not to distribute the estate without notifying the creditor of his intention to so do. If the executor or administrator so acts as to lead a reasonably prudent man to believe that no formal presentation is necessary, or that the claim will be allowed without any presentation, he would be liable if the creditor's claim was not considered. While the law places certain duties upon the creditor, it does not throw a cloak around the executor or administrator which will shield him from the consequences of his own wrong.

§ 669. And if whole estate be paid and afterwards other claims presented he shall not be liable therefor. "If an executor or administrator in manner aforesaid, pays away the whole of the estate and effects of the deceased before notice of the demand of any other creditor, he shall not, in consequence of such new demand, be required to represent the estate insolvent, but may plead that fact, and, upon proving such payments, shall be discharged." [R. S. § 6110.][144]

142 § 555.

143 See § 10717 G. C.

144 § 10742 G. C.

See previous section.

The whole of the estate and effects of a deceased, means all his property: and if a claim be presented the real estate may be sold even after a partition by the heirs. Faran vs. Robinson, 17 O. S. 242.

§ 670. If so paid away as to leave insufficient assets to satisfy subsequent claims. How far liable. "If an executor or administrator in manner aforesaid, pays away so much of the estate and effects of the deceased, that the remainder is insufficient to satisfy a demand of which he afterward has notice, on such last mentioned demand, he shall be liable to pay only so much as may then remain in his hands." [R. S. § 6111.][145]

§ 670a. May prove estate insolvent. "If two or more such demands be exhibited, which together exceed the amount of assets in his hands, he may represent the estate insolvent, and must divide and pay over what remains in his hands, to and among such creditors as prove their debts, under the commission of insolvency, pursuant to such order as the court makes in that behalf. The creditors of the deceased, who previously were paid shall not be liable to refund any part of what was received by them." [R. S. § 6111.][145*]

An important provision of the above section is, that it provides that a creditor shall not be obliged to refund any part of the money where it has been properly paid to him. It was held in an early case, that where an administrator supposing an estate to be solvent pays a creditor beyond his distributive share, that he might recover back the excess,[146] whether this is the law now or not, may be questionable.[147]

§ 671. If assets are exhausted in paying preferred claims. Executor or administrator not liable for payment of subsequent claim. "Upon settlement of the administration account in court, if it appears that the estate and effects which came to the hands of the executor or administrator have been exhausted in paying charges of administration, the allowance to the widow and children of the deceased, the charges of his last sickness and funeral, or other debts or claims, entitled by law to a preference over the general creditors such settlement shall be a bar to an action brought against the executor or administrator, by a creditor not entitled to such preference. The executor or administrator may plead and give it in evidence, although the estate has not been represented insolvent. [R. S. § 6112.][148]

[145] § 10743 G. C.

[145*] § 10744 G. C.

[146] Rodgers vs. Weaver, 5 O. 536.

[147] See § 959, Insolvent estate.

[148] § 10745 G. C.

It is sometimes the practice where claims are presented which

§ 672. Interest on claims.

As a general rule, an administrator or executor is not chargeable with interest upon the money of the estate in his possession and control. But where it is the duty of an executor or administrator to pay money in his hands to creditors, legatees or distributees of the estate, and he needlessly delays such payment and neglects to make it when such payment is due, or where he has unreasonably and causelessly delayed the final settlement of the estate, and has used the funds of the estate for his own purposes, he will be chargeable with interest; and in an aggravated case it is the duty of the Court to charge him with compound interest, computing the interest annually.[149] The principle deducible from the decided cases upon this subject is that one exercising such trust is liable for interest when he has improperly kept the beneficiaries out of the use of their money; and mere delay in closing up an estate is held to sometimes be *prima facie* evidence of this.[150] As to the liability of the estate of the decedent for interest upon claims, it may be said that, with the exception of contracts and obligations which expressly bear interest, unless the statute prescribes a different rule, the claims of creditors are to be treated with respect to the matter of interest just as they stood at the time of the decedent's death.[151] No interest can be allowed upon a claim, even though demanded, unless the paper or contract which is the basis of the claim shows that interest results as a matter of course from the facts stated.[152]

are not entitled to preference, and the estate is insolvent, in order to save expenses, a calculation is made by the executor or administrator as to what can be paid *pro rata*, and then the creditors receipt for such amount and release the administrator from all further liability. This mode can only be pursued where all creditors agree.

See § 515, Investments.

[149] Cooch vs. Irwin, 7 O. S. 23; Henry Prob. Prac. 340; citing Johnson vs. Hedrick, 33 Ind. 129; Brackenridge vs. Holland, 2 Blackf. 377; Roberts vs. Malin, 5 Ind. 18; Case vs. Case, 51 Ind. 277; Shaw vs. Bates, 53 Vt. 360.

[150] Manning vs. Manning, 1 Johns. Ch. 528; Dufour vs. Dufour, 28 Ind. 421; Norris App., 71 Pa. St. 106; Vance vs. Vance, 32 La. Ann. 186.

[151] Schouler Exrs. & Adms., § 440; Davis vs. Wright, 2 Hill Law 560; Suc. Durnford, 1 La. Ann. 92; Holmes vs. Lusk, 78 Ky. 548.

[152] Aguirre vs. Packard, 14 Cal. 171.

Interest should be allowed on accounts and other claims presented according to custom, and in the same manner that the same could have been collected if the decedent was alive.

General legacies bear interest at the legal rate, from the end of the first year, from the date of the notice of the appointment of the executor, unless it be clearly apparent that the testator did not so intend.[153]

If an administrator or executor pays pressing demands out of his own funds, he is entitled to credit himself with interest on the sum so advanced.[154]

§ 673. Payment to heirs, etc., before final settlement.

An executor or administrator who voluntarily pays, with knowledge of all the facts, etc., a part of the assets of the estate to the widow, heirs, or legatees, before the final settlement of the estate, leaving insufficient means in his hands to pay the debts of the estate and the expenses of administration, and compensate himself for his services, cannot recover from the parties to whom such payments were made, sufficient money for the needs of the administration. The loss is his, for by such voluntary payment he is guilty of waste and is not entitled to relief. To make such payment a voluntary payment so as to preclude a recovery from the distributee, to whom the payment was made, it must have been made with full knowledge of all the facts, or with full opportunity of obtaining such knowledge, otherwise such distributee is liable to refund, if necessary, for the payment of the debts and expenses of the estate.[155]

As a rule an overpayment to a creditor, made by the administrator or executor, may be recovered. It being inferred that

[153] Gray vs. Case School, 62 O. S. 1.

The above is the syllabus of the case, and the Court says, one year from the date of the notice of appointment. It seems to us that it would have been more accurate to have said, one year from the date of giving bond.

[154] See § 715.

[155] Smith vs. Smith, 76 Ind. 236; Stokes vs. Goodykoontz, 126 Ind. 535; Wolf vs. Beaird, 123 Ill. 585; Rogers vs. Weaver, 5 Ohio 536; Walker vs. Hill, 17 Mass. 380; Wheadon vs. Olds, 20 Wend. 174; Alexander vs. Fisher, 18 Ala. 374.

See § 632, also James vs. West, 47 Bull., 857.

he only intended to make such payment as the estate could afford, and not to subject himself to personal liability on account of a deficiency of assets. This is, however, contrary to the common law rule.[156]

But it is probably essential to a recovery, that such payment has been made under the impression that the estate was solvent.[157]

The better practice under our statute is to take a refunding bond where a distributive share is paid before final settlement of the estate.[158]

[156] Walker vs. Hill, 17 Mass. 380; Hatcher vs. Royster, 14 Lea 222; Beatty vs. Dufief, 11 La. Ann. 74.

[157] Rogers vs. Weaver, 5 Ohio 536; Walker vs. Hill, 17 Mass. 380.

[158] Edmunds vs.. Scott, 78 Va. 720.

See § 696.

A beneficiary in an estate has no power under the statute to receipt for her distributive share in advance of the distribution or of a finding of the amount coming to her, and a receipt so given by her remains subject to explanation, and an administrator has no power to negotiate for or accept such a receipt where the assets of the estate have passed out of his hands and he is therefore unable to settle with the beneficiary. *In re* Kuehnken's Estate, 8 N. P. 657.

CHAPTER XL.

PAYMENT OF LEGACIES.

§ 674 Introductory.
§ 675 Specific legacy.
§ 676 General legacy.
§ 677 Demonstrative legacies.
§ 678 Gifts of stock, etc., General or Special.
§ 679 Vested and contingent legacies.
§ 680 Absolute and conditional legacies.
§ 681 Cumulative, repeated and substituted legacies.
§ 682 Stated amount and residuary legacies.
§ 683 Lapsed legacies.
§ 684 Void legacies.
§ 685 Adeemed legacies.
§ 686 Satisfied legacies.
§ 687 Legacies in lieu of dower.
§ 688 Legacies to creditors.
§ 689 Legacy to a debtor.
§ 690 Legacies charged on land.
§ 691 Legacy for life.
§ 692 Legacies in the nature of incomes and annuities.
§ 693 Abatement of legacies.
§ 694 General rules as to payment.
§ 695 When legacies should be paid.
§ 696 If any legatee require legacy to be paid within eighteen months, Court may require him to give bond.
§ 697 Application for order requiring payment.
§ 698 Form of application.
§ 699 Hearing, etc.
§ 700 Form of bond.
§ 701 Form of entry, approving bond and ordering payment.[1]

§ 674. Introductory.

The subject of legacies, properly speaking, is a branch of the subject of wills, and to general treatises on wills, the reader must be referred for extended discussion. Of course it can only affect the administration of an estate where there is a will of the decedent, for a legacy is a gift or disposition in one's favor by a last will and testament, and is commonly applied to a gift of personal property, the word "bequest" being, however, a more proper word, strictly confined to personalty. Many difficult questions arise as to the payment of these gifts; when and how such payment should be made. Where an executor or administrator with the will annexed, has any doubts

[1] See § 1180 *et seq.*, As to construction of wills; § 1240, As to gifts *causi mortis*.

about the propriety of making payment of a legacy, he should let the Court decide the question. This he can do in a number of ways. He can bring an action to construe the will,[2] or he can refuse payment of a legacy, and in that manner compel the legatee to bring an action in the Probate Court asking the Court to direct payment.[3] This may be done before a final account is filed, as provided in sec. 10762, G. C.,[4] or after final account has been filed, payment may be enforced, under sec. 10848-9, G. C.[5]

It has been a question with the writer, whether this chapter should follow the chapter on accounting, etc., or should be treated of when speaking of wills. However, as some legacies may be required to be paid before an account is filed, it would seem not inappropriate to treat of the subject immediately after the consideration of the matter of payment of debts. There are quite a number of different kinds of legacies. Thus we have general, specific, demonstrative, pecuniary, absolute, conditional, vested, contingent, residuary, cumulative, additional, repeated, satisfied, lapsed and adeemed. These various kinds of legacies will be considered in the subsequent sections of this chapter, although from the nature of this work, they cannot be treated with that thoroughness which they deserve.[6]

§ 675. Specific legacy.

Probably the first kind of a legacy that an executor will need to deal with, is that of a specific legacy, which is defined to be a gift of a particular, specified and determined piece of property as distinguished from a general gift.[7] It differs from a general legacy in that it is not intended by testator to be paid out of his estate generally, but is to be paid solely by delivering to the beneficiary the specific thing given by will.[8]

[2] § 10857, 10858 G. C., § 33.

[3] A suit to collect a legacy must be brought in the Probate Court. Smith vs Harker, 41 O. S. 236; 9 Am. L. Rec. 488.

[4] § 696.

[5] An unpaid legacy is not the subject matter of a chattel mortgage. Keller vs. Shaffer, 29 O. S. 264. § 761.

[6] See § 720, Accounting. § 1206, Real estate devised.

[7] Page on Wills, 912.

[8] Byrne vs. Hume, 86 Mich. 546; Page on Wills, 912, citing:

Thus, a gift of testator's property

Our statute provides[9] that where property is specifically bequeathed, it may be delivered to the legatee, by the legatee giving to the executor a redelivery bond, otherwise it remains in the possession of the executor to be disposed of in the final settlement of the estate, as required by the will. A specific legacy under certain conditions may have an advantage over other legacies, or may be at a disadvantage. If the estate is insolvent such legacy does not abate until the entire amount of the general residuary legacies have been consumed in paying the testator's debts, unless a contrary intention is manifested by the will.[10]

However, if the property specifically bequeathed for any cause does not exist, the specific legatee cannot hold other property of the testator for the payment of such a legacy. It

invested in his mercantile business is a specific gift. Kelley vs. Richardson, 100 Ala. 584. So a gift of the horses, farming implements, etc., upon a given plantation, is a specific bequest. McFadden vs. Heffley, 28 S. C. 317; 13 Am. State Rep. 675. So a devise of land owned by testator at the date of the will is a specific devise. Kelley vs. Richardson, 100 Ala. 584. Money may be the subject of a specific legacy. A gift of money deposited at a certain named bank is a specific legacy. Barber vs. Davidson, 73 Ill. App. 441; Prendergast vs. Walsh (N. J.), 42 Atl. 1049; Towle vs. Swasey, 106 Mass. 100; Crawford vs. McCarthy, 159 N. Y. 514. A gift of a certain sum out of a certain described deposit has been held to be a specific legacy. Crawford vs. McCarthy, 159 N. Y. 514. So a gift to the beneficiary of a debt specifically described by indicating the debtor is a specific bequest. Sinnott vs. Kenaday, 14 App. D. C. 1; Gelbach vs. Shively, 67 Md. 498; Tomlinson vs. Bury, 145 Mass. 346; Gilbreath vs. Winter, 10 Ohio 64; Derby vs. Derby, 4 R. I. 414; Gardner vs. Printup, 2 Barb. 83. So a gift of a debt, secured by a mortgage, the executor being directed to assign the mortgage to the legatee, is a specific bequest. Wheeler vs. Wood, 104 Mich. 414. And a gift of a certain amount to be paid by allowing the legatee to select such amount out of a specified number of bonds and mortgages held by testator's executors was treated as a specific gift. Blundell vs. Pope, (N. J.) 21 Atl. 456. A gift of certain encumbered realty, with a direction that the executors pay off the encumbrances thereon, is a specific devise of such realty free from all encumbrances. Porter vs. Howe, 173 Mass. 521. A specific legacy may be a gift of property to be afterwards acquired, if described with sufficient particularity. Kelley vs. Richardson, 100 Ala. 584; Shaffer's Succession, 50 La. Ann. 601.

[9] § 10699 G. C., § 474.

[10] Page on Wills, 923.

is sometimes very difficult to determine whether or not a certain bequest is specific or general. From the liability of specific bequests to fail for want of proper property to apply towards the satisfaction of the same, the Courts have inclined to favor general legacies, and where there is a doubt in that respect, to hold the legacy to be general rather than specific. A specific legatee is entitled to all the income or increase resulting thereon from the time of the death of the testator.

There is no difference in Ohio between a bequest of a thing in specie, and of its proceeds; both are specific and not demonstrative.[11]

§ 676. General legacy.

A general legacy is not payable until it is shown that there are sufficient assets to pay creditors and preferred claims as indicated in the previous chapter. It is defined to be a bequest chargeable upon the general estate and not so given as to be distinguishable from other parts of the estate of the same kind.[12] It is also defined to be a legacy which may be satisfied by any part of the testator's estate, corresponding either in value or general description to the provisions of the will.[13]

The characteristic of the general legacy or devise is that it does not attempt to dispose of specific pieces of property. Any pecuniary legacy, which from the terms of the will, is payable generally from testator's estate is a general legacy.[14] A bequest of "all moneys or legacies coming to me from any source," is said not to be a specific legacy.[15] A bequest of money due the testatrix from the estate of her deceased husband, subject to payment of certain other legacies, was held to be a general and not a specific legacy.[16] A bequest of all testator's property except certain specified articles is a general

[11] Sharp vs. McPherson, 6 C. D. 634; 10 C. C. 181, 186. See § 694 as to payment.

[12] Bouver's Law Dic. 20; 13 Am. & Eng. Ency. of Law 10.

[13] Kelley vs. Richardson, 100 Ala. 584; Dean vs. Rounds, 18 R. I. 436.

[14] Kelley vs. Richardson, 100 Ala. 584; Golder vs. Chandler, 87 Me. 63; Hughes vs. Hughes, 91 Wis. 138.

[15] Dean vs. Rounds, 18 R. I. 436; Derby vs. Derby, 4 R. I. 414.

[16] Littig vs. Hance, 81 Md. 416.

bequest.[17] In case of doubt of testator's intention, the Courts always presume that he intended to give a general legacy instead of a specific one.[18]

Thus, certain legacies which aggregate in amount the principal of a fund given by testator in trust for other legatees, and which are payable on the decease of such other legatees, are held to be general legacies, there being no direction that they be paid out of such trust fund.[19]

No preference is indicated between general legacies by such expressions in the will, as "in the first place," "first of all," etc., followed by other legacies beginning with "next," or "secondly."[20] The order in which the legatees are named is immaterial, as well as the fact that one is named in the body of the will and the others in the codicil.[21]

§ 677. Demonstrative Legacies.

There is another kind of a legacy which has some of the characteristics of both a general and a specific legacy, and is designated as a demonstrative legacy. It is defined to be one which is general in its nature, but which is made payable out of certain specified property, either real or personal.[22]

[17] Kelley vs. Richardson, 100 Ala. 584.

[18] Dryden vs. Owing, 49 Md. 356; Littig vs. Hance, 81 Md. 416; Briggs vs. Hosford, 22 Pick. (Mass.) 288; Wallace vs. Wallace, 23 N. H. 149; Gilbreath vs. Winter, 10 Ohio 64; Dean vs. Rounds, 18 R. I. 436.

[19] Teal vs. Hilton, 21 R. I. (Part 2) 227.

[20] Everett vs. Carr, 59 Me. 325, 330; Wms. Ex., 1370.

[21] Sumner vs. Society, 64 N. H. 321, per Smith, J.

[22] Page on Wills, 915.

A gift of a certain amount "to be paid out of my personal property on hand after the death of my said wife," is a demonstrative legacy. Hibler vs. Hibler, 104 Mich. 274. So is a gift of "the sum of $8,000 invested in stocks"; Johnson vs. Conover, 54 N. J. Eq. 333; and a gift of a certain sum "which may be invested in bank stock" has been held demonstrative. *In re* Hodgman, 140 N. Y. 421. A demonstrative legacy has been held to be created by a gift which, in its terms, is apparently specific where it is evidently given as a means of carrying out testator's intention of dividing his estate equally. Hammer's Estate, 158 Pa. St. 632; Lake vs. Copeland, 82 Tex. 464.

Demonstrative legacies thus combine most of the advantages of both general and specific legacies. If the property out of which it is made payable is in existence, the demonstrative legacy is payable out of such fund before other legacies. Dunford

A demonstrative legacy is, of course, a first charge upon the fund or property which testator designates as to the source of payment of such legacy.[23] A demonstrative legacy is not defeated, however, by the partial or total failure of the fund out of which such legacy is payable, but in such case the deficiency is to be made up out of testator's personal estate, not specifically bequeathed.[24]

§ 678. Gifts of stock, etc., general or special.

When a testator, by will, disposes of a certain number of bonds and stocks, or bonds and stocks of a certain value, it is often very difficult to determine whether the gift is general or specific; and there is some difference of judicial opinion in particular cases. The general principle which controls in this case is that, if it appears from the entire will that testator intended to pass particular, designated bonds or stocks, that the gift is specific; while, if the will can be complied with by giving any bonds or stocks of the kind, value, and amount named, the gift is a general one. Thus, a gift of a certain amount of money in certain named securities, and identifying them, is a general gift, and not a specific one, though testator had exactly that amount at his death. A gift of a certain

vs. Jackson, 22 S. E. 853. If the property out of which it is payable is not in existence, the demonstrative legacy is payable out of testator's property generally. Page on Wills, 915, 916.

A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy, "given generally, but with a demonstration of a particular funds as the source of its payment." It is, therefore, equivalent to, or in the nature of, a devise or bequest of so much, or such a part of the fund or thing specified. Glass vs. Dunn, 17 O. S. 413.

[23] See Chapt. 36, Page on Wills.

[24] Rote vs. Warner, 17 C. C. 342; 9 C. D. 536; Ives vs. Canby, 48 Fed. 718; Golder vs. Chandler, 87 Me. 63; Byrne vs. Hume, 86 Mich. 546; Lake vs. Copeland, 82 Tex. 464.

"The gift is unconditional and absolute, although as is often the case, he overestimates the sources of supply which were to assure its payment. The source indicated turning out to be insufficient, others must be taken to supply the deficiency. It is a demonstrative legacy, not lost because of the non-existence of the property specially pointed out as a means of satisfying it." Moore vs. Alden, 80 Me. 301; citing Smith vs. Fellows, 131 Mass. 20; McLean vs. Robertson, 126 Mass. 537; Potter vs. Brown, 11 R. I. 232; Wells vs. Borwick, L. R. 17 Ch. D. 798.

value of securities, to be selected by executors from his estate generally, is a general and not a specific gift. A gift of a certain sum, "either in stock or money," is, of course, a general gift. But where testator gives stocks, bonds, or other securities in such way as to show that he gives specific bonds or specific shares of stock or particular securities, the gift is regarded as a specific and not a general one. Thus, where testator gives a specified number of shares of a certain kind to one beneficiary, and another specified number to another, the two together being exactly equal to the amount of stock owned by testator when he made his will, the gift is treated as a specific one, especially, as in a subsequent clause, he gives "balance of my stock," that is, the rest of his stock of other kinds, to other beneficiaries. A gift of the dividends of a specified block of stock, being considered in law as a gift of the stock itself, is a specific bequest. Where testator's intention to make a specific gift is clear, a slight misdescription of the security to be given does not prevent the gift from being a specific one.[25]

A bequest of $10,000, payable as follows: "Twenty shares of the First Nat. Bk. at $2,000, $1,000 in L. S. & M. S. Ry., at par, $7,000 in money or good note," is a demonstrative legacy, and if the testator did not own the named stock or bonds, is payable out of the residuum as a general legacy.[26]

[25] Page on Wills, 914, and authorities cited.

In a case which is a departure from the normal, a gift to legatees of certain number of shares of a particular kind of stock "now owned by me and standing in my name" on the corporation stock books, amounted in all to 2,200 shares; at the date of the will testator owned over 3,000 shares; at the time of his death he owned only 200 shares. The Court held that this was a general and not specific legacy. This result was to some extent aided by a statute providing that a will should be construed as if it had been made immediately prior to testator's death, unless his intention clearly appears otherwise. The legacies were, therefore, treated as general pecuniary legacies. Where testator directs that a certain sum of money derived from his estate generally be invested in a certain manner, this is held to be a general, and not a specific legacy, the fund thus invested being raised from testator's general estate. Page on Wills, 915.

[26] Rote vs. Warner, 9 C. D. 536; 17 C. C. 342, 343-4.

§ 679. Vested and contingent legacies.

A legacy is contingent when the enjoyment of it depends upon the happening of some event as the arrival of the legatee at a certain age — and vested, when given generally, in which case, is payable out of the personalty; it vests immediately upon the testator's death. The distinction between vested and contingent legacies is important mainly with reference to the question of lapse. It also becomes important as bearing upon the question whether, and from what time, the legatee is entitled to interest on the legacy, and to what person the legacy goes when limited over. The leading inquiry upon which the question of vesting or not vesting turns, is, whether the gift is immediate, and the time of payment or of enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like. If futurity is annexed to the substance of the gift, the vesting is suspended; but if it appear to relate to the time of payment only, the legacy vests instantly. The mere circumstance that the gift is future, that is, the actual possession is postponed, does not make time of the substance of the gift, or affix a condition to the immediate vesting of the interest. That question is determined by the intention of testator, as gathered from the whole will, and not by particular expressions.[27] The law favors the vesting of estates, and unless a contrary intention is unequivocally expressed, it will not be imputed to the testator.[28] If a legacy is directed to be paid when the legatee attains full age, the gift is absolute, and vests on the death of the testator; but if it is payable when he comes of age, or if, or provided, he lives till he is twenty-one, it does not vest till the contingency happens, and if it never happens, the legacy lapses.[29]

[27] Hamilton vs. Rogers, 38 O. S. 255.

[28] Linton vs. Laycock, 33 O. S. 128.

[29] Page on Wills, § 667, § 670; Redf. Sur. Prac. 611.

A direct gift to a minor is vested, notwithstanding it is given over, in case of his death under age, or "without heirs"; and though liable to be divested on a contingency, the substituted legatees will only take the principal; and the interest accruing meanwhile belongs to the

§ 680. Absolute and conditional legacies.

An absolute legacy is where a thing is bequeathed without any qualification, while a conditional legacy is one depending upon the happening or not happening of some uncertain event, by which it is either to take place or be defeated.[30]

The condition may be either precedent or subsequent. If precedent, the estate vests upon its performance; if subsequent, it vests upon the testator's death, subject to be divested by non-performance. Precedent contingencies are such as must happen or be performed before the estate can vest or be enlarged; subsequent are such that, by their failure or non-performance, an estate already vested may be defeated.[31] There are no technical words to distinguish them, and whether they be the one or the other is a matter of construction, and depends upon the intention of the party creating the estate.[32]

Thus a legacy in trust conditioned upon the immediate and continued engagement of the beneficiary in the business con-

minor, and may be appropriated for his support. Pinney vs. Francher, 3 Bradf. 198. See Matter of Goodrich, 2 Redf. 45. Willets vs. Titus, 14 Hun 554; Linton vs. Laycock, 33 O. S. 128; Foster vs. Wick, 17 O. 250.

The rule favoring immediate vesting must yield to the intention. Hence, a devise requiring the estate to be divided after the death of a son, between the children of sons A and B, and if A's children died childless, that share to go to B's children, subject to a requirement that the executors should pay A $3,000; held, no interest vests in the children of A or B until C's death, because the will was a mere direction to pay to them, and the share of A's child dying would go to B's children after C's death, subject to the payment of $3,000 to A, and A having died before C, the $3,000 never vested in him and he could not transmit it to his widow, but B's children took it. Baldwin vs. Humphrey, 4 C. C. 57; 2 C. D. 417.

A legacy to B, payable at the death of the testator's widow vests at once, and hence does not lapse by B's death before the widow, but is payable to his administrators. McGuffey vs. Brooke, 2 C. S. C. R. 231.

[30] See Caw vs. Robertson, 5 N. Y. 125; rev'g 3 Barb. 410; Cooper vs. Remsen, 3 Johns Ch. 382; Id. 521 5 Id. 459; Crocheron vs. Jaques, 3 Ewd. Ch. 207. Of the duty of executors, in the payment of a bequest conditioned on their being satisfied that the beneficiary had reformed from dissipation. See Dustan vs. Dustan, 1 Paige. 509; Smith vs. Rockefeller, 3 Hun. 295.

[31] Bl. Comm. ii. 154.

[32] 4 Kent Comm. 124; Towle vs. Remsen, 70 N. Y. 303.

ducted by the testator in his life time, fails upon the discontinuance of such services, although caused by illness and permanent physical disability.[33]

If a legatee upon condition accepts the legacy, and enters into possession, he must perform the condition, however burdensome. He is not bound to make his election whether or not to take the bequest, until the condition and value of the gift can be reasonably ascertained. A mere design or intention to accept will not conclude him, or prevent a retraction, if he was ignorant of the real state of the legacy, and the extent of the charge upon it. If he refuses to accept the legacy, the executor will be considered as a trustee holding the fund for the benefit of those interested in the legatory charges.[34]

A recital in a will that the legacy given is in consideration of the legatee's attention to testatrix and her husband,[35] or an expression of gratitude toward a legatee for his services to be rendered as executor,[36] was held to be an expression of motive

[33] Welsh vs. Welsh, 20 Week. Dig. 369.

[34] Redf. Sur. Prac. 612.

A limitation over of personal property dependent on a future uncertain event (as an absolute money legacy to L, but if she dies without leaving children then over) takes effect (if at all) as an executory devise and not as a remainder, and no interest vests in them until the contingency. Lapham vs. Martin, 33 O. S. 99.

Under an absolute legacy to L, but if she dies leaving no children, then over, the executor has no power to invest the fund and give L the income only, but must give her possession of the principal, though she has moved out of the State, is childless and has no property. If the limitation over is valid, the executory devisees and not the executor are the proper parties to protect their own interests without requiring security. Lapham vs. Martin, 33 O. S. 99.

A devisee, or grantee, unlike an heir, may disclaim the gift, and his creditors can not charge it. Any unequivocal act of disclaimer — as by answer in a suit — will estop him. Wallace vs. McMicken, 4 Gaz. 165; 2 D. 564.

Accepting a legacy or personalty is not an election to accept a separate devise or realty charged with payment to other legatees. Collett vs. Cook, 3 C. C. 119; 2 C. D. 68.

Accepting a devise or bequest charged with the payment of debts renders the devisee personally bound for them by implication of law, at least to the extent of the devise. Fuller vs. McEwen, 17 O. S. 288.

[35] McCarty vs. Fish, 87 Mich. 48.

[36] Chassaing vs. Durrand, 85 Md. 420. (After the gift was added: "I thank him, in advance, for services in closing up my estate as testamentary executor.")

of testator in making the gift, and not a condition upon which he made it. Accordingly, the failure of the beneficiary to act as expected by testator does not avoid the gift. So a gift of a homestead to testator's wife, "for a home for her and my children," shows testator's motive in making the gift, and does not impose a condition that testator's wife shall continue to reside thereon.[37]

A gift to one upon condition that after receiving the gift he pay certain sums of money to persons designated, is generally considered not strictly a condition, the breach of which may forfeit the estate but rather as imposing a personal liability upon such devisee, or as creating a trust.[38]

§ 681. Cumulative, repeated and substituted legacies.

A legacy bequeathed twice to the same person, may be either cumulative, if the testator intended the legatee to have two legacies given him in the same will, or it may be only a repetition of the bequest in the first, in which case the legatee will take but one legacy. The latter is also known as a substituted or repeated legacy, while cumulative legacy seems to be synonymous with an additional legacy.[39] Woerner gives Williams' classification as to the determination of questions arising in the matter of cumulative or repeated legacies, as follows: First, where there is no evidence of the testator's intention apparent on the face of the will; second, where there is such evidence; and in respect of those cases where no internal evidence of intention is discernible, he suggests the following proposition to aid Courts of construction: I. If the same specific thing is bequeathed twice to the same legatee in the same will, or in a will and again in a codicil, but one legacy is given; for when once given, the testator has exhausted his power of disposition over the thing given. II. Where two legacies of quantity are given in the same instrument of equal amount,

[37] Davis vs. Hardin, 80 Ky. 672; Talbot vs. Schneider, 151 Mo. 299.

[38] Young vs. Grove, 4 C. P. 668; Woodward vs. Walling, 31 Ia. 533; Cunningham vs. Parker, 146 N. Y. 29. (This is recognized by the Courts, especially where there is no gift over.)

[39] Schoul. Exrs. 468; Woerner on Admin. 968; Page on Wills, § 798.

to the same legatee, there also the same bequest is considered a repetition, and the legatee takes but one legacy. III. Where two legacies of quantity of unequal amount are bequeathed to the same legatee in one and the same instrument, the one is not merged in the other, but the latter is regarded as cumulative, and the legatee takes both. IV. And where two legacies are given *simpliciter* to the same legatee by different instruments, the presumption is, also that the latter is cumulative, whether they be equal or unequal in amount.[40]

Of course, the first thing always to be considered is the intention of the testator, and the above rules apply only when there is no possibility of ascertaining the testator's intention from his words construed with reference to any circumstances which the Court may lawfully consider. Legacies substituted for or added to former legacies are, according to a general rule, subject to the same conditions as those for which they are substituted or to which they are added, although it is not so expressed in the testamentary instruments. But this rule, like the other rules of construction above mentioned, is never applied to thwart, but only to carry into effect, the testator's intention; the rule must always yield to the discernible intention of the testator.[41]

If the two legacies are payable at different times and places, the presumption is that they are cumulative, even though they are given in the same instrument.[42] Where the two gifts are given in the same instrument to the same beneficiary, and are of the same amount and value, the *prima facie* rule is that, in the absence of anything showing a contrary intention, the legacies are presumed to be substitutional.[43]

§ 682. Stated amount and residuary legacies.

It may perhaps be stated as a general rule, that the amount of legacies are fixed by the testator, and will not be changed

[40] Woerner on Admin. 970.

[41] Woerner on Admin. 971. See § 1182, Construction of wills.

[42] Ingelfield vs. Coghlan, 2 Coll. C. C. 247; Thompson vs. Teulon, 22 L. J. Ch. 243; 1 W. R. 97.

[43] Brennan vs. Moran, 6 Ir. Ch. R. 126; Garth vs. Meyrick, 1 Bro. C.

unless there is deficiency in the estate. Very often, however, in the same instrument the testator disposes of the residue of his property, and this residue so disposed of by will, constitutes a residuary legacy. It carries with it, not only everything in terms disposed of, but everything that in the end turns out not to be well disposed.[44] Hence lapsed and void legacies fall into the residue, for the same reason that general residuary bequests contingent in terms, carries the income which accumulates between the testator's death and the period of vesting. If the testator's estate is insufficient to pay off all his legacies and devises in full, after paying his debts, the legacies given in the residuary clause abate first. No payment can be made to the residuary legatee until all other legacies have been paid in full.[45] Such legacies are usually to be classed as general legacies, although there might be instances in which they would be specific, especially might this be true where there is sufficient money on hand to pay debts and general bequests; and the property remaining would be specific.[46]

This would not, however, often occur. Where the testator gives particular specific portions of a tract of land to different devisees, and the balance to another, the latter devise is specific.[47]

Where a specific disposition follows or is preceded by a general residuary gift, the specific disposition is regarded as

C. 30; Manning vs. Thesiger, 3 Myl. & K. 29; 4 L. J. Ch. 285; Dickinson vs. Overton, 57 N. J. Eq. 26; Page on Wills, p. 948, § 799.

[44] 1 Jar. on Wills, § 762.

[45] Page on Wills, § 772.

[46] Schoul. on Exrs. 462.

[47] Pittman's Estate, 182 Pa. St. 355.

Thus, where a testator disposed of real and personal property specifically, and then proceeded, "I bequeath to my friend, Dr. J. D., all my books, medicines, and shop furniture, and all the estate not before devised, including my gig and saddle horses," it was held that this was not a general residuary clause carrying slaves on two several plantations, but must be construed to include only property of the same kind as the articles enumerated. Minor vs. Dabney, 3 Rand. 191, 198, *et seq.*; see also Godard vs. Wagner, 2 Strobh. Eq. 1, 9. Where certain things are enumerated in a legacy, and a more general description is coupled with it, that description generally covers only things of a like kind with those specially named. Andrews vs. Schoppe, 84 Me. 170; Woerner on Admin. 968.

an exception or qualification out of the general disposition;[48] but the gift of a life estate specifically to one, and a gift of the residue to the same donee, will give him a fee in, or absolute title to, the property so given.

A clause may operate as a residuary gift without the use of the words "rest," "residue," etc.,[49] and conversely if by "rest," "balance," etc., the testator means to refer to a portion of land, parts of which are devised to others, these words will not prevent the gift from being specific.[50]

No particular form of words is necessary to constitute a residuary legatee; any expression is sufficient from which the testator's intention is discernible that the person designated shall take the surplus. Nor is it of controlling consequence that the clause is not the last of the disposing provisions, though such is the usual position.[51]

§ 683. Lapsed legacies.[51a]

A lapsed legacy or devise is one which was originally valid, so that if testator had died immediately upon the execution of his will such devise or legacy would have taken effect, but which fails because the beneficiary in some way becomes incapable of taking under the will before the devise or legacy vests.[52] A legacy or devise is also said to lapse where the beneficiary, though competent to take under the will, refuses to do so.[53]

A lapse at common law most frequently occurs by reason of the death of the beneficiary before that of the testator. In Ohio, as in a number of other States, this has been changed by statute.[54]

And the legacy does not lapse where it is made to any child or other relative of the testator. If such child or other relative

48 Davis vs. Callahan, 78 Me. 313.

49 Striewig's Estate, 169 Pa. St. 61.

50 Tittman's Estate, 182 Pa. St. 355.

51 Morton vs. Woodbury, 153 N. Y. 243, and cases cited.

51a See § 1028, Bequests to charitable institutions.

52 Where a person makes a will to his wife and then is divorced—the legacy does not lapse. Charlton vs. Miller, 27 O. S. 298.

53 See § 1195, Lapsed bequests; Page on Wills, § 728.

54 § 10581 G. C.

Where the will provides that a certain person may do certain acts, and such person dies without performing such duties, a legacy dependent upon such performance lapses. *In re* King, 17 Dec. 403.

shall have been dead at the time of the making of the will, or died thereafter, leaving issue surviving the testator, in either case, such issue shall take the estate devised in the same manner as the devisee would have done. A lapse might occur by reason of the death of the beneficiary after testator's, but before the gift vested.[55]

But where a legacy or devise vests upon testator's death, it does not lapse because the beneficiary dies before the devise or legacy vests in possession.[56]

Likewise a devise in trust, or in the nature of a trust, does not lapse by reason of the death of the trustee before the beneficiary. Thus a gift to a designated priest, to be expended in masses for the repose of the soul of testatrix, was held not to lapse by reason of the death of the priest before that of testatrix, since another trustee might be appointed.[57]

If a legacy be given upon a valuable consideration in payment of a debt of testator, it does not lapse.[58]

A residuary clause of "the balance" of certain property, after paying the foregoing legacies, does not pass the amount of void or lapsed legacies, but they are intestate property, and so of legacies void under our mortmain statute.[59] A testator may by will prevent a lapse and the common law favors such reasonable construction of the will as would prevent a lapse.[60]

Where the statute against lapse applies only where the beneficiary is a "relation" of testator, a relation by marriage is

[55] Where a devise is made of lands to the husband of the testatrix for life, with a direction to the executor to sell after the death of the husband, and distribute as follows: "1st. Should my sisters, S and C, or either of them survive myself and my husband, I give either or each of them surviving $500," and the husband elects not to take under the will. *Held:* Upon the death of S prior to the death of the husband the legacy to her lapses. Such election by the husband does not authorize the executor to sell the lands before the death of the husband. Wilson vs. Hall, 6 C. C. 571; 3 C. D. 589.

[56] Page on Wills, § 739.

[57] Kerrigan vs. Tabb., 39 Atl. 701.

[58] Page on Wills, § 739.
See § 687.

[59] Davis vs. Davis, 62 O. S. 411; S. c. below, 6 Dec. 371; 4 N. P. 276; 8 C. D. 52; 15 C. C. 174.

[60] Page on Wills, § 741.

not a relation within the meaning of the statute.[61] Nor is a husband a "relative" of his wife in this sense.[62] Nor is a wife a "relative" of her husband.[63]

Where the statute prevents lapse, and in case a beneficiary leaves a "lineal descendant," it is held that the mother of the beneficiary is not a "lineal descendant."[64] Nor, indeed, are any of the heirs not in the descending line from the beneficiary.[65] Nor is an adopted child a descendant so as to prevent a lapse.[66] Under statutes preventing lapse, the beneficiary who dies before testator can not, by his will, alter the devolution of the gift from that indicated by statute.[67]

§ 684. Void legacies.

A void legacy or devise, is one which never could have taken effect upon testator's death. It differs from a lapsed legacy, in this, that a lapsed legacy is one which was originally valid, and that if the testator had died immediately on the execution of the will, would have been enforced. Both in their results are the same.

[61] Horton vs. Earle, 162 Mass. 448; (a brother-in-law held not to be a relation in this sense. Bramell vs. Adams, 146 Mo. 70.

[62] Norwood vs. Mills, 1 N. P. 314.

[63] Renton's Estate, 10 Wash. 533.

See § 5971 R. S., § 1194, providing against a devise to a relative failing by death of the devisee before the testator applies to a devise to children as a class. Woolley vs. Paxson, 46 O. S. 307.

[64] Morse vs. Hayden, 82 Me. 227.

[65] Loveren vs. Donaldson (N. H.), 45 Atl. 715.

§ 10531 G. C., § 1194, provides against the lapse of a devise to "any child or other relative" of the testator who dies leaving issue. A devise to one whom the testator's daughter had adopted under § 8030 G. C., § 1898, and also has designated as heir under § 8598 G. C., § 1902, thus standing like a grandchild to the testator, does not lapse by the death, leaving issue, of such person before testator. (Supr. Ct., not rep.) White vs. Agnew, 38 B. 47.

[66] Phillips vs. McConica, 59 O. S. 1.

[67] Halsey vs. Convention of P. E. Church, 75 Md. 275. A bequest of a fund in trust to pay the income to S for life, and at her death to divide the principal among her surviving children. S died, leaving children and also the children of a deceased child. Held, the latter could not take. The statute (now R. S., § 5971), to prevent lapsing by death, does not apply. (Supr. Ct., not rep.) Stamp vs. Cooper, 34 B. 318.

See § 1195, Lapsed bequest.

A condition in a will making a legacy dependent upon a separation of husband and wife is void. Moores vs. Moores, 33 O. C. C. 463.

See § 1028, As to bequests to charitable institutions.

Void legacies may, for purposes of convenience, be divided into two general classes: those which are void by reason of some condition in testator's will which is not complied with, and those which are void by reason of the existence of some positive rule of law which prevents testator from making the disposition of his property which he contemplates.[68]

Legacies which are void by reason of some condition in testator's will, which is not complied with, are so numerous as to prevent a discussion in this treatise.[69]

Legacies which are void by reason of the existence of some positive rule of law, may be illustrated by gifts of remainders over on breach of a condition in restraint of alienation, or by gifts which are void as being in contravention of the rule against perpetuities. So a gift may be void, because the description of the property given is so ambiguous that it is impossible to tell to which part of testator's estate it applied. A gift may also be void because the legatee never had the capacity to take the gift.[70]

The rules which govern the devolution of void legacies are substantially the same as those which control in case of lapsed legacies. In the absence of a residuary clause the property which is the subject of a void gift descends as in case of intestacy.[71]

Where there is a valid general residuary clause, void legacies pass under such residuary clause to the residuary legatees.[72] While at common law void devises descended to the heir, they pass now under a residuary clause which contains apt words to pass such property.[73] A well recognized exception to the rule

[68] Page on Wills, § 745.

[69] See for discussion, chapt. 30, Page on wills.

As to absolute and conditional legacies, see previous sections, of this chapter.

[70] Page on Wills, § 745.

[71] Levy vs. Levy, 33 N. Y. 97; State vs. Holmes, 115 Mich. 456; McHugh vs. McCole, 97 Wis. 166; 10 L. R. A. 724.

[72] Davis vs. Hutchings, 15 C. C. 174; 8 C. D. 52; rev. 4 N. P. 276; 6 Dec. 371; Dulany vs. Middleton, 72 Md. 67; Carter vs. Presbyterian Church Board of Education, 144 N. Y. 621; *In re* Allen, 151 N. Y. 243.

[73] Davis vs. Hutchings, 15 C. C. 174; 8 C. D. 52; reversing 4 N. P. 276; 6 Dec. 371; Giddings vs. Giddings, 65 Conn. 149; Milwaukee Protestant Home vs. Becher, 87 Wis. 409.

that void legacies and devises pass under a residuary clause, is where the void legacy or devise is itself given by a residuary clause. In such case the property which is the subject of the void gift does not pass to the other residuary legatee, but descends as intestate property.[74]

§ 685. Adeemed legacies.

A legacy is, strictly speaking, adeemed (from *adimere,* to take away) when the thing given has by some act of the testator, ceased to exist in the form in which it is described in the will, so that on his death there is nothing answering the description of the legacy to be given to the legatee. This, of course, can only happen in cases of specific legacies, since general or demonstrative legacies are not dependent upon the existence of specific things, and cannot, therefore, be adeemed, or taken away, by the destruction or alteration of the subject of the gift.[75]

A similar result follows where the testator performs the function of an executor, by giving during his lifetime what he intended the legatee to have by his will, thereby satisfying the legacy himself, leaving nothing for the executor to do in respect to such legacy. The distinction between the ademption and satisfaction of legacies seems clear enough, but it is not generally observed, the term "ademption" being applied indiscriminately to cases where the legacy is cut off by the destruction or alteration of the subject, and where it is satisfied by the delivery of the subject to the legatee during the testator's lifetime.[76]

[74] Powers vs. Codwise, 172 Mass. 425; Temple vs. Pasquotank County, 111 N. C. 36; Booth vs. Baptist Church, 126 N. Y. 215.

[75] Gilbreath vs. Winter, 10 Ohio. 64, 68; Smith's Appeal, 103 Pa. St. 559; Walton vs. Walton, 7 Johns. Ch. 258, 262.

Whether a gift made to a legatee by a testator subsequently to the date of the will is to be taken as an ademption if the legacy depends on the intention of the testator, then the legacy is to a person other than a child, unless the gift is for the same specific purpose for which the legacy was intended, there is no presumption of such intention, but it must be shown either from the will itself or by extrinsic evidence that ademption was intended. Ellard v. Ferris, 91 O. S. 339.

[76] Woerner on Admin. 973; Page on Wills, § 779.

"I give to M all the amount that may be recovered from K due me for the sale of the P estate," is a specific and not pecuniary or demonstrative legacy, and is adeemed by the testator having received the money. Gilbreath vs. Winter, 10 O. 64.

An ademption is a premature compliance with a will, but an act antedating the will, or an advance, can not diminish a legacy, for evi-

From the nature of ademption, it follows that it could only apply to specific legacies, and to demonstrative legacies. If it has been determined that the legacy is a specific one, little trouble will arise whether it was adeemed.

The question sometimes arises whether a bequest was intended by the testator to be paid at all events, the fund being pointed out by the way only of demonstration. The leading principle is that when a testator bequeaths a sum of money, or, what is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, such intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund; although no positive rule of ready application to every case can be laid down. Each case will depend upon a consideration of all the material provisions of the will, and of the extrinsic circumstances respecting the testator's family and estate, which may be fairly brought to bear upon the question of intent.[77]

Where specific property remains in existence in specie, slight and immaterial changes in its form do not adeem legacies.[78] Where B and his wife each made a will, B giving $700 to a grandson, C, and the wife giving $500 to the same, B afterwards conveyed to C real estate, reciting a consideration of $1,100, the wife releasing dower, and the deed stating that it was in part consideration of C's relinquishment of his prospective interest in the estate of B and his wife. C also gave B a receipt for the deed, stating therein that it was an advancement and in full for all his interest as heir-at-law of B or otherwise

dence of such intent would vary the will.

Nor can an executory contract affect a legacy either as a contract or an estoppel. Statements in the will that legacies will be adeemed in a certain way, merely gives his executors convenient evidence of his intent to make gifts in lifetime. A legacy is adeemed only when a gift was extended at the time to be a satisfaction of the legacy. A subsequent intention will not have such effect. Stichtenoth vs. Toph, 23 B. 126.

[77] Redf. Sur. Prac. 621.

[78] See Page on Wills, 781, for further discussion.

and also " as heir at law " of the wife. B died before his wife. Held, C is entitled to the $500 legacy under the wife's will. There is no ademption, nor an advancement, nor an estoppel, nor a release.[79] A specific legacy which has been adeemed is not revived merely by republishing the will, nor does the ademption of a specific legacy revive a legacy for which it was substituted.[80]

§ 686. Satisfied legacies.

A legacy is satisfied when the testator during his lifetime delivers something of value to the legatee which he intends to be a substitute for the legacy.[81] Whether or not a legacy has been satisfied, is purely a question of fact, and from the fact that the law favors the theory, that all children should share equally in the property of their parent, the presumption arises that if a parent gives to a child to whom a legacy is provided, it will be presumed that the gift was in satisfaction of the legacy. It was the doctrine of the common law, that if a portion be given to a child it satisfies the entire legacy, but the doctrine now is, probably, that a gift of a part of the legacy is only a *protanto* satisfaction.[82]

Where the testator does not occupy a relation of a parent to a beneficiary, a gift made by the testator to the beneficiary is not presumed to be in satisfaction of the legacy.[83] These presumptions, however, make out only *prima facie* cases and may be overcome by testimony to the contrary.

Specific legacies are said not to be affected by the subsequent

[79] (Supr. Ct., not rep.) Brown's Exception, 42 B. 258.

After devising to his sister all his personalty and a life estate in his farm, being his only realty, the testator required his executor after his sister's death to sell the farm and divide the proceeds among nephews and nieces. The testator afterwards sold the farm and of the proceeds there remains part of the mortgage unpaid, and also some cash money. Held, the legacy to nephews and nieces was specific and therefore was adeemed by the sale and the remaining proceeds pass to the sister under the bequest of personalty. Sharp vs. McPherson, 6 C. D. 634; 10 C. C. 181.

[80] 13 Am. & Eng. Ency. of Law 80.

[81] Page on Wills, § 782.

[82] Page on Wills, § 783.

[83] Page on Wills § 784.

advancement of a portion, because the gift of specific articles of personal property, by the father to his child is not presumed to be intended as a portion.[84] Advancements as the term is properly applied, does not apply to satisfaction of legacies. For in its proper application, it applies to the distribution of the property of an intestate.

§ 687. Legacies in lieu of dower.

A very frequent form of legacy, is that given by will to the widow of the testator. By our statute, such a provision made in favor of the widow, or widower, will be considered as made in lieu of her dower rights, unless it plainly appears by the will of the testator, to have been the intention that the widow or widower should have the provision made in the will to be in addition to the dower rights.[85]

Perhaps the most important attribute to this kind of a legacy, is as to its order of abatement, where there is an insufficiency of assets to pay other legacies. In our State husband and wife stand in the same relation as to dower rights. The text-books, however, usually speak of them in the feminine gender. "The acceptance by the widow," says Woerner,[86] "of the testamentary provision made for her, in lieu of her right of dower in the testator's estate, gives her an interest therein superior to that of a legatee; having relinquished her dower, which is paramount to the rights of creditors as well as of legatees or devisees, she thereby became a purchaser of the interest represented by the devise of legacy to her. She takes, not by the bounty of the testator, but in virtue of a contract with him, the reciprocal considerations being the relinquishment by the widow of her right of dower, thereby enabling the testator to dispose of his estate without reference thereto, and the price offered by him for this right, consisting in the devise of legacy to her."[87]

[84] Woerner on Admin. 978.

[85] §§ 10506, 10567, 10568, 10569 G. C., § 1215.

[86] Woerner on Admin. 272.

[87] Isenhart vs. Brown, 1 Edw. Ch. 411, 413, citing Eng. & Am. authorities; Carper vs. Crowl, 149 Ill. 465, 479; Jarm on Wills *467, and Bigelow's note, p. 458, collecting

"Thus," says the same author in another place,[88] "a provision for a widow in lieu of her dower right entitles her to take as a purchaser for a valuable consideration, not subject to that abatement to which general legacies are subject,[89] even though the value of the legacy be in excess of the value of the dower right,[90] and though the will was made before marriage, if in contemplation of marriage,[91] and although the gift be an annuity payable out of the income." [92]

The provision in lieu of dower is held to be superior to specific, as well as general legacies; these must abate if necessary to satisfy the same.[93] But whether specific devises of real estate abate in favor of such provision is not so unanimously held.[94]

A somewhat difficult question might arise in case of a legacy given in lieu of dower, as to its abatement, where it was in the nature of a residuary legacy, should the assets be insufficient. There is no doubt of the settled rule that such legacies are to be favorably considered, and if possible the rights of the widow or widower will be protected, at least to the value of those rights relinquished by the acceptance of the legacy.[95]

The judge of the Probate Court, generally finds that one of his most difficult duties, is to correctly inform widows and widowers as to their rights under the will, and by law in the estate

American cases. As to the preference of legacies in lieu of dower over other legacies, see Woerner on Admin. 985, and cases.

[88] Woerner on Admin. 985, citing authorities given below.

[89] Page on Wills, § 776; Security Co. vs. Bryant, 52 Conn. 311; Pollard vs. Pollard, 1 Allen 490; Lord vs. Lord, 23 Conn. 327, 330; Williamson vs. Williamson, 6 Pai. 298, 305; *In re* Gotzian, 34 Minn. 159, 167; See Barnett's Appeal, 104 Pa. St. 342, in which the widow's legacy was held to abate.

[90] Warren vs. Morris, 4 Del. Ch. 289; Brown vs. Brown, 79 Va. 648, citing English authorities; Howard vs. Francis, 30 N. J. Eq. 444, 448.

[91] Towle vs. Swasey, 106 Mass. 100, 106; Farnum vs. Bascom, 122 Mass. 282, 289.

[92] Moore vs. Alden, 80 Me. 301; Rowe vs. Lansing, 53 Hun. 210.

[93] Borden vs. Jenks, 140 Mass. 562; Clayton vs. Aiken, 38 Ga. 320, 332; Loocock vs. Clarkson, 1 Desaus. 471, 475.

[94] Affirmatively in the case of Borden vs. Jenks, *supra;* negatively in Boykin vs. Boykin, 21 S. C. 513, 534, and Morse vs. Hayden, 82 Me. 223, 231; Woerner on Admin. 985.

[95] See Page on Wills, § 776.

of the deceased, when such parties are making their election.[96] Of course a legacy in lieu of dower could not have preference unless the widow was entitled to dower. Possibly under our statute, the rule would apply even if there was no dower estate, provided the widow released her distributive share of the personal estate.

While personal property is primarily liable for the payment of bequests, the testator may change or exonerate one class of his property for the payment of his debts, and the bequests made to his widow in lieu of her dower have been held to be impliably exonerated from the payment of his debts.[97]

§ 688. Legacies to creditors.

Legacies to creditors are like those spoken of in the previous section, made upon a consideration, and are, therefore, entitled to a preference.[98] The rule that a legacy to a creditor is a satisfaction of the debt, is subject to many exceptions. In general, a legacy implies a bounty, and not a payment.[99] But one who accepts a bequest and is put to his election between the gift in the will and a claim against the estate, his acceptance of the former is a satisfaction of the latter; and it is immaterial whether what he takes turns out to be of greater or less value than that which he surrendered.[100]

The cases justify the following statement of doctrine on this subject: (1) A legacy is never deemed a satisfaction of a debt contracted after the date of the will. (2) It is not considered a payment when the will contains an express direction that the debts and legacies shall be paid, such as "after all my debts and legacies are paid, then I give," etc., or words of like import.[101] (3) Where the particular motive or purpose for which

[96] See chapt. on election under wills, § 1214 *et seq.*

[97] Page on Wills, § 763, citing Calder vs. Curry, 17 R. I. 610; See § 946, Dower relinquished.

[98] Page on Wills, §§ 776, 795; Woerner on Admin. 985.

[99] Reynolds vs. Robinson, 82 N. Y. 103.

[100] Caulfield vs. Sullivan, 85 N. Y. 153.

[101] An express direction for the payment of all the testator's debts rebuts the presumption that a legacy to a creditor was intended as a satisfaction of the debt (Fort vs. Gooding, 9 Barb. 371). See Boughton vs. Flint, 5 Abb. N. Cas. 215;

the legacy is stated in the will, *e. g.*, as a token of regard, or from ancient friendship, or from relationship, and the like, it will not be deemed a satisfaction of the debt. (4) Where the legacy is contingent and uncertain, or payable at a future time, or upon condition, it is not a satisfaction. (5) Where the legacy is less than the debt, or the debt is unliquidated, or in negotiable paper, or in a current account, the debt is not satisfied. (6) Where the legacy is of a different nature from the debt, as where the testator is indebted by bond, and he bequeaths an interest in land, it is not a satisfaction. (7) A specific legacy is never a satisfaction, unless expressly so declared by the will, and it is so accepted by the legatee.[102]

The general rule is that the effect of a legacy to testator's creditor is governed by testator's intent, and that an intention thereby to pay the debt must be either evidenced by the language of the will or be fairly inferable from the circumstances.[103]

§ 689. Legacy to a debtor.

Where a testator gives a legacy to one who is indebted to him, without any expression of his intention to release such debt, the mere fact of giving such legacy does not of itself operate as a release of the debt.[104] In such cases the indebtedness may be deducted from the legacy where the legacy exceeds the indebtedness, as a proper means of adjusting the mutual credits. A bequest, however, by the testator to his debtor of the amount of his debt, is a forgiveness of the debt, and might be classed as being a specific legacy.[105] The naming of a person as executor

s. c. 74 N. Y. 476; rev'g 13 Hun 206.

[102] Willard on Ex'rs 366; Williams vs. Crary, 5 Cow. 368; 8 Id. 246; 4 Wend. 443; Clarke vs. Bogardus, 12 Wend. 67; Compare Mulheran vs. Gillespie, Id. 349; and see Eaton vs. Benton, 2 Hill 576.

A legacy to the creditor's wife, and its acceptance is not an extinguishment. (Mulheran vs. Gillespie, 12 Wend. 349.)

[103] Redf. Sur. Prac. 615; See 13 Bull 564.

[104] Page on Wills, § 794, citing Hayward vs. Loper, 147 Ill. 41, affirming 49 Ill. App. 53; Spath vs. Ziegler, 48 La. Ann. 1168; Sleeper vs. Kelley, 65 N. H. 206; Bailey's Estate, 153 Pa. St. 402; Chaffee vs. Maker, 17 R. I. 739.

[105] Showell vs. Showell, 5 Barb. 312.

in a will does not as at common law, discharge any just claim which the testator had against the executor.[106] Such a bequest is like any other bequest, liable to be taken as assets to pay the testator's debts, and as before herein stated, the executor may, where the legatee is indebted to the testator, retain either in partial or full satisfaction of the debt by way of set-off.[107]

A legatee is bound by a recital in the will of a debt due by him, except in a clear case of a mistake in figures. A will provided that as testator was not indebted to any of his children, any judgment got on a claim by any of them should be deducted from his share. One child held testator's note and transferred it to a person who got judgment on it against the estate. The same child also had a claim against the testator for the price of land he had sold for her and had not paid her, and she got judgment on this against the estate, both judgments having been paid by the executor. Held, both judgments must be deducted from said child's share.[108]

§ 690. Legacies charged on land.

Originally at common law, real estate was not liable for the debts of a decedent. From this followed the doctrine, that real estate is not subject to the payment of a legacy, unless it appears to have been the intention of the testator to make such real estate liable therefor; and the doctrine still remains that, in the absence of anything in the will showing a contrary intention, legacies are never to be paid out of real estate.[109]

To enter into a discussion of this subject, is not within the province of this work. Suffice to say, that when a person makes a bequest, it may be fair to presume that he expects its payment to be made out of his property, and it will not take very strong language to give a construction that real estate may be used for

[106] See § 389.

[107] Woerner on Admin. 975; Schoul. Exrs., § 470.

[108] (Supr. Ct. not rep.); Sheets vs. Hunter, 37 B. 283.

A debt due to a legatee, as physician for services, is not extinguished by a legacy of $5,000 "to my good, kind, attentive physician, Dr. G.," he need not elect, but is entitled to both. Swing vs. Gatch, 7 Am. L. Rec. 5; 3 B. 571.

[109] Page on Wills, § 747; Geiger vs. Worth, 17 O. S. 564.

When a testator's personalty is not sufficient to pay his debts and costs of administration and legacies provided for in the will are not made a charge on the land, proceeds derived from the sale of the land do not fall in the residium but pass to the heirs for want of a fund out of which they may be paid. Ferguson vs. Wentz, 27 Dec. 462.

A devise to a son of a certain tract of land upon consideration that he pay to a daughter a certain sum devised, is a charge on the farm and in such case the personal property is exonerated from its payment. Lacy vs. Buelsall, 33 O. C. C. 460.

the payment of such legacies. Especially is this true, where the realty and personalty is blended in one fund.[110] If a devisee of land charged with the payment of legacies accept the devise, he has the personal duty imposed on him to pay without reference to the fact, whether the property devised and accepted, is sufficient for that purpose.[111] However, to charge legacies on land, so that the devisee is required to pay them, the intention to make it such a charge may be implied, but the intention must be clear.[112] A provision that certain property, part of which is realty, is to be used for the payment of debts, clearly charges the debt upon the realty.[113] And where a testator gives legacies in excess of the amount of his personal property, this will be held to be a manifestation of his intention, that his real estate may be used for the payment of such legacies.[114]

Subject to the payment of debts and expenses of administering the estate, the testator may make any portion or part of his property responsible for the payment of his legacies and in such a manner as he may choose.[115] The devisee of land incumbered by a mortgage is not entitled to have the debt paid out of personalty and realty specifically devised to others, but takes *cum onere* unless there is personalty or realty not specifically devised from which to pay the debt.[116]

§ 691. Legacy for life.

It was at one time very much questioned whether a life estate could be created in personalty, but it is now well settled that as a general rule such estate may be created.[117] Where

[110] Moore vs. Beckwith, 14 O. S. 129; Longley vs. Stump, 11 Bull 247; Hunt vs. Hayes, 19 C. C. 151; 10 C. D. 388.

[111] Fuller vs. McEwen, 17 O. S. 288.

[112] Clyde vs. Simpson, 4 O. S. 445.

[113] Watts vs. Watts, 38 O. S. 480.

[114] Townsend vs. Townsend, 25 O. S. 477; Dean vs. Loewenstein, 6 C. C. 587; 3 C. D. 597.

[115] See discussion, Chapt. 35, Page on Wills; Woerner on Admin. 1096-7.

[116] Tucker vs. Lungren, 5 C. D. 577; 12 C. C. 622.

[117] King vs. Beck, 15 Ohio 559; Pruden vs. Pruden, 14 O. S. 251; Keating vs. Reynolds, 1 Bay (S. Car.) 80; Williamson vs. Hall, 10 Am. Law Reg. N. S. 466.

See § 597 and cases there cited, Page on Wills.

personal property is bequeathed to one for life only with remainder over, it sometimes becomes an important question whether the first taker is entitled to the possession and control of the corpus of the property, and, if so, whether the first taker must give bond for the repayment of the same at the expiration of the life estate. Where the property is bequeathed in this way in trust, it is elsewhere held the first taker has no right to the possession of the corpus of the property.[118]

Where the property is given for life, and no trust is created, the beneficiary has a right to the possession of the corpus of the property without the intervention of a trustee.[119] Where a trustee is appointed by will during the minority of the life tenant, the tenant is entitled to the possession of the property on coming of age.[120] In Ohio and other States it is held that the life tenant is entitled to the possession of the personal property without giving any bond for the repayment of the same, unless some special showing is made, which will induce the Court in its discretion to require such.[121]

Where life tenant has power to dispose of the corpus as he sees fit, his right to the possession of the property without giving bond is generally recognized.[122] Dividends, upon stock owned by testator which have been declared at the time of the testator's death, although payable subsequently or even if the dividends were declared at a subsequent time, for a period which had expired at or before the death of the testator, are payable to the estate and do not go to a life tenant. The subject of dividends and to whom they should be paid in case of life tenants

[118] La Bar's Estate, 181 Pa. St. 1; Reynold's Estate, 175 Pa. St. 257.

[119] Fox vs. Senter, 83 Me. 295; Kuykendall vs. Devecmon, 78 Md. 537; White vs. Massachusetts Institute of Technology, 171 Mass. 84; Henderson vs. Kinard, 29 S. Car. 15.

[120] Kuykendall vs. Devecmon, 78 Md. 537.

[121] Bierce vs. Bierce, 41 O. S. 241; Posegate vs. South, 46 O. S. 391; Lapham vs. Martin, 33 O. S. 99; Martin vs. Lapham, 38 O. S. 538; Ratliff vs. Warner, 32 O. S. 334.

This doctrine has been applied even where the life-tenant is a non-resident and is financially irresponsible, it being held that security can be required only upon a showing that the life tenant intends to squander the corpus. Martin vs. Lapham, 38 O. S. 536.

[122] Posegate vs. South, 46 O. S. 391; Langley vs. Farmington, 66 N. H. 431; Woerner on Admin. 999.

and remainderman, is one of considerable difficulty and the courts do not seem to be in accord.[123]

§ 692. Legacies in the nature of incomes and annuities.

A testator within the rules prescribed by law may make such disposition of his property as he sees fit, and may dispose of his property by piece meal in the way of incomes or annuities.[124]

An annuity is a right to the payment of a specified sum of money at stated intervals, usually annually or at aliquot parts of a year.[125] One of the chief points of difference between a gift of income and an annuity is, that a gift of income fails if the principal of the estate is not sufficient on investment to pay the income bequeathed;[126] while an annuity does not fail because the net income is insufficient to pay it in full, but is payable out of the principal.[127]

Where the testator absolutely gives the beneficiary a given income and merely indicates in his will the source from which it is to be obtained, the general rule is that the income in such cases is to be estimated from the death of testator, enough of the capital, if necessary, being retained to pay the income during the period in which the fund is non-productive.[128] This rule holds good even where the first payment is to be made only when "sufficient funds for that purpose shall come" into the

[123] See Woerner on Admin. 1002; Page on Wills, § 602; See § 1398, As to dividends.

[124] See § 1287 *et seq.*, as to income, etc.

See chapter next to index for tables, etc.

It cannot be within the province of this work to give an extended discussion of this subject, and it more properly belongs to the duties of a testamentary trustee than to those attaching to an administrator or executor. But by reason of its similarity to legacies is inserted here. See Chapt. 26, Page on Wills.

[125] Dewey's Estate, 153 N. Y. 63; Kearney vs. Cruikshank, 117 N. Y. 95.

It need not be paid annually. Cummings vs. Cummings, 146 Mass. 501; Pierce's Estate, 56 Wis. 560.

[126] Dewey's Estate, 153 N. Y. 63.

[127] Addition vs. Smith, 83 Me. 551; Merritt vs. Merritt, 48 N. J. Eq. 1; Whitson vs. Whitson, 53 N. Y. 479; Curran vs. Green, 18 R. I. 329.

[128] Griggs vs. Veghte, 47 N. J. Eq. 179; Stanfield's Estate, 135 N. Y. 292.

hands of the trustee.[129] A gift of the income generally means a gift of the net income after deducting taxes and other expenses necessary to the preservation of the property from which the income is derived.[130] So where the education of minors is charged upon testator's estate, the estate may be distributed upon withholding a sum adequate for such education.[131]

Assessments for sewers and street paving must be deducted from the income under a will providing that "all reasonable repairs and improvements" shall be deducted from the income.[132] But where "taxes were made payable out of the income given to life tenant, it was held that sewer assessments could not be deducted from such income.[133] Where a life tenant does not expend the entire income of the estate in which he has an interest, a question is presented as to the proper disposition to make of such accumulation at his death. If he has a life estate, it was held that the income was his absolutely, and that any accumulations are the property of the life tenant, and at his death are to be distributed as part of his estate.[134]

If, however, the first tenant has not a life estate, but is merely given a proper and suitable maintenance and support out of the estate for his life, the life tenant only has a right to so much of the income of the estate as is reasonably necessary and proper for his support, and the accumulations will pass either under a residuary clause or as property not disposed of by will.[135]

If the beneficiary dies between the periods for the payment of income, it is now held that the income should, in such case, be apportioned, provided it is an absolute gift of income and not a

[129] Crew vs. Pratt, 119 Cal. 131; Page on Wills, § 601.

[130] Duke of Cleaveland's Estate, (1894, 1 Ch. 164); Heard vs. Read, 169 Mass. 216; Morse vs. Morrell, 82 Me. 80; Dickinson vs. Henderson, (Mich.) (1900), 81 N. W. 583; Dewey's Estate, 153 N. Y. 63; Boggs vs. Taylor, 29 O. S. 172.

[131] Neff vs. Neff, 3 W. L. Gaz. 67; Page on Wills, § 602.

[132] Warren vs. Warren, 148 Ill. 641.

[133] Chambers vs. Chambers, 20 R. I. 370.

[134] Eldred vs. Shaw, 112 Mich. 237; Schwartz vs. Gehring, 7 C. C. 426; 4 C. D. 662; (in case the will gave the life tenant "the use of all my real and personal property during her life.")

[135] Page on Wills, § 605.

gift of support merely.[136] Common law and equity were opposed to apportionment of annuities where the annuitant dies between the days of payment.[137] An exception was always made to this rule in jurisdictions when a widow who elected to take in lieu of dower was held to be a purchaser for value, in favor of annuities bequeathed in lieu of dower.[138]

§ 693. Abatement of legacies.

When there are not sufficient assets to pay all the legacies, according to the rules established by law, or the declared intention of the testator, those which are not paid, are said to abate. Of course no legacy can be paid at the expense of valid debts of the testator, for the law will compel a man to be just, before it will allow him to be generous. The order of abatement of legacies whether by will directly expressed, or by rules of law, are founded upon the intention of the testator. Where the decedent does not direct the order in which legacies should abate, the following is the order of their abatement: *First,* residuary legacies, *second,* general legacies, *third,* legacies given for a valuable consideration or the relinquishment of dower or some right or interest, *fourth,* specific and demonstrative legacies. Thus if a will provided legacies of the above mentioned class, and the assets were insufficient, the first class that would suffer would be the residuary legacies, and after that, general legacies, then those for a valuable consideration, and last specific and demonstrative legacies. These various legacies abate *pro rata* in the class to which they belong, as a general rule.[139] Of course if the will shows that one legacy of a class should have preference over another of the same class, such preference would be given.

[136] Page on Wills, § 606.

In the absence of instructions in the will there is a contrariety of opinions. Henry vs. Henderson, 63 L. R. A. 616; (Miss.) 1905, holding it not apportionable.

[137] Wiggin vs. Swett, 6 Met. (Mass.) 194; 39 Am. Dec. 716; Kearney vs. Cruikshank, 117 N. Y. 95.

[138] Cushing's Will, 58 Vt. 393; Page on Wills, § 609; Woerner on Admin. 994, 1002; Schoul. Ex. 479.

[139] See Page on Wills, chapt. 37.

A recent Connecticut case holds it not apportionable. Mower vs. Sanford (1905), 63 L. R. A. 615, and extensive note.

Where the will has a number of provisions the court will look at all

§ 694. General rules as to payment.

The general rules in regard to the payment of legacies, where no time is fixed or indicated by the will, together with the interest thereon, may be stated thus:

First. Specific legacies are considered as severed from the bulk of the testator's property; by the operation of the will; from the death of the testator; and, as specifically appropriated, with the income and increase thereof for the benefit of the legatee from that period, and interest is computed thereon from the death of the testator.[140]

Second. General legacies are not payable until one year from the issuing of letters testamentary, but draw interest from the expiration of one year after the testator's death, as at common law.[141]

Third. A legacy given to a widow, in lieu of dower, where the testator died seized of real estate of which she was dowable, draws interest from the death of the testator.

Fourth. A legacy given in satisfaction of a debt draws interest from the testator's death.

Fifth. A legacy given to a child of the testator, or one to whom the testator has placed himself in *loco parrentis,* will, if such child is an infant, and is not otherwise provided for by the testator's bounty, or in some other way, draw interest from the testator's death, to provide means for the support and maintenance of such infant child; the amount of interest for the first year to be fixed by the Court according to circumstances, not, however, to exceed the amount necessary for the proper support, education and maintenance of such infant during the year succeeding the testator's death.[142]

the provisions of the will and the surrounding conditions of the testator in determining which of the legacies shall abate. Youtsey vs. Bowman, 6 N. P. (N.S.) 381; 18 Dec. 577.

[140] See § 675.

[141] Webster vs. Bible Society, 50 O. S. 1; Gray vs. Case School, 62 O. S. 1.

[142] Krigbaum vs. Southard, 23 Bull. 438; Langhorst vs. Ahlers, 7 N. P. 40; 9 Dec. 607; 12 Dec. 405.

See § 327, Right barred by will or contract.

While the contest of a will, pending its determination, is an impediment to the payment of the legacy thereunder, yet it will not prevent it drawing interest after one year from the date of the executor's qualification. Ebersole vs. Cole, 19 N. P. 507; 27 Dec. 175.

Sixth. An annuity draws interest from the death of the testator in the absence of any direction contained in the will to the contrary.

Seventh. A general legacy of a specific amount bequeathed to one for life, with remainder over, on the death of the life tenant, will begin to draw interest at the end of twelve months from the death of the testator; and the first payment of interest will become due thereon at the expiration of the second year.

Eighth. A life tenant of the residue of the testator's estate will be entitled to the net earnings of such residue from the testator's death, after providing for the payment of debts and other legacies.[143]

§ 695. When legacies should be paid.

If the legacy is paid before the time limited by law for creditors to present their claims, it is done at the peril of the executor or administrator. If the administrator or executor is satisfied beyond question that the assets will be sufficient to pay all the legacies as well as the debts of the decedent, legacies ought to be paid when sufficient assets are realized. Unless the administrator or executor is so satisfied he should not make payment on any legacy until eighteen months have elapsed from the date of his giving bond. If legatees desire their legacies at an earlier date the law provides a method in which to acquire them. In the case of specific legacies as we have heretofore seen,[144] the legatee can acquire immediate possession by giving a re-delivery bond; and if other legatees desire their legacies and there are assets in the hands of the executor or administrator, they may require payment by giving an indemnity bond as provided in the subsequent section. The question whether or not an administrator or executor will be required to pay a legacy is vested in the Probate Court.[145]

[143] Rice Prob. Law; Page on Wills, §§ 499, 788, 804; Woerner on Admin. 1005-1012.

Where a will devised $25,000 to A and H to be divided share and share alike, when each arrives at 24 years of age, and A arrives of age seven years before H, H is not entitled to interest from the time A was entitled to receive her legacy. Langhorst vs. Ahlers, 12 Dec. 405; 65 O. S. 600.

An executor can not be compelled to pay a legacy before eighteen months from the date of his appointment unless bond is given as required by § 10762 G. C. Wells vs. King, 19 N. P. 184.

[144] See § 675.

[145] The assets constitute a trust

While the statute seems to contemplate that a payment might be ordered without giving the bond, yet the administrator or executor except in rare instances ought to be protected by an indemnity bond, and in no case ought he be required to pay a legacy before the eighteen months' limitation for creditors to present their claims has expired. Unless the remaining assets to pay creditors are sufficient beyond all reasonable question. After the expiration of the time limited for presentation of creditors' claims, a failure to pay might make the executor or administrator liable on his bond.[146]

§ 696. If any legatee require legacy to be paid within eighteen months, court may require him to give bond. "When within eighteen months after having given bond for the discharge of his trust, an executor or administrator is required by any legatee or next of kin, to make payment in whole or part, of his legacy or distributive share, if it deems fit, the court may require that the legatee or the next of kin first give bond to the executor or administrator, with surety or sureties approved by the court, conditioned to refund the amount so to be paid, or as much of it as may be necessary to satisfy demands that afterward may be recovered against the estate, and to indemnify the executor or administrator against loss and damage on account of such payment." [R. S. § 6128; 102 v. 204.] [147]

fund, first, for creditors, and secondly, for the legatees and distributees. Over the administration of this trust by the executor or administrator, the authority of the probate court is ample to see that the fund is faithfully applied for the benefit of those to whom it belongs. To this end, where payment is required of a legacy or distributive share, before the time has elapsed, allowed for creditors to present their claims, the court is expressly authorized to require the executor or administrator to be indemnified by a refunding bond against the consequences of such payment. Dawson vs. Dawson, 25 O. S. 450.

[146] See §§ 10743, 10744, G. C., § 265.

Where the will leaves the time when a legacy should be paid in the discretion of the executor, yet the courts can direct the legacy to be paid, notwithstanding such discretion given to the trustee, when after the lapse of a reasonable time since the death of testator, it appears that it may safely be done.

The condition, age and surroundings of a testator may be taken into consideration by courts in determining probabilities, and where it thus appears that after paying the legacy ample property of the estate is left to satisfy all claims that might possibly be presented, and where it appears that the requirement of a bond to protect the executor would be a great hardship to the legatee, payment to him of the legacy without giving such bond may be ordered. *In re* Isherwood's Estate, 7 N. P. 332; See Disney vs. Hawes, 12 Bull. 322.

If payment is made before required to a legatee, this does not prevent it being credited to share of beneficiary on final settlement. Westwater vs. Gintner, 18 N. P. 209.

[147] § 10762 G. C.

§ 697. Application for order requiring payment.

If the legatee desires a payment to him, or a delivery to him of specific articles, he should file an application in the Probate Court setting forth the facts upon which he expects to rest his application. This application should show, outside of preliminary matters, that the executor or administrator has assets in his hands which could be applied on the payment of such legacies. It should also allege a willingness on the part of the legatee to give such bond of indemnity as the Court might require, or if not, to allege a good ground for not giving bond, etc. The administrator or executor should enter his appearance to the action, if not the Court should order that a notice be delivered to him.[148]

§ 698. Form of application.

(*Title.*)

Now comes A. B. and represents to the Court that on the.....day of ....., C. D. was duly appointed and qualified as executor (or administrator with the will annexed) of E. F., deceased, by the Probate Court of.....county, and that he is still acting as such executor. That the said E. F. bequeathed by his will, which is probated in the Probate Court of.....county to the said A. B. (here state what). That the said C. D., executor, has in his hands sufficient assets to pay said legacy as provided in said will, and all debts of decedent, that he has requested said executor to pay said legacies, but that said executor has neglected and refused so to do. Said A. B. further alleges, that he is willing to give a bond of indemnity to the said C. D., as executor in such sum, and with such security as the Court may require. Wherefore he prays that order may be made by the Court, requiring said C. D. to pay to said A. B. the legacy to him bequeathed by E. F., deceased.

.....

Sworn to and subscribed before me and in my presence, this.....day of....., 190...

§ 699. Hearing, etc.

If the executor has entered his appearance, the Court might proceed to an immediate hearing of the case. If the executor has not entered his appearance, the Court should make an entry

[148] A suit to collect a legacy can only be brought in the Probate Court. Smith vs. Harker, 9 Rec. 488; 41 O. S. 236. See Gray vs. Case School, 62 O. S. 1, 7; Lapham vs. Martin, 33 O. S. 99.

setting the case down for a date for hearing and also requiring a notice to be issued to the executor, stating the time of hearing and the nature of the complaint. The following may be used as an order requiring bond, etc.[149]

FORM OF ENTRY.

(*Title.*)

This day came A. B., a legatee under the will of E. F., deceased, and filed his application in this Court for an order requiring C. D., executor of the estate of said E. F., to pay a legacy bequeathed to said A. B. by E. F., deceased; and it appearing to the Court that C. D. has assets in his possession belonging to said estate which may be applied on the payment of said legacy, it is ordered that said A. B. give bond to the said C. D. in the sum of.....dollars, the sureties to be approved by this Court, conditioned according to law, and that this cause be continued until such bond be filed herein and approved by the Court.

§ 700. Form of bond.

Know all men by these presents, that we, A. B., C. D. and E. F. are held and firmly bound unto G. H. in the sum of.....dollars; for the payment of which we do hereby jointly and severally bind ourselves:

Whereas, said G. H., executor of the last will and testament of I. J., has this day paid to said A. B. the sum of.....dollars on a legacy left to him by the said I. J., in his last will and testament, and four years not having expired from the time said G. H. gave bond for the discharge of his trust as said executor. Now the condition of the above obligation is such that if the said A. B. shall refund said amount paid to him, or so much thereof as may be necessary to satisfy any demands that may be recovered against the estate of said I. J., deceased, and shall indemnify the said G. H. against all loss and damage on account of said payment, then this obligation to be void; otherwise to be and remain in full force and effect.

Signed by us this.....day of.....A. D. 190....

Executed in presence of.....[150]

§ 701. Form of entry, approving bond, and ordering payment.

(*Title.*)

This day came A. B., a legatee under the will of E. F., deceased, and having produced to the Court, the bond as required by a former order herein stated, and the bond having been examined by the Court and the sureties thereon approved, the said executor is directed to pay to the said A. B. the legacy provided for him in the will of E. F., deceased, as prayed for in his application herein.[151]

[149] If the executor wished to raise an issue as to his liability, etc., he might file an answer as in § 574, for form of notice and entry see §§565, 566, which may easily be changed to answer in the matter above.

[150] Whit. Prob. Code.

[151] If an action is brought after the filing of an account and order to distribute according to law and the will of deceased, it is done under §§ 10848, 10849 G. C., § 761.

CHAPTER XLI.

ADMINISTRATOR'S AND EXECUTOR'S ACCOUNTING.

§ 702 Duty to account.
§ 703 Executor or administrator to render an account, etc.
§ 703a When to make oath as to account.
§ 704 Where to be filed.
§ 705 Time extended.
§ 706 Time allowed to collect assets not to operate as allowance of further time to file account.
§ 707 Administrator, etc., of deceased or insane administrator, etc., to file account.
§ 708 Successive administration.
§ 709 Joint executors, etc.
§ 710 With what executor or administrator shall be charged.
§ 711 Amount of sale bill.
§ 712 Goods and chattels not included, etc.
§ 713 Rights and credits of the decedent.
§ 714 Proceeds of real estate sold.
§ 715 Interest, etc.
§ 716 Profit and income — Rents, etc.
§ 717 How chargeable with property consumed by him.
§ 718 Increase or decrease of estate not to affect executor or administrator.
§ 719 Executor or administrator not responsible for bad debts.
§ 720 Entitled to what credits.
§ 721 Vouchers to be produced for all debts paid.
§ 722 Vouchers. What is proper.
§ 723 What items may be allowed without vouchers.
§ 724 Comments. Affidavits, etc.
§ 725 Preparation of account.
§ 726 Oath to account.
§ 727 Form of administrator's or executor's account.
§ 728 Filing and entry.
§ 729 Notice of filing accounts to be published.
§ 730 Form of notice, etc.
§ 731 Entry and record of publication.
§ 732 Importance of notice.
§ 733 Examination of accountants under oath.
§ 734 Hearing when no exceptions are filed.
§ 735 Entry where no exceptions are filed.
§ 736 Exceptions.
§ 737 Form of exceptions.
§ 738 Court may refer account to special commissioner.
§ 739 Trial, etc.
§ 740 Evidence.
§ 741 How compelled to render account.
§ 742 Who may compel, etc.
§ 743 When and how account may be opened, etc.
§ 743a Mistakes or errors.
§ 743b Distribution after settlement.
§ 744 Absence of party.
§ 745 To correct errors and mistakes.
§ 746 Opening account after eight months, etc.
§ 747 Error and appeal.
§ 748 Statement in lieu of account.
§ 749 Ancillary account.[1]

[1] See § 634, As to ext'rs and Adm'r's compensation; See § 1293, As to Trustees' accounting; See § 1484, as to Gdn's accounting; See § 1289, Dividends; See § 1290, Gain and loss; See § 1291, Alteration and repairs.

§ 702. Duty to account.

An administrator or executor having collected the assets of the estate, and paid the debts as provided in the preceding chapters, the duty will be incumbent upon him to give to the Court, a detailed statement of his management of the trust. If all the debts and all the assets have been paid within the period of eighteen months, he may file what is termed a "final account." If he has not been able to perform these important functions of his trust, he must file an account of what he has already done; this is known as a "partial account." In its requirements, it is not to be dealt with differently from a final account. This obligation to file an account rests upon all who undertake to administer an estate.[1*] It is usually set forth in the bond which administrators or persons holding a trust position are required to file,[2] but it is not dependent upon any stipulation. It rests upon all executors and administrators, administrators with the will annexed, temporary administrators, testamentary trustees, guardians by will or deed, representatives of deceased executors of administrators, guardians, or testamentary trustees. This is so much ingrained in the policy of our law, that the Courts have held a provision in a will invalid, which attempted to free an executor from the obligation to account.[3]

The object of accounting is to furnish for all persons interested a complete history of the estate, so that they may protect themselves against fraud, negligence or loss.[4]

An account may be described as a statement in writing verified, containing, in concise detail, the history of the dealings with the trust estate or funds.[5] Settlement out of Court does not dispense with the duty of accounting, and is not a compliance with the condition of the bond,[6] but a residuary legatee

[1*] Schoul. Exrs. 631.

[2] § 10606 G. C., § 83; § 10618 G. C., § 124; § 10635 G. C., § 1367.

[3] Matter of Gilbert, 11 N. Y. Supp. 743.

A clause in a deed that the trustee shall not be required to render any account of his trusteeship, does not supercede the jurisdiction of the Probate Court to require an account. Pherson vs. Mitchell, 12 O. App. 336.

[4] Hall vs. Grovier, 25 Mich. 428; *In re* Place, 1 Redf. 276; Swan vs. Wheeler, 4 Day 137; Rhett vs. Mason, 18 Gratt. 541; Woerner on Admin. 1134.

[5] Jess. Sur. Prac. 1266.

[6] Clark vs. Clay, 11 Fost. (N.H.) 393; Bard vs. Wood, 3 Met. (Mass.) 74; Harris vs. Ely, 25 N. Y. 138;

who has given the required bond,[7] or an executor or administrator, to whose hands no property has come, need not account.[8]

§ 703. Executor or administrator to render an account, etc. "Within twelve months after his appointment, every executor or administrator shall render his account of his administration upon oath, and in like manner render such further accounts thereof every twelve months thereafter, and at such other times as the court requires, until the estate is wholly settled. He may be examined on oath on any matter relating to his accounts and the payments therein mentioned, and also touching any property or effects of the deceased, which came to his hands." [R. S. § 6175; 102 v. 205.][9]

§ 703a. When to make oath as to itemized account. "Every executor, administrator with the will annexed, or testamentary trustee who does not make a final settlement of the decedent's estate within such twelve months, and carries the administration of his trust from year to year thereafter, whenever he renders such account above mentioned, on oath to such court, as a part thereof, shall make a full, itemized statement of all the funds of the decedent's estate under his control, the date and nature of their investment, the security therefor, and the rate of interest or income accruing thereon, and shall at such time exhibit to the court, for its examination, the security or securities he may have for said funds." [R. S. § 6175; 102 v. 205.] [9*]

The above section provides that an administrator shall file an account within twelve months after his appointment, and the Courts have held that he could not be required to file an account at an earlier date.[10]

Thereafter an administrator or executor if further time be granted, must file his account within twelve months and also at such other times as the Court may require. This would seem

Stewart vs. Stewart, **31 Ala. 207;** Smile vs. Siler, 35 Ala. 88.

[7] Clark vs. Tufts, 5 Pick. (Mass.) 337; McElroy vs. Hathaway, 44 Mich. 399; Copp vs. Hersey, 31 N. H. 317.

[8] Walker vs. Hall, 1 Pick. (Mass.) 20. See In re Soutter (N. Y.), 12 N. E. Rep. 34, 7 Am. & Eng. Ency. of Law, 422.

But it seems he must in some manner inform the Court and others interested that he has had no funds. In practice this is usually done by filing a statement in lieu of an account. See subsequent section. See §§ 1491, 1484, 1296, 1293, 440.

Whether a statement could be filed averring merely that all the debts have been paid, without in detail showing the amount of assets received and the debts paid there may be some question, depending largely who the interested parties may be. If the administrator was the sole heir or the executor the sole legatee, it might be done. If the items can not be given in detail by reason of loss, negligence or death of administrator, then the statement should be made as complete as the known facts will justify.

[9] § 10820 G. C.

[9*] § 10821 G. C.

[10] State of Ohio vs. **Moore, 2 W. L. Gaz. 405.**

to give authority to the Court if good cause be shown, to require an account to be filed at any time even though an extension had been granted of twelve months. This is probably the correct view, for whatever time an administrator or executor has beyond the twelve months provided by statute he receives from the Court, and not from a positive provision of law.

§ 704. Where to be filed.

The account must be filed in the Probate Court which made the appointment. The subject of accounting belongs generally to a Court of Equity, but it was undoubtedly the intention of our constitution and the statutes made in relation to estates, that the jurisdiction over the settlement of estates should exclusively vest in the Probate Court,[11] and until his accounts are finally settled.[11a] If for any reason the Probate Court, from the nature of its organization and the general powers given it, could not protect substantial rights of persons interested in such estates, a Court of Equity might assume jurisdiction.[12] But if it did assume jurisdiction, it would only be in the nature of affording auxiliary relief.

This is very well expressed by Corwin, J., when he says,[13] "We certainly do not admit the right of a creditor, by any proceeding, at his own option, to transfer the settlement of an estate from the Probate Court to a Court of Equity. But cases have arisen, and may arise again, when, from the peculiar relations of the administrator to the estate, or his connection with a title sought to be converted into assets, in the opinion of a majority of this Court, the aid of a Court of Equity may be invoked by a creditor, not for a general settlement of the estate of which he is a creditor, but for the purpose of reaching and placing in the hands of the administrator assets which might otherwise not be reached. But, this object accomplished, the Court of Equity will have performed its function, and leave the distribution of the assets thus obtained, to the Probate Court." [14]

[11] State vs. Beatty, 33 Bull. 109.

[11a] In re Morrison Estate, 68 O. S. 252.

[12] Rote vs. Stratton, 2 N. P. 27.

[13] McDonald vs. Aten, 1 O. S. 296.

[14] When a testator, by his will, directed his executors to invest a specific fund, the interest to be paid

§ 705. Time extended.

We have seen in a previous section,[15] that every executor and administrator is required to proceed with diligence to pay the debts of the testator; and in another part of this work,[16] that he is to proceed with diligence to convert the assets into money or funds, for the purpose of distribution. If, however, after having exercised diligence in both of these respects and twelve months have expired from the time of the administrator's or executor's appointment, upon his filing the account required by law, a further time of twelve months may be allowed. The Court ought to require in all cases, diligence, energetic, and active effort on the part of the administrator or executor, to settle the estate if possible within the twelve months' period. Observation and experience has demonstrated that a prolonged settlement of an estate works disadvantageously in more ways than one. Assets undisposed of, generally depreciate in value. Debts unsecured, lose their security. Family feuds increase and are encouraged. Legatees, administrators, and others die and hamper the administration of the estate. It, therefore, follows, that this extension of time should only be granted for good and sufficient reasons; and if it is granted for a twelve month period, for good cause shown, I apprehend the Court may revoke such an order and require an account to be rendered at an earlier date.

§ 706. Time allowed to collect assets not to operate as allowance of further time to file account. "The time allowed by

annually to S., the widow of his deceased son, during her life, and at her death, the principal thereof to be paid to her two sons, L. and D., and L. and D. died without issue, leaving no brother or sister either of the whole or half blood, and leaving no debts whereby the principal of said fund descended to S., as their next of kin. Held: The trust in the hands of the executor having failed by the occurrence of a contingency not provided for by the will, and the entire beneficial interest in the fund having vested in S., equity will decree its payment directly to her, without the delay and expense of successive administrations. Taplor vs. Huber, 13 O. S. 288; Pomeroy's Equity Jurisprudence, § 1154, vol. 3.

Formerly equity would enforce an accounting, etc. Cram vs. Green, 6 O. 428.

[15] § 647, § 648.

[16] § 447.

the court to collect the assets of the estate, shall not operate as an allowance of further time to file the accounts mentioned in the preceding sections." [R. S. § 6177.][17]

This section has reference to the extension of time that may be granted by virtue of sec. 10684 G. C., previously referred to.[18] The extension of time for the collection of assets and the filing of accounts are usually embodied in one application, and is granted when the account is filed. Although the statute would permit the extension of time for the collection of assets at some other time than at the filing of the account, yet without express permission so to do an administrator has power to collect assets so long as assets are unadministered.

§ 707. Administrator, etc., of deceased or insane administrator, etc., to file account. "When an executor or administrator dies, or by reason of insanity or other incompetency, is placed under guardianship before the estate is fully administered, the executor, administrator, or guardian of such deceased or incompetent executor or administrator, shall render a final account of such decedent's or ward's administration within six months after his appointment." [R. S. § 6175a.][19]

While the statute grants a period of six months for an executor or administrator of a deceased or insane executor or administrator to file his account, yet it ought to be done at the very earliest possible convenience. Not to do so may not only embarrass the estate of the deceased administrator, etc., but also the estate of which he was administrator.[20]

§ 708. Successive administration.

At common law it was generally held that an administrator *de bonis non* could not compel an accounting by his predecessors. But this is not the rule in our State. Here it is the duty of a

17 § 10824 G. C.

18 See § 440 *et seq.*

19 § 10822 G. C.

20 See § 10957 G. C., as to the requirements of an administrator of a deceased guardian; § 1499; and § 208 *et seq.*, as to removed administrator; See § 1500.

Where there are two executors or administrators and one dies, it would seem that the accounting should be done by the surviving executor and not by the administrator of the deceased executor.

See also Jones vs. Williss, 72 O. S. 201; In re Sidwell, 67 O. S. 424; In re Morrison's Estate, 68 O. S. 252.

succeeding administrator to demand an accounting and settlement of the administration down to the moment of a death, removal, or resignation of the previous administrator or executor.[21]

The statute does not make it very clear as to the length of time that an administrator *de bonis non* has, within which to file his first account. Generally the rules applicable to administrators and executors are applicable to succeeding administrators. The statute requires that a succeeding administrator should give notice of his appointment the same as an original administrator, and likewise applies the same rule of statutory limitation as to the enforcement of creditors claim.[22]

It would, therefore, seem that it was the intention of the Legislature to apply the same rule as to the time within which accounts should be filed. Generally, it may be said, that the principles and rules which govern the accounting of administrators, are applicable to the accounts of administrators or their representatives settling with their successors. Such accounting, where the Court has jurisdiction, is final and conclusive,[23] but only as to the rights and liabilities of the estate on the one hand, and the deceased or removed administrator on the other; the administration of the estate as such is not thereby affected, but is to be continued in all respects as if no change in its representation had taken place.[24]

§ 709. Joint executors, etc.

Accounts may be rendered by one or more joint executors or administrators.[25] The account may be a joint account or it may be the separate account of each. As each one is entitled to receive and keep the assets of the estate, he is entitled to file

[21] See chapts. 9, 10 and 14.

[22] See §§ 10755, 10757 G. C.

[23] State vs. Gray, 106 Mo. 526; Scott vs. Crews, 72 Mo. 261, 265; Spraddling vs. Pipkins, 15 Mo. 118; State vs. Matson, 44 Mo. 305; State vs. Thornton, 56 Mo. 325.

[24] Brooks vs. Mastin, 69 Mo. 58, 63 *et seq.;* McManus vs. McDowell, 11 Mo. App. 436; Woerner on Admin. 1182; See § 1496, Settlement with succeeding Gdn.

See § 1294, Trustees.

[25] See § 201 *et seq.*, for Joint or co-administration.

his separate account to show for what part of the estate he is responsible.[26] Where, however, a joint account is filed, all will be liable as shown by the account, unless the presumption raised thereby is rebutted.[27] And some of the cases go so far as to hold that filing a joint account is more than *prima facie* evidence of a joint liability;[28] that it is conclusive, and the fact that a joint account is filed, of itself makes the executors or administrators joining therein jointly liable.[29]

In this State, when an account is rendered by one or more joint executors or administrators, the Court may, in its discretion, allow the same to be verified by any one of them.[30] Accounts which are joint in form, if really filed by only one executor, will not bind his co-executor.[31] When one of two executors presents his account for settlement, his associate may contest it.[32]

§ 710. With what executor or administrator shall be charged. "Every executor or administrator shall be chargeable with the amount of the sale-bill, as hereinbefore provided, and with all goods, chattels, rights, and credits of the deceased which come to his hands, and are by law to be administered, although not included in the inventory or sale-bill; also, with all the proceeds of real estate sold for the payment of debts or

[26] Barclay vs. Morrison, 16 S. & R. 129; Bellerjeau vs. Knott, 4 N. J. L. 359; Heyer's App., 34 Pa. St. 183.

[27] Suydam vs. Bastedo, 40 N. J. Eq. 433; Conner vs. McIlvaine, 4 Del., Ch. 30; Glacius vs. Fogel, 88 N. Y. 434; Call vs Ewing, 1 Blkf. 301.

[28] In Delaware, the following presumptions were held applicable, *prima facie*, upon a joint account passed by two executors: 1st, that the balance shown by the account was held by them jointly, the account including assets jointly held and assets charged to the executors severally; 2nd, that debts credited as being paid by both executors were paid out of assets jointly held, so far as they go; 3rd, that as to assets charged severally, each contributed ratably to the payment of debts credited to both equally. Woerner on Admin. 1180.

[29] Haage's App., 17 Pa. St. 181; Laroe vs. Douglass, 13 N. J. Eq. 308; Young's App., 99 Pa. St. 74.

[30] When any account is rendered by two or more joint executors or administrators, the Court may, in its discretion, allow the account upon the oath of any one of them. [38 v. 146, § 162]; § 10833 G. C.

[31] English vs. Newell, 42 N. J. Eq. 76.

[32] Mead vs. Willoughby, 4 Dem. 364.

legacies, and all the interest, profit, and income that in any way comes to his hands from the personal estate of the deceased." [R. S. § 6179.][33]

§ 711. Amount of sale bill.

The first matter particularized with which the administrator or executor is chargeable, is the amount of the sale bill. Therefore it is not necessary in the account to set out in detail the prices received for various articles, but merely to state that so much was received as per sale bill. In other States, generally, the inventory is the basis upon which the administrator's or executor's account must rest, and in such States in his account the administrator or executor charges himself with the amount of the inventory and then deducts or adds as the case may be, for losses or gains that may be had by sale, etc. Our law is simpler, in that it provides that he shall account for the articles as sold. However, this does not relieve the administrator or executor from accounting for everything that has been inventoried, and therefore it may yet be said that the inventory in our State is the basis of accountability of the executor or administrator.[34]

If any of the notes taken at the sale, without fault of the administrator or executor, are uncollectible, the same could be deducted.[35]

§ 712. Goods and chattels not included, etc.

The second item with which the administrator or executor is chargeable, is the goods and chattels, etc., which shall come into his hands whether they be included in the inventory and sale bill or not. This is broad enough to include every item of a chattel nature which comes into the hands of the administrator as assets of the estate. If such articles have not been sold, they must in some manner be accounted for. Not to do so would be a *devastavit.*

33 § 10826 G. C.

34 See ch. 27, § 469, and ch. 28, § 495.

35 See § 485.

Where an administrator and his decedent gave a joint promissory note, the administrator must charge himself with one-half of the note. In re Lones, 57 Bull. 122. See Perkins vs. State, 9 C. C. 207, 6 C. D. 229.

There must be included in the report all property omitted from the inventory which has come to the administrator's knowledge, with a statement of its value or the amount received therefrom, even though he received such property in the lifetime of the decedent.[36] But it is not proper to charge him with property of which he has no knowledge (or cannot obtain the possession).[37]

§ 713. Rights and credits of the decedent.

The next in order of those things with which the administrator or executor stands chargeable, are the rights and credits of the deceased. By this term is meant, all choses in action, that belong to the deceased and are properly an asset of the estate.[38] If he personally owe the estate he must include that in his current report, even if it has not been inventoried.[39] But he need not include a debt upon which he is only contingently liable, nor one owing, not to the deceased, but to his former representative.[40]

Although his own debt be included in the inventory or report, he may show that it is unjust.[41] In such case he has the burden to show that he does not owe the debt.[42] He may show that the claim is barred by the statute of limitations if the bar be complete before his appointment.[43] With the statement of his own debt he must include interest if it bear interest.[44] But he cannot be charged eight per cent. interest merely be-

[36] Stone vs. Stillwell, 23 Ark. 444; Hurlburt vs. Wheeler, 40 N. H. 73; Boston vs. Boylston, 4 Mass. 318; Downie vs. Knowles, 37 N. J. Eq. 513; Smith vs. Jewett, 40 N. H. 513; Valentine vs. Strong, 20 Md. 522; Merchant vs. Comback, 39 N. J. Eq. 506; S. C. 41 N. J. Eq. 349 (milk of cows).

[37] State vs. Scott, 12 Ind. 529. See § 363 *et seq.*

[38] See § 385.

[39] Rabb's Estate, 16 O. S. 273; Tracy vs. Card, 2 O. S. 431; Bigelow vs. Bigelow, 4 O. 138; Baucus vs. Storer, 89 N. Y. 1.

[40] Shields vs. Odell, 27 O. S. 398.

[41] Everts vs. Everts, 62 Barb. 577; Black vs. White, 13 S. C. 37; Wood vs. Tallman, 1 N. J. L. 153; Lynch vs. Divan, 66 Wis. 499.

[42] Dickie vs. Dickie, 80 Ala. 57.

[43] Wilson vs. Rose, 3 Cr. C. C. 371.

[44] Calvert vs. Holland, 9 B. Mon. 458; Ackerman's Case, 40 N. J. Eq. 533; Rodenbach's Appeal, 102 Pa. St. 572.

cause he realized that rate on his own money and did not pay the debt.[45] But the fact that an executor or administrator is insolvent does not relieve him from accounting for what he owes the estate. Immediately upon the appointment of a debtor as administrator or executor such debt becomes assets of the estate, and it must be accounted for.[46]

In the item of rights and credits, the accountant should be sure to account for all the moneys on hand at the death of the decedent as well as for all notes, bills of account, etc.[47] If they are uncollectible the administrator or executor is not responsible, but they should be accounted for.[47*]

§ 714. Proceeds of real estate sold.

The next in order of the matters required to be accounted for, is the proceeds of real estate sold for the payment of debts or legacies of the deceasd. This applies to all real estate which is converted into money, be the same by virtue of authority derived from a will, or the order of the Court. An executor's items of account of sales made under a power in the will without order of the Court should identify each tract. An account merely giving the price and purchaser is not sufficient. The account in these cases, being the only record by which to advise those interested.[48]

In the distribution of assets derived from the sale of real estate after the payment of debts it should be applied as the will directs and if there be no will, it is to be distributed as real estate.[49]

§ 715. Interest, etc.

An executor or administrator is not chargeable with interest on the money received by him in his official capacity unless he

[45] Grant vs. Edwards, 92 N. C. 442.

[46] McGaughey vs. Jacoby, 54 O. S. 487; See § 390; James vs. West, 47 Bull. 750.

[47] For various kinds of rights of credits, see chapt. 21.

[47*] See § 6181 R. S., § 719.

[48] Williamson's Estate, 4 N. P. 882; 7 Dec. 24.

[49] § 10816 G. C., § 905.

has made some profitable use of the money, or has been guilty of negligence in accounting for it.[50]

An administrator is not expected to invest any part of the money belonging to the estate; nor is an executor, unless he is required to do so by the will of the testator. On the contrary, it is his duty to collect the assets and pay them over to the persons entitled to receive them as speedily as circumstances will allow.[51]

But if he has invested the money and received interest upon it, he must account for it; and the fact that he has received interest, or has made use of the money in his own business, may be inferred from a long delay in settling his accounts, or his neglect to pay over balances after demand made upon him.[52] But if the delay was without negligence on his part, he will not be chargeable with interest unless he has made profit of the funds.[53] He is not to be charged with interest in any case from the date of his appointment, or of his receipt of the

[50] See § 672; James vs. West, 47 Bull. 857; Wyman vs. Hubbard, 13 Mass. 232; Dunlap vs. Watson, 124 Mass. 305; White vs. Ditson, 140 Mass. 351.

Where executors, without objection, and for the mutual benefit of all interested in the estate, retain the entire fund without reference to the separate beneficiaries, each of the latter is entitled to his proportionate share in the income realized from the investment of the entire fund. Foote vs. Bruggerhoff, 21 N. Y. Supp. 509; S. C. 66 Hun. 406; 22 N. Y. Supp. 1105; 67 Hun. 652.

Instead of charging him with interest, the Court may charge him with the profits he has received by an investment of the trust funds. Wingate vs. Pool, 25 Ill. 118; Merchant's Case, 39 N. J. Eq. 506; S. C. 41 N. J. Eq. 349; Gilbert vs. Welsch, 75 Ind. 557.

[51] Executors and administrators, however are charged, with more reluctance than trustees, for simply letting funds lie idle, since their primary function is to administer and not to invest. Schoul. Exrs., § 538; See McCrea vs. Martien, 32 O. S. 38.

[52] Coosh vs. Irwin, 7 O. S. 23; Wyman vs. Hubbard, 13 Mass. 232; Forward vs. Forward, 6 Allen, 494.

[53] Lamb vs. Lamb, 11 Pick. 370.

Mere delay in closing the administration, when it does not appear to have been needless, though accompanied by demands of the executor for credits which the Court properly disallows, will not justify the Court in charging him with interest on balances in his hands. Nor could he be charged with interest merely because he has not reported it, or paid it into Court, when there has been no order of Court requiring him to do so. Dufour vs. Dufour, 28 Ind. 421; Johnson vs. Hedrick, 33 Ind. 129; S. C. 5 Am. Rep. 191.

money. He is to be allowed a reasonable time to settle the estate, and the time proper to be allowed for that purpose must depend upon the circumstances of each case. No general rule would do justice in all cases.[54]

When the administrator employs the funds of the estate in trade, he is liable to be charged with compound interest.[55]

If an administrator fraudulently fails to account for interest received, whether received on notes or bonds or on funds in his hands, he will be chargeable with the highest rate of interest allowed by law,[56] and may be charged with the whole profits on the fund so employed.[57]

Interest will be charged against an administrator for funds which he is ready to distribute, but can not because the heirs are unknown. It is his duty to invest the money for them. "May," in sec. 10843-5, G. C., means "must."[58]

An executor who is indebted to the estate on his individual note to testator will be charged with interest on the note until its maturity, and he cannot relieve himself of the payment of interest by crediting the note to the estate as collected before maturity, unless the money arising therefrom was used for the benefit of the estate, at the time of the credit.[59]

An executor who has been prevented, after the death of the life-tenant, from paying over the principal of the estate to the remainderman by the pendency of the legal proceedings to determine their respective rights thereto, is not chargeable with interest for failure to invest the principal after the life-tenant's

[54] See Clarkson vs. De Peyster, 2 Wend. 77; Schieffelin vs. Stewart, 1 Johns., Ch. 620; Jennison vs. Hapgood, 10 Pick. 77.

[55] Boynton vs. Dyer, 18 Pick. 1; Robbins vs. Hayward, 1 Pick. 528 note; Schieffelin vs. Stewart, 1 Johns., Ch. 620.

[56] Ray vs. Doughty, 4 Blackf. 115; Scott vs. Crews, 72 Mo. 261; Lommen vs. Tobiason, 52 Ia. 665; Perrin vs. Lepper, 40 N. W. Rep. 859; *In re* Essex's Estate, 20 N. Y. Supp. 62.
James vs. West, 67 O. S. 28.

[57] Utica Ins. Co. vs. Lynch, 11 Paige, 520.

If an executor mingles the assets of the estate with his own money, and afterwards fails, the parties entitled to the estate can come in and prove against the executor's estate only on an equality with his creditors. Little vs. Chadwick, 151 Mass. 109.

[58] Thornton's Estate, 5 Dec. D. 151; 7 N. P. 335.

[59] Clifford vs. Davis, 22 Ill. App. 316.

death, since he was justified in holding it for distribution among the remaindermen, who were in a position to settle their dispute and demand payment of him at any time.[60] An executor is chargeable with profits realized on estate funds loaned to himself, and any bonus received on loans to others, and if he realized less than the legal interest on money used by him he is chargeable with the deficiency.[61]

§ 716. Profit and income. Rents, etc.

If there is any profit arising from any of the personal property other than that of interest, which is spoken of in the previous section, it must be accounted for. Likewise the income of real estate.[62] But it is a well recognized rule that the administrator has no authority to collect the rents of real estate belonging to the estate of the deceased. Nor has the executor, unless authorized by the will of the testator. Real estate vests in the heirs and devisees immediately upon the death of the owner, and all rents that become due subsequent to his death belong to them.[63] Even if the estate is insolvent the heirs are entitled to the rents and profits until the land is sold by order of the Court for the payment of debts.[64] But rents collected by the executor or administrator to be applied by agreement with the parties to the payment of claims against the state thereby rendering it unnecessary to sell the land are personal assets and must be accounted for.[65]

§ 717. How chargeable with property consumed by him. If an executor or administrator neglects to sell personal property which by law he is required to sell, and retains, consumes, or disposes of it for his own benefit, he shall be charged there-

[60] *In re* Howard's Estate, 23 N. Y. Supp. 836; S. C. 3 Misc. Rep. 70.

[61] *In re* Richardson's Estate, 23 N. Y. Supp. 978; S. C. 2 Misc. Rep. 38.

[62] See § 1288, as to profits, etc. As to assets generally, see § 363, *et seq.*

[63] Emblements and rents that are earned, although not due, go to the administrator.

[64] See §§ 871 and 872, as to rents generally; Overture vs. Dugan, 29 O. S. 230.

[65] Turpin vs. Turpin, 16 O. S. 270; Campbell vs. McCormick, 1 C. C. 504; 1 C. D. 281.

with at double the value affixed thereto by the appraisers." [R. S. § 6182.][66]

§ 718. Increase or decrease of estate not to affect executor or administrator. "No profits shall be made by executors or administrators, by the increase, nor shall they sustain any loss by the decrease or destruction, without their fault, of any part of the estate." [R. S. § 6180.][67]

§ 719. Executor or administrator not responsible for bad debts. "An executor or administrator shall not be accountable for debts inventoried as due to the deceased, if it appears to the court that, without his fault, they remain uncollected." [R. S. § 6181.][68]

§ 720. Entitled to what credits.

In the previous sections we have considered with what the accountant is chargeable. We now come to the other side of the ledger and have for consideration that with which he should credit himself. As a general rule it may be stated that executors and administrators are allowed as proper credits in their accounts and all disbursements made in good faith for any liability of the estate, either arising in the course of the admin-

[66] § 10829 G. C.

[67] § 10827 G. C.

As to Collection of assets, see § 440 *et seq.;* as to Management of estate, see § 506 *et seq.;* as to Sale of personal property, see § 469 *et seq.;* as to Money on deposit, see § 378, § 513.

All the power, influence and skill of one occupying such a relation is to be used for the advantage of the beneficial owner, and not for personal gain; and all increase, gains and profits, whether arising from the natural increase in value of the property, or from the management of the trustee, are the absolute property of the beneficiary. Berkmeyer vs. Kellerman, 32 O. S. 239.

It is a well settled rule in equity that a trustee is not permitted to so manage the subject of his trust, as to make profits or gain therefrom for himself. The beneficiaries in the trust have a right to expect and require the exercise of his best judgment, care and diligence, on their behalf, and the gains resulting therefrom inure to their sole benefit. What such trustee may not do directly he is not permitted to do through the intervention of an agent or attorney. Cox vs. John, 32 O. S. 532.

[68] § 10828 G. C.

See § 443, Negligence in collecting; See § 485, More than eighteen months allowed.

Administrator not to be charged with money in his hands tied up by litigation. James vs. West, 67 O. S. 28. But a debt owed by executor to estate can not be classed as bad debt. Jones vs. Williss, 72 O. S. 189; McGaughey vs. Jacoby, 54 O. S. 487.

istration or existing against the estate at the time of decedent's death, and paid in the manner prescribed by the law. It has been mentioned elsewhere,[69] that expenses of administration are necessarily entitled to payment before debts of the deceased, because they are incurred for the very purpose of securing the payment of the debts. The matter of the payment of debts as well as the payment of legacies has been fully considered in previous chapters.[70] And suffice to say here that a debt properly paid, and expenses properly incurred are always proper credits in the account.[71] A prerequisite to the allowance of a credit as a general rule is a receipt for its payment. This is provided for by the following section of the General Code:

§ 721. Vouchers to be produced for all debts paid. "In rendering such account, every executor or administrator shall produce vouchers for debts and legacies paid, and for funeral charges and just and necessary expenses, which shall be filed with the account, and they, together with the account, be deposited and remain in the probate court." [R. S. § 6183.][72]

§ 722. Voucher, what is proper.

The above section as to the requirement of receipts should be strictly enforced against every executor or administrator. The term "voucher," when used in connection with the disbursement of moneys, implies some written or printed instrument in the nature of a receipt, note, account, bill of particulars, or something of that character, which shows on what account or by what authority a particular payment has been made, and which may be kept or filed away by the party receiving it, for his own convenience or protection, or that of the public. A voucher is any instrument which attests, warrants, maintains, bears witness.[73]

[69] § 646 *et seq.*

[70] § 646 *et seq.*; § 674 *et seq.*

[71] In the previous chapt. 39, expenses of administration has been treated as a debt of the estate, and likewise expenses incurred in an administration. Woerner on Admin. 1144.

[72] § 10830 G. C.

See § 1487, Gdn's accounting.

[73] 28 Am. & Eng. Ency. of Law 506.

If from the nature of the transaction vouchers cannot be produced, strict proof will not be required.[74] If the expense of a journey made in the interest of the estate is claimed, there should be an itemized account thereof.[75] If the administrator has vouchers for items less than $10 he should produce them; and the failure to produce them will furnish sufficient reason, under the discretion of the Court, for the rejection of the claim for an allowance.[76] But an admission that the administrator's books put in evidence are correct, dispenses with the production of vouchers.[77]

In proving the account the Court is not bound by the technical rules of evidence.[78] If a voucher is lost, and the item it represents is challenged, the administrator must prove that it is a proper credit.[79]

§ 723. What items may be allowed without vouchers. "On the settlement of an executor's or administrator's account, he may be allowed any item of expenditure, not exceeding ten dollars, for which no voucher is produced, if such item be supported by his oath positively to the fact of payment, specifying when and to whom it was made, and such oath be uncontradicted. Such allowances, in the whole, shall not exceed two hundred dollars." [R. S. § 6184.][80]

§ 724. Comments, affidavit, etc.

The above section embodies the common law rule that items not exceeding 40s. are sufficiently proved by the oath of the accountant,[81] provided there was no fraud by making the same

[74] Lidderdale vs. Robinson, 2 Brock. 159; Matter of Pollock, 3 Redf. 100.

[75] Williams vs. Petticrew, 62 Mo. 460; Pearson vs. Darrington, 32 Ala. 227.

[76] *In re* Orser, 5 Dem. 21.

[77] *In re* Langlois' Estate, 26 Abb. N. C. 226; S. C. 14 N. Y. Supp. 146.

[78] Sterrett's Appeal, 2 Pa. & W. 419.

[79] *In re* Rowland, 5 Dem. 216; See § 1487.

Books of a business carried on by an executor, when properly kept, will be received as vouchers. *In re* Reynolds, 3 N. P. 292; 2 Dec. 11.

[80] § 10831 G. C.

[81] Woerner on Admin., 1116 and 1188.

come within the limits, by a division of a larger claim. The general practice in reference to the allowance of items without a receipt or voucher is, that such items should be set out in detail in the account with a designation that there is no voucher for them, and then require the accountant to make an affidavit to the account. However, if the items are numerous and near the excess limit, a special affidavit may be required which may be accepted in lieu of a voucher. The following may be used as a form of affidavit:

State of Ohio, ...county, ss.
Before me the undersigned Probate Judge in and for Clark county, personally came A. B., who being first duly sworn, says he is the executor (or administrator) of the estate of C. D., deceased; and that as such on the.....day of....., he paid to.....the sum of..... dollars for (here state for what the payment was made), and that on the .....day of.....he paid to E. F. for (here state what) the sum of.....dollars. All of such payments were made for the benefit of said estate (or state the reason why a receipt was not taken, or if a receipt was taken and lost so state).

.....

Sworn to and subscribed before me and in my presence this.....day of ....., 19....[82]

§ 725. Preparation of account.

It may not be amiss here to say a few words in reference to the preparation of the account. Unless the account is of exceeding simplicity, no administrator or executor should attempt to prepare it unless he is well versed in such matters, without the employment of an attorney. Most Probate Judges furnish blanks and these can be generally had, for the asking, and usually are the best fitted for a proper account. The first thing that should be consulted in the preparation of an account, especially if it be the first account, is the inventory; and all matter contained in the inventory should be accounted for in the account either through the items contained in the sale bill or otherwise. Very great hardships are sometimes incurred by a failure to consult and examine all

[82] If exceptions are filed to certain items of a report, the vouchers are not strictly evidence. Finch vs. Ragland, 2 Dev. Eq. 137; but they are received as *prima facie* evidence of the expenditures, unless the other side disprove them. Birkholm vs. Wardell, 42 N. J. Eq. 337; Metzger vs. Metzger, 1 Bradf. 265; Boughton vs. Flint, 74 N. Y. 476; Valentine vs. Valentine, 4 Redf. 265; Woerner on Admin. 1188.

the previous papers. If the account to be filed is the second or subsequent account, the previous account should be examined.[83]

The next thing that should be strictly observed, is the ascertainment of vouchers for each expenditure, and where possible, get a voucher, provided none has been already acquired. If any assets remain uncollected, the account should state the fact and the reason for their remaining in that condition. If any debts have not been paid, a like statement should be made. This may be made in the body of the account or separately, and attached to the account as an exhibit. Finally the account having been prepared, a careful addition should be made, and the vouchers should be numbered and arranged in numerical order. If the account is a final one, or even if not final, it would be well to submit it to the parties in interest and get their approval. And if all is satisfactory, and the debts are all paid, a distribution may be made before the account is filed, and included in the account.[83a] Unless all is satisfactory, a distribution ought not to be made until the account is passed upon. It should not be forgotten, that if the account be filed by the executor, and he holds trust funds and carries the trust from year to year, that he must also attach to his account, a full itemized statement of all the funds of the decedent's estate under his control, giving the date, nature of the investment, and security thereon, and the rate of interest, etc.[84] If the administrator or executor claims extra compensation, a statement in detail of such claims should be made. Likewise if the administrator has employed an attorney or other person in the

[83] There came under my observation while Probate Judge an instance where an account had been filed and omitted to state a sum of money which the inventory showed to be on hands. Nine years afterward a citation was filed, requiring the administrator to account for this money. At that length of time no one was able to give a satisfactory explanation of what had been done with the money on hand, although most of the parties interested were satisfied that it had been in some manner paid out. Yet there seemed to be nothing for the Court to do but to order the administrator to account for the money. See Gilbert vs. Marsh, 4 N. P. 338; 7 Dec. 230.

[83a] It should not be forgotten that if a distribution to heirs is made prior to eighteen months from date of appointment of the administrator, and debts remain unpaid, the administrator would still be liable for them.

[84] § 10939 G. C.

The account must also show that the inheritance tax is paid. § 5347 G. C., § 361.

See previous section of this chapter.

management of the estate, whose claim is considerable in amount, an itemized statement should be filed.[85] If there are desperate claims and the accountant wishes to file them for the benefit of the heirs, an order of Court for that purpose should be procured.[85*]

§ 726. Oath to account.

The statute does not provide that the account should be sworn to, but simply provides that the administrator or executor may be examined upon oath on any matter relating to his accounts, and the payments therein mentioned, and also touching any property or effects of the deceased which have come to his hands.[86] It is, however, the general practice, to require all accounts to be sworn to by the accountant. "Adult parties," says Woerner,[87] "interested in the settlement may waive the verification. But it is the duty of the Court to require the account to be sworn to when the rights of infants or absentees are involved." Another reason why an oath should be required attached to the account is, the informal manner in which an adjudication is had on most of the accounts. Generally when no exceptions are filed, no further examination is had of the accountant, therefore if the account were not sworn to, a great safeguard against fictitious accounts would be escaped. The affidavit may be administered by any officer who is competent to administer an oath. The oath usually administered is to the effect that the account is just and true, and that it contains a full statement of the administration of the estate. A form for such oath is attached to the form of account.[88]

[85] It is advisable that every account intended for judicial settlement, whether the proceedings in which it is presented be voluntary or compulsory, should be prepared in view of the right as persons interested to object to its items, and put the accounting party to his proof in justification of their propriety or amount. No one can be more interested than the accounting party himself in having his account properly made up, so as to include all legal debts and credits, and to disclose consecutively and intelligibly the history of his administration. Jessup's Sur. Prac. 1286.

[85*] §§ 1492, Guardian's accounting; § 456, Sale of desperate claims; § 1655, Assignee's accounting.

[86] §§ 10820-21 G. C., § 703; also previous section.

[87] Woerner on Admin. 1187.

[88] Schouler Exrs. 525.

§ 727. Form of administrator's or executor's account.

.....and final account of....., administrator (or executor) of the.....of....., deceased.

In account with said trust before the Probate Court of..... county, Ohio.

Said administrator or executor charges himself as follows:

190...

To amount received from

Said accountant is further charged with balance found due said estate on former settlement of date of.....

....., 190..

Total .....$

Said accountant claims credits on account of payments and disbursements made on behalf of said estate, as follows, to-wit:

190...

By amount paid, Receipt No. 1

" " " " 2

By amount paid Probate Judge's fees — this account.....$

By Administrator's and Executor's Commissions.

6 per cent. on first thousand,..... $.....

4 per cent. on next 4 thousand,..... $.....

2 per cent. on remainder,..... $.....

Total. .....

By Administrator's and Executor's further allowance made by Court, ...

Said accountant further credits himself with amount found due him on former settlement of date of....., 190..

Total credits, ...$

RECAPITULATION.

Total amount chargeable,.....$

" " credited, ...$

Balance due estate — Administrator or Executor,.....$

OATH TO ACCOUNT.

The State of Ohio,.....county, ss.

....., administrator (or executor), within named, being duly sworn, says that the foregoing account, and the vouchers therein referred to, present a full and correct statement and exhibit of the administration of said estate to the time of the filing hereof (except as shown by former accounts) as he verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

....., Probate Judge.

By....., Deputy Clerk.

APPLICATION FOR EXTENSION OF TIME.

(Sec. 10685 G. C.)

Said administrator (or executor) asks the Court for.....additional time, from this date, for the settlement of said estate for the reason that .....

Said.....says that he has in his hands moneys applicable to the

payment of the debts of the deceased amounting to $..... and that he has used due diligence to collect the assets and pay the debts of said estate. That said estate is as he believes.....solvent; that at the time of this application there is not in his hands more than one hundred dollars in money; subject to the claims of creditors of said estate.

.....

Sworn to before me and subscribed in my presence this.....day of ....., 190...

....., Probate Judge.
By ....., Deputy Clerk.

§ 728. Filing and entry.

Having prepared the account, the next thing in order, is to present it to the Probate Court. Fees for the account should be paid at the filing, and likewise if there is any claim to extraordinary compensation on the part of the executor or administrator, it is advisable to consult the judge and get his idea as to the propriety and amount of the allowance. Of course if exceptions be filed to the account, whatever the Court might say in a *pro forma* manner, would not be binding, but in many cases no exceptions are filed, and in such cases if consultation has been had, all further requirement of the presence of the accountant will be dispensed with. The following may be used as a general form of entry, some parts of which may be eliminated according to circumstances.

ENTRY ORDERING NOTICE, ETC.

....., 190...

....., deceased.

.....

.....of the.....of.....

(and final) account current, which is ordered to be filed.

(The affidavit required by law being filed, and there not being in the hands of said.....more than one hundred dollars in money, subject to the claims of creditors, said estate being.....solvent. On motion .....additional time, from this date, is allowed for the collection of the assets of said estate.)[89]

Ordered that notice be given of the filing of said account, and the same be advertised for hearing on.....day of....., 190..., to which time this matter is continued.[90]

As to compensation of said....., the Court finds that any delay, after notice of the expiration of the time for the filing of said account, was necessary and reasonable.[91]

A. B., Probate J.

[89] § 10684 G. C., § 440.

[90] Previous section.

[91] See §§ 124 and 83; §§ 10618 and 10606-7 G. C.

§ 729. Notice of filing accounts to be published. "The probate judge shall cause notice of the filing of accounts by executors, administrators, guardians, trustees, and assignees, trustees, and commissioners of insolvents, to be published in some newspaper of the county, specifying when such accounts will be heard, not less than three weeks after the publication of such notice, at which time it shall be competent, for cause, to allow further time to file exceptions to such accounts. The costs of such notice, if more than one account be specified in the same notice, must be paid in equal proportions by the executors, administrators, guardians, trustees, and assignees, trustees or commissioners of insolvents, respectively." [R. S. § 6402.][92]

§ 730. Form of notice, etc.

The above section authorizes and the general practice of the Court is, to only make advertisements of accounts either at stated periods, or when a certain number of accounts have been filed. The Court may order a single account to be advertised. The following may be used as a general form:

NOTICE.

State of Ohio, Clark county, ss.
In the Probate Court.
To whom it may concern:

Notice is hereby given that accounts and vouchers have been filed in the office of said Court, by administrators of the following deceased persons, to-wit: (here name) and by executors of the wills of the following deceased persons (here name) and by guardians of the following persons (here name them) and by trustees of (here give the name of the beneficiaries as well as the power of appointment).[93]

All persons interested in said accounts or trusts in any way whatever, will take notice that the same have been set for hearing on the.....day of.....at or before which time exceptions may be filed to any of said accounts, and the same will be heard at that date or at such other time as the Court may designate.

A. B., Probate Judge.[94]

§ 731. Entry and record of publication.

While it is advisable in the separate finding made on each account to include a finding, and that proper publication is made of each, yet it is also advisable to make an entry on the

[92] § 11201 G. C.

[93] Some Courts include in this general notice the hearing as to assignee's accounts, but as a general rule it will be found better to make a separate advertisement of assignee's accounts.

[94] A good practice is to regularly give the notice the first of each month. See § 1657, Assignees.

entire number of accounts, which are advertised at one time, and also order that they be recorded, as it is not feasible to record the advertisement with each account. The entry may be in the following form:

ENTRY.

(*Title.*)

Proof of publication of notice of filing accounts to be heard on the..... day of.....having been filed in this Court, the same is hereby approved, and it is hereby ordered that said notice, together with the proof of publication, be entered upon the journal of this Court in full, and that said accounts be recorded.

§ 732. Importance of notice.

The judge should carefully examine the notice to see that a proper publication has been made. No provision is made in our statute as to the rights of infants, and as none is made, it may be presumed that an account may be passed upon and bind the infant, although he is not represented by a guardian *ad litem* or otherwise.[95] To bind interested parties notice must be given them, or as to them there will be no adjudication.[96]

Publishing a notice in the English language in a German paper is insufficient.[97] But, if published on the English side of the paper, where such paper has both English and German sides,[98] a notice "to all persons interested in said estate" is sufficient.[99] A notice that a partial settlement will be made will not authorize a final settlement.[100] But a final settlement without notice will have the effect of a final settlement with a *prima facie* validity.[101] The administrator cannot take advantage of a failure to give notice,[102] or that the settlement was

[95] See Favorite vs. Booher, 17 O. S. 555; § 614.

[96] Barnett vs. Vanmeter, 7 Ind. App. 45; Crawford vs. Redus, 54 Miss. 700; Bellocq's Succession, 28 La. Ann. 154; Githens vs. Goodwin, 32 N. J. Eq. 286; Long vs. Thompson, 60 Ill. 27; Clarke vs. Perry, 5 Cal. 59; Gray vs. Myrick, 38 N. J. Eq. 210; Lenox vs. Harrison, 88 Mo. 491; Roberts vs. Johns, 16 S. C. 171.

[97] Heitkamp vs. Biedenstein, 3 Mo. App. 450.

[98] McLean vs. Bergner, 80 Mo. 414.

[99] Roberts vs. Spencer, 112 Ind. 81.

[100] King vs. Collins, 21 Ala. 363.

[101] Winborn vs. King, 35 Miss. 157; Grant vs. Hughes, 94 N. C. 231.

[102] Williamson vs. Hill, 6 Port. 184; Davis vs. Davis, 6 Ala. 611. See Ballard vs. Mack, 27 O. C. C. 839; 3 O. L. R. 249; McMahon vs. Ambach, 79 O. S. 119, as to necessity.

made before the day fixed for it.[103] The fixing by the Court of a date for hearing the report is, at most, a mere irregularity, and the order of the Court approving the report and dischaging the administrator is not invalidated thereby.[104] However defective the notice may be in form, the decree will be binding, and cannot be attacked in a collateral proceeding.[105]

§ 733. Examination of accountants under oath. "The probate judge may examine under oath, all executors, administrators, guardians, and trustees, and assignees, trustees and commissioners of insolvents, touching their accounts. If he deems it proper to do so, he may reduce such examination to writing, and require such executor, administrator, assignee, trustee, or guardian, to sign it. Such examination must be filed with the papers in the case." [R. S. § 6403.][106]

§ 734. Hearing when no exceptions are filed.*

The mere fact that no exceptions have been filed to an account does not relieve the Court of its duty to make an examination of the account, and, for matters unexplained by the account call the accountant into Court to make an explanation. I fear that sometimes Courts, either do not recognize their full responsibility in this matter, or if they do, are negligent in the performance of the duties devolving upon them. The Probate Judge himself should make the examination, but if such is not feasible a competent, responsible clerk should attend to the matter. The judge or his clerk should see that the amounts with which the accountant charges himself correspond with those in the sale bill, inventory, or former account as the case may be. If the fund is a trust account he should observe whether or not the interest has been collected and charged on the credit side. He should compare the vouchers with the amounts they claim to represent in the account, and in this way he will

[103] Semoice vs. Semoice, 35 Ala. 295.

[104] Williams vs. Williams, 125 Ind. 156.

[105] Jones vs. Jones, 115 Ind. 504; § 1657, Assignments.

[106] § 11202 G. C.

*Cited Jones vs. Creamer, Fayette Cir. Ct. 1910.

It is the duty of the Probate Judge, whether exceptions be filed or not, to scan the account as to amounts expended for personal expenses, and to only allow such sum as is reasonable. Kroll vs. Close, 82 O. S. 190.

It is likewise the duty of the Probate Judge to see that trusts created by a testator's will are properly carried out. Jones vs. Creamer, 13 C. C. (N.S.) 585; 32 O. C. C. 225; affirmed on reasons stated in

ascertain whether a voucher is missing. If it is missing and the amount exceeds ten dollars, he should call the accountant and require him to make an explanation. He should scrutinize closely expenditures made in the management of the estate, the employment of attorney, etc., and last he should see that the additions and subtractions are correct. No account should be accepted that does not clearly set forth the administration of the estate in such a manner that it will show on its face a full and satisfactory execution of the trust as required by law.[107]

§ 735. Entry where no exceptions are filed.

The Court having made a satisfactory examination, the following may be used as a general form of entry:

(*Title.*)

....., 19...

.....of the.....of....., having heretofore to-wit, on the.....day of....., 19..., filed in this Court..h..... ....(and final) account current, and notice of the filing and of the time of hearing thereof having been given, for not less than three weeks prior thereto by publication, in the....., a newspaper of general circulation in said county, the said account, and there being no exceptions filed thereto, is now here heard. And the Court finds that said..... is chargeable with assets of the estate of said.....to the amount of $....., and entitled to credits in the sum of $....., and there is due said estate....., which amount..... ordered to be paid over or distributed to the party entitled thereto.

.....Probate Judge.[108]

§ 736. Exceptions.

The proper method of objecting to an account is to file a paper in the Probate Court pointing out in detail each item objected to and stating the ground of the objection.[109] This writing excepting to certain matters contained in the account must be filed by a person, having *actual notice,* on or before the date at which the account is to be heard. It may be filed by

the opinion of the Circuit Court, 87 O. S. 480.

[107] See § 1659, Assignees.

[108] The Probate Court has not jurisdiction in making an order of distribution to determine the persons to whom distribution is to be made, and the amount going to each but its power is exhausted in that particular when, upon final settlement of the account of the executor or administrator, it enters a general order of distribution. First National Bank vs. Beebe, 62 O. S. 41; See § 981.

Under a former statute it had such power. McLaughlin vs. McLaughlin, 4 O. S. 508.

[109] Woerner on Admin. 1190.

The account may be referred. James vs. West, 47 Bull. 857.

Matters passed upon in proceedings brought by the administrator to sell real estate can not be made the subject of exceptions to his account. Estate of Hess, 33 O. C. C. 449. See § 232 as to limitation of trust; § 798, entry of discharge.

any person having an interest in the result of the accounting. The interest of the objecting party should appear of record and the Court may hear evidence to determine whether he is entitled to be heard or not.[110] The allegation of a possible interest is not sufficient.[111] It has also been held that one who claims property by a title paramount to that of the deceased cannot be heard to object to the accounting.[112] Creditors may except to the account, but not creditors of the heir at law.[113]

In a subsequent section,[114] it is provided, that no former account may be opened so as to correct any matter therein contained, where such a matter had been previously heard and determined, unless by leave of Court. It therefor furnishes an additional reason why the exception should set out definitely and certainly the matter objected to; and while rules of pleading will not be strictly adhered to, in such a matter, yet they govern as far as practicable; and it has been held that an objection to an administrator's final settlement or report, on the ground that he has not collected debts due the estate, is insufficient unless it show also that the debts are collectible, and that the debtors are solvent, and such exception may be disposed of on demurrer. It cannot be assigned as error that the report does not show facts sufficient to entitle the administrator to his discharge. So a general objection to an entire account, some of the items of which are properly proved, may be overruled.[115]

Exceptors, however, are not precluded from taking further exceptions to errors in the account which become apparent subsequently to the filing of the original objections, and which they had no means of knowing at the time. In such cases as a matter of course, the accountant must have sufficient time to prepare a reply.[116] The Probate Court has power to charge an executor on exceptions to his account with loss incurred by selling land for an inadequate price in bad faith.[117]

110 Garwood vs. Garwood, 29 Cal. 515, 518.

111 Estate of Hallock, 49 Cal. 111.

112 Cathey vs. Kerr, 15 La. An. 228.

113 Owens vs. Thurmond, 40 Ala. 289.

Sureties on the bond of the administrator may except and have errors corrected Porter and Wills vs. Brown, 16 Bull. 69.

114 § 10834-10836 G. C., § 743.

115 Woerner on Admin. 1190.

116 On the filing of exceptions to an administrator's account the proceedings are in the nature of a suit between the parties, the progress of which each must observe at his peril. Gray vs. Harris, 43 Miss. 421.

117 Brown vs. Reed, 56 O. S. 264; 6 C. D. 15; 10 C. C. 44.

§ 737. Form of exceptions.

The Court might hear exceptions to an account when made orally, but such is not good practice and where a Court had made a rule, that exceptions should be in writing and such rule was not followed, the Court was sustained in dismissing the exception. For the same reason that pleadings are required in ordinary actions at law, the exception should be stated in writing. No particular form is required, but it should show *first,* that the party filing the exceptions has some interest in the accounting, and *second,* it should show a *prima facie* case for sustaining the exception. The statute does not require that it should be verified, but there are no reasons existing why it should not be verified the same as any other pleading.[118]

The following may be used as a form of exceptions:

(*Title.*)

Now comes A. B. and represents that he is (here state), whether an heir at law, creditor, or widow of deceased), and excepts to the account herein filed by E. F., as administrator of C. D., and which is for hearing on the.....day of....., and says that said account is not true and correct in the following matters, to-wit: (here set out in detail matters excepted to).

.....Sign

Sworn to and subscribed before me and in my presence this.....day of.....

While not absolutely required; in order to keep a record of the proceedings in the case, the Court should on filing of the exceptions make an entry which may be as follows:

(*Title.*)

This day came A. B. and filed his exception to the account of E. F., administrator (or executor) of the estate of C. D., and the Court fixes the.....day of.....at.....o'clock for hearing said excep-

[118] In New York, under Code Civ. Pro., § 2514, subdiv. 11, "the expression 'person interested,' where it is used in connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as a creditor." Owens vs. Thurmond, 40 Ala. 289.

Petition for citation alleging that certain bonds which came into the possession of executor were never delivered to the beneficiary, does not state facts sufficient to open the account for fraud or manifest error where it appears that the beneficiary acquiesced therein. Koehnken *In re,* 6 C. C. (N.S.) 359; 27 O. C. C. 840.

A person filing exceptions should be one who is interested directly in the distribution. A creditor of an heir is not such person. Sturges, *In re,* 18 Dec. 344; 6 N. P. (N.S.) 667.

But the court *sua sponte,* may take up the matter in the account, and make such orders and finding as are proper. See Kroll vs. Close, 82 O. S. 190; Jones vs. Creamer, 32 O. C. C. 225.

tion; and orders that said A. B. give to said E. F. notice of the time of hearing of said exception at least.....days before that date.[119]

§ 738. Court may refer account to special commissioner. "If it deems it expedient and proper, the court may refer the account and the exceptions thereto, if any, to a special commissioner, appointed by it for that purpose." [R. S. § 6186.][120]

The usual rules pertaining to reference and the appointment of a master-commissioner or referee by a Court apply to a reference under this section.[121]

The entry of appointment may be in the following form:

(Title.)

This cause came on to be heard on the account of E. F., administrator of C. D., filed on the.....day of.....and exceptions made thereto by A. B., the Court upon due consideration referred the same to X. Y., who is hereby appointed commissioner to examine said account and report to this Court.

§ 739. Trial, etc.

Such proceedings are essentially equitable in their nature,[122] and the rules of procedure governing ordinary civil cases should be applied whenever practicable.[123] But substance is considered rather than form, and strict formality of procedure is not required. The parties have no right of a trial by jury, yet there might possibly be instances where an issue for a jury might be made up.

Where an account is contested by persons interested, the account and the objections filed thereto stand as the pleadings in

[119] In these proceedings the account and objections thereto form the pleadings; and an objector to an account is as much bound to set up in such objections any claims which he proposes to make, as the defendant in an action is bound to set up in his answer any claims which he proposes to urge. Matter of Hart, 60 Hun. 516.

[120] § 10833 G. C.

[121] See Kinkead's Pract.

A referee can only hear such matters as are properly referred to him. When exceptions to a final account are referred, the referee has no power to go back to previous accounts filed, especially where the partial accounts had been filed more than twenty years before. In re Campbell, 22 Dec. 578.

A motion for a new trial on the matter of reference comes too late after the report of the referee is filed.

[122] Ellis' Estate, 5 N. P. 207; 5 Dec. 330; Woerner on Gdn. 315.

[123] Goodbub vs. Hornung, 127 Ind. 181.

It has been held that no reference can be made unless all the parties agree thereto, and the court refers to § 5215 R. S., § 11483 G. C., but that section only refers to reference under chapter relating to appointment of referees. In the case of *In re* German, 2 N. P. (N.S.) 667; 15 Dec. 304, a reference was made of a guardian's account, and the court held it was void, because the parties did not consent. This seems, in view of § 10833, § 738, to be somewhat doubtful. I apprehend it would make no difference whether the person was called a referee or a master commissioner, if his duties were the same.

Under § 6186 R. S., § 10833 G. C., the matter of an account and exceptions thereto may be legally referred, although the parties do not consent. All that is required is that the court "deems it expedient."

the cause and determine the issues.[124] The Probate Court has jurisdiction to try every question necessary to the settlement of the account.[125] But the legality of an executor's or administrator's appointment cannot be considered in such a proceeding,[126] nor can the Court consider transactions by an executor before he assumed that official capacity,[127] nor the question whether an allowance to the widow from the decedent's estate was properly made by the Probate Court, where the same is fixed by the Court.[128]

§ 740. Evidence.[128a]

The same rules of evidence are applied as in any other case, and where the statutory rule makes a party incompetent, generally it will be applied in this kind of a proceeding. Thus an administrator of a deceased administrator was not allowed to testify as to matters he had excepted in the former administra-

[124] Matter of Heuser, 87 Hun (N. Y.) 262; Matter of Hart, 60 Hun. (N. Y.) 516.

[125] Merchant vs. Merchant, 2 Bradf. (N. Y.) 432; Shaffer's Succession, 50 La. Ann. 601.

[126] Carroll vs. Hughes, 5 Redf. (N. Y.) 337; Matter of Altemus, 32 La. Ann. 364.

[127] Berryhill's Estate, 61 Iowa 345.

[128] 19 Ency. of Plead. and Prac. 1040.

A matter not properly to be included in the account cannot be held to be adjudicated by the account. Sharp vs. Pontius, 2 C. C. 7; 1 C. D. 336.

An account of an administrator with exceptions thereto having been referred to a special commissioner by the Probate Court under § 10833 G. C., and such commissioner having made his report, the same being confirmed, and an appeal taken to the Court of Common Pleas, that Court may hear and determine the cause upon such report and other testimony if necessary, or may, if it deems it expedient and proper, refer the account and exceptions to a new commissioner appointed by the court for that purpose. The court may pursue either course as to it may seem best, and error will not lie for so doing. James vs. West, 47 Bull. 750.

[128a] Cited, Steward vs. Barry, 102 O. S. — (1921).

Former accounts of an administrator having been passed upon and settled, and exceptions being filed to his final account and a reference made to a special commissioner and then exceptions filed by leave of the Court to parts of his former accounts, by persons claiming to be creditors, it is not error for the Court to refer such former accounts and the exceptions thereto, together with the question as to whether such exceptors are creditors, to the special commissioner for hearing and report. James vs. West, 47 Bull. 750.

See Wehrmann vs. Beech, 7 C. C. (N.S.) 367; 28 O. C. C. 128.

In determining matters of account the court is governed by equitable principles. Wilds, *In re* Est., 50 Bull. 384.

Where an allowance is made to a widow for dower, etc., in a proceedings to sell real estate the same can not be attacked by exceptions to the account of the administrator. In re Hess, 33 O. C. C. 449.

tor's account.[129] But generally an administrator is competent to testify in behalf of either party.[130] The burden of proof rests upon the executor or administrator to establish the validity of any item of credit in the account, which is challenged; for want of sufficient *prima facie* proof, such credits will be rejected.[131] And where an administrator claims that a debt shown by the inventory to be due from him to the decedent had been paid during the lifetime of the testator, the burden is on him to prove that fact.[132] But when credits claimed by the executor or administrator are supported by vouchers, showing the nature of disbursement, and said facts which if true show the disbursement to be reasonable and just, and for the good of the estate, the presumption arises in favor of the administrator's claim and the person contesting bears the burden of disproving them.[133]

Generally it may be said that in proceedings for the settlement of an executor's or administrator's accounts, the Court should in receiving evidence give the rules of evidence the most liberal construction consistent with justice.[134] On the trial of objections filed to the account of the executor or administrator, the executor or administrator stands in the position of plaintiff, but each party objecting must make out his case by proper and sufficient evidence.[135] The burden of establishing more assets

[129] *In re* Runyan's Estate, 4 N. P. 335; 7 Dec. 236.

See Butt vs. Worthington, 36 O. C. C. 720; affirmed 57 O. S. 636; Wehrman vs. Beach, 28 O. C. C. 128.

[131] Rabb's Estate, 16 O. S. 273.

[131] Woerner on Admin. 1188, citing authorities, 19 Ency. Plead. & Prac. 1044.

A person who is incompetent to testify can not offer in evidence the answer to a letter written by the deceased, where the original letter is not in court. Tolerton vs. Robinson, 33 O. C. C. 179.

[132] Dickie vs. Dickie, 80 Ala. 57; Underhill vs. Newburger, 4 Redf. 499.

[133] 19 Ency. Plead. & Prac. 1040.

But it was held in Pennsylvania, deviating somewhat from the current of authorities, that the administrator is not obliged to show diligence in collecting a debt for the nonpayment of which he takes credit in his account, until evidence of the want thereof has been shown by the person objecting. Woerner on Admin. 1189.

[134] Loomis vs. Armstrong, 63 Mich. 355; *In re* Ludigh, 15 Dec. 193; affirmed, 71 O. S. 485.

[135] Succession of Gayle, 27 La. Ann. 547.

If an executor is invested by the will with powers that are unlimited, the Probate Court will not hear exceptions to his acts unless fraud is shown. If such executor becomes insane, and a trustee appointed for him filed the final account for such executor, exceptions to the acts done while of unsound mind will not be considered. Reynolds' Estate, 2 Low. D. 11; 3 N. P. 292.

than the executor or administrator has accounted for rests upon the objecting party, and the objection must be established with reasonable certainty.[136]

§ 741. How compelled to render account. "If an executor or administrator fails to render his accounts as hereinbefore directed, he may be compelled to do so, as in case of failing to file an inventory, and the same proceedings be had to attach and remove him and to appoint a successor." [R. S. § 6178.][137]

§ 742. Who and when may compel, etc.

The law does not say who may compel the filing of an account. Unquestionably any one who has an interest in the estate may compel such an accounting. I apprehend that it would not only include persons interested in the estate, but bondsmen of the executor or administrator as well. Not only may such persons compel an accounting, but the court of its own motion may do so. In fact the court ought to attend to this matter very carefully. Every administrator and every executor as a means of protecting those whose interests are at stake, should be compelled to file his account at the times indicated by the statute. Some courts have a clerk whose especial duty it is to attend to this matter, and in those courts it is found that the accounts of estates are in better condition than in those courts where such matter is neglected. A citation may be issued at any time before an action would be barred on an administrator's bond, that

[136] Marre vs. Ginochio, 2 Bradf. (N. Y.) 165; Bainbridge vs. McCullough, 3 Thomp. & C. (N. Y.) 486; Matter of Stevenson, 86 Hun. (N. Y.) 325; Matter of Baker, 42 N. Y. App. Div. 370; 19 Ency. Plead. & Prac. 1045.

[137] § 10825 G. C.

As this section makes special reference that an account may be ordered to be filed in the same manner as an inventory, the reader will be referred to the chapter on inventory where the forms given with very little change can be adopted for use in this section. § 303.

The Court can enforce the filing of an account by proceedings in contempt. § 543 R. S. See §981, Insolvent statutes.

The proceedings by citation, etc., is a necessary incident to the proper exercise of the jurisdiction of a Probate Court, and is barred, when action on the bond is barred. Phillips vs. State, 5 O. S. 122.

Where notice for hearing has been properly published, an account can not be opened up, to determine a question whether or not a distributee, whose receipt is on file, did in fact receive her share. This must be done in an independent action. Kochken, *In re* Est., 1 C. C. (N.S.) 126; 25 O. C. C. 245.

The power of citation is incident to the jurisdiction of the Probate Court. Phillips vs. Harter, 5 O. S. 122.

An administrator can be compelled to file an account so long as he has not filed a final account or there are assets in his hands. The ten-year statute of limitations does not apply to such cases. *In re* Campbell, 33 O. C. C. 578.

is, within ten years from the time the account could have been required.[138]

If the time has elapsed in which the account should be filed, the allegations of the application for a citation would be very simple. If an account was desired during a period of extension which had been granted by the Court, the application should state specifically the reasons for the desirability of the account being filed before the time as extended by the Court had expired.[139]

§ 743. When and how account may be opened after settlement. "When an account is settled in the absence of a person adversely interested, and without actual notice to him, it may be opened on his filing exceptions to the account within eight months thereafter." [R. S. § 6187.][140]

§ 743a. Mistakes or errors. "Upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein. Matters of dispute between two parties, which previously had been heard and determined by the court, shall not again be brought into question by either of the same parties without leave of the court." [R. S. § 6187.][140*]

§ 743b. Distribution after settlement. "If upon hearing and settlement of such account, a balance due the estate remains in the hands of the executor or administrator, the court in its discretion may order distribution to be made by him according to law." [R. S. § 6187.][140†]

§ 744. Absence of party.

It is now well settled that the settlement of the accounts by the Probate Court is conclusive against parties with actual notice as to all matters set out therein, and no second accounting as to them can be required unless such account is impeached for fraud or error.[141] But such account is not final as to assets in the executor's hands and not accounted for, or passed on, or when payment is made to the wrong person. As to them the Probate

138 Phillips vs. State, 5 O. S. 122; Gilbert vs. Marsh, 4 N. P. 338; 7 Dec. 230.

139 See § 280 *et seq.*, § 304, as to filing inventory. See § 1486.

140 § 10834 G. C.

140* § 10835 G. C.

140† § 10836 G. C.

141 McAfee vs. Phillips, 25 O. S. 374.

If the administrator does not account for all the money that is in his hands, or should be in the account, it may be opened up. Lambright vs. Lambright, 74 O. S. 198.

This statute is remedial, and should be liberally construed so as to suppress the mischief and advance the remedy, and uncontested partial accounts may, upon proper exceptions, be opened up on hearing of the final account; and for fraud the whole account can be required to be restated. Ludigh, *In re*, 15 Dec. 193.

Where there is no other relief a Court of Equity may protect a person who is injuriously affected, and who has not been guilty of negligence or laches. Gantz vs. Guase, 82 O. S. 41.

It can only be impeached for fraud where action is brought within four years from discovery of

court may compel further accounting any time within the statutory limit. Subject to these exceptions and to those provided in the above section in reference to error and mistakes,[141a] the person desiring to take exceptions to the account where he has notice, must do so before or at the time of hearing the account. Permitting a person adversely interested to open up an account within eight months from the date of its hearing, is one of grace, extended to such person and he must show himself strictly entitled to come within the statutory provision. As to whether he had actual notice is a question of fact, and it will be incumbent upon him to show that he did not have actual notice. If an administrator or executor wishes to preclude persons from taking advantage of the above section, he should in addition to the notice given by publication, give to all persons notice that he has filed his account, and that it will be heard on the day set by the Court. The Court would hold, no doubt, that all minors and persons under a disability, even if they had actual notice, could open up the account within the eight months.[142]

§ 745. To correct errors and mistakes.

The statute gives to every one the opportunity to have errors or mistakes which occurred in a previous account corrected in a future account.[142a] This provision could only extend to intermediate or current accounts. The statute further provides that no error or mistake can be corrected where such error or mistake has been the subject of controversy between the parties, and has been adjudicated, unless by leave of court; and where a matter has been adjudicated by appeal from the Probate Court, it can not be reopened even by permission of the Probate Court.[143]

fraud. Henry vs. Doyle, 82 O. S. 113.

See § 746.

141a A mistake is defined as some unintentional omission or error. *In re* Campbell, 22 Dec. 581.

142 The settlement of the final account of an executor or administrator showing the payment of money to a person not entitled thereto, is no bar to a subsequent action against him for the recovery of the money by one who is legally entitled to the same. Banning vs. Gotshall, 62 O. S. 210.

142a *In re* Ludigh, 15 Dec. 193; affirmed, 71 O. S. 485.

143 Stayner's Case, 33 O. S. 481.

The "errors and mistakes" in a previous account which might be corrected on the hearing of a subsequent account do not embrace errors and mistakes of the Court on matters previously litigated, so far as the same parties are concerned. They have had their day in Court.

And the Court in any instance would be very cautious in exercising the power to grant leave to open an account which had been judicially settled.[144]

Where the Court has required that exceptions to an account be made definite and certain, little trouble will be experienced in determining whether or not a matter has been settled judicially upon dispute of the parties. A more difficult question arises as to the kind of a mistake or error that may be corrected in a subsequent account. The errors and mistakes that may be corrected are errors and mistakes of fact, and not those of law.[145] For whatever has been judicially passed upon it, if advantage is to be taken of that fact, it must be done by appeal or error in the manner provided by statute. And it has been held that an account containing items of credit to an administrator for his statutory commissions, and for extra services, and for an amount paid by him for attorney fees in the settlement of the estate, and which account current was duly allowed and confirmed by the Probate Court, cannot, on the filing of a second account, more than one year thereafter, be reopened for hearing, and such items be disallowed by the Court, on exceptions filed thereto, when it is not claimed or found that there was any error or mistake therein, or in their allowance.[146]

In another case it was said, "If, therefore, there was any error or mistake, either in the debit or credit side of the former accounts, not heretofore adjudicated between these parties, it was subject to correction in this account, whether that error or mistake consisted in omitting proper charges or credits, or in including incorrect charges or credits, or whether made by the Court or the executrix.[147]

On a hearing of the subsequent accounts, the Probate Court was appealed to to go behind this judgment of the Common Pleas, so far as to correct the alleged errors of that court. Clearly, the Probate Court could not thus disregard a judgment rendered on appeal from its decision. To do so would defeat the right of appeal, and render nugatory the mandate of the Appellate Court, which it was bound to respect and obey. Id. 489.

144 Field vs. Hitchcox, 14 Pickering 405; Smith vs. Dutton, 4 Shepley 308; Brown vs. Doolittle, 151 Mass. 600.

§ 10834 G. C., § 743, is almost a verbatim copy of the Massachusetts statute and the citations from that State are peculiarly applicable.

145 19 Ency. of Prac. 1058, 1070.

146 Campbell vs. McCormick, 1 C. C. 504; 1 C. D. 281.

See note at end of §§ 746, 743.

147 Watts vs. Watts, 38 O. S. 480.

Just what is meant by the above as to correcting a mistake made by the Court, may not be easy to determine. If it is a matter in the account which the Court is presumed to have judicially passed upon, then I apprehend it could not be corrected in a future account.

If the Court errs in its application of the law to the given facts, it is an error and mistake that cannot be opened up in a subsequent account. If the error or mistake is one of facts, it may be.

In a recent and well considered case,[148] where the question involved was the reopening of a guardian's account under the provisions of the law relating to guardians, it was held that an account cannot be opened up unless it was made to appear that a mistake or fraud had entered into the settlement, and to that extent, and to that extent only, might it be reformed and corrected, for the Probate Court as to matters that come within its jurisdiction, is a Court of record and its judgments are of the same binding effect as judgments of any other Courts, and can only be impeached for fraud.[149]

§ 746. Opening account after eight months, etc.

What remedy a person may have for a correction of an error in an account after the same has been heard when a person is present or has actual notice, or when not present and eight months has expired, is not so very plain. It is well settled that Probate Court is a Court of record and its judgments import absolute verity. When it passes judgment such judgment can only be set aside or vacated in a manner provided by law. Sec. 11631, G. C., provides a number of causes which may be

[148] Millen vs. Young, 18 C. C. 71; 8 C. D. 391.
See § 797, as Account of distribution.

[149] Woodward vs. Curtis, 19 C. C. 3; 10 C. D. 400.
It has been held that an account of distribution can not be opened up in the Probate Court when eighteen months have elapsed. *In re* Est. of Boehnken, 1 C. C. (N.S.) 126; 15 Cir. D. 245; C. C. (1903).
See *In re* Ludigh, 15 Dec. 193.
After the expiration of eight months, where the account is settled in the absence of a person interested and without actual notice to him, the judgment of the Probate Court settling the final account of an executor or administrator becomes absolute and conclusive and can not be attached except for fraud of the prevailing party. Crawford vs. Zeigler, 84 O. S. 224; 56 Bull. 185.
See § 743.
In Hunter vs. Yocum, 27 Dec. 31; 18 N. P. 14, it was held that the account could not be opened up except for fraud. But where a mistake has been made in the former final account as to the existence of debts against the estate and credits due the administrator, the former account may be opened up by the Probate Court upon the filing of a subsequent account showing existence of such debts and credits.

sufficient to vacate a former order made by the Probate Court or Court of Common Pleas. Our Supreme Court, however, has held that the provisions of sec. 11631 of the Code of Civil Procedure, as extended by sec. 11643 to Probate Courts, do not confer power upon the Probate Court in the proceedings instituted under sec. 11635 to vacate or modify its own order previously made in the settlement of the accounts of the executors and administrators.[150]

This would seem to leave a party absolutely without a remedy unless he might file a petition in equity to review the account. The Court, in the case of Johnson vs. Johnson,[151] seems to give as a reason why the finding could not be opened under sec. 11631, etc., that the proceedings in an accounting are of an *ex parte* character, and that the provisions of sec. 11631 extend only to adversary parties. Whether this is the rightful construction or not, it is settled until the Supreme Court declares to the contrary. In a later case,[152] where it was sought to vacate a former order of the Probate Court, the judge says, "but for the opinion in Johnson vs. Johnson, 26 O. S. 357, I should have held that the application for that purpose must be made under sec. 11631, R. S., of the Code." It seems, then, that a Court of equity would be the only resource that could be possibly had to vacate a finding of the Probate Court in the matter of a settlement of an estate after the time had elapsed for an appeal or a proceedings in error. This would apply to a current or partial account, as well as a final account, as to those matters which the Court judicially passed upon. There has been some question as to the power of a Court of equity in such cases, but I think it may be said to be the law in Ohio that the Common Pleas Courts retain jurisdiction in all matters in the settlement of estates where the remedies afforded by law and the jurisdiction conferred upon the Probate Court is inadequate; and in one Common Pleas decision,[153] it was held on demurrer that a petition was good which was filed in the Court of Common Pleas to vacate an order made by the Probate Court in the settlement of estates. In this same case the demurrer was sustained, however, because the petition did not allege sufficient

[150] Johnson vs. Johnson, 26 O. S. 357.

[151] 26 O. S. 357.

[152] Stayner's Case, 33 O. S. 491.

[153] Rote vs. Stratton, 2 N. P. 27. The Circuit Court in Howenstine vs. Sweet, 13 C. C. 239, hold the same way. 7 C. D. 498.

facts to constitute a cause of action, the charge of fraud being only alleged in general terms. In a later case,[154] it was held that the fraud for which a Court of equity will vacate a judgment must be a fraud practiced by the successful party in obtaining the judgment. Quoting from the New York Court of Appeals, it is said "the fraud which will satisfy equitable interference in setting aside the judgment and decree must be actual and positive, not merely constructive; it must be fraud occurring in the conception or procurement of the judgment or decree, which was not known to the party at the time, and for not knowing which he was not chargeable with negligence."

In this case it was not claimed that the administrator did not make the payments as set out in his accounts, but that they were unauthorized payments. The Court says "so far as this record goes there is nothing to show that the Probate Court did not pass on every question here made as to the legality of these items in this account." The presumption is that the Probate Court has performed its duty, and having passed upon these questions, even if the Probate Court came to an erroneous conclusion as to matters of law — or as to those matters — it is not for this Court or the Court of Common Pleas, sitting as a Court of original jurisdiction, to reverse the judgment of the Probate Court because it may differ from that Court as to matters of law or fact.

In another case it is said,[155] "We are led to the conclusion then, that where in the settlement of an account of that kind, and where, as in this case, there were exceptions to the account of the executor, and a decision is made by the Court, and that decision is properly entered upon the journal or record of the Probate Court, it is final unless reviewed or changed in some manner provided for by the law regulating the settlement of estates of deceased persons — and that the Probate Court in such case has not the right to vacate such order or judgment otherwise, and that an order made long after the entry of the

[154] Woodward vs. Curtis, 19 C. C. 25; 10 C. D. 400.

[155] Kinselia vs. DeCamp, 15 C. C 498; 8 C. D. 352.

original judgment, as was done in this case, was a nullity, and the original order stands in full force." [156]

What power the Court might have to correct a palpable error made in its own journal entry after the day it was rendered, is not very clearly settled by judicial opinion. It would seem that a Court ought always to have power to make its journal show exactly what the Court intended it to show, and therefore if the finding did not show what the court intended it to show, or what the actual finding of the Court was, that at any time it could change it to correspond with what the actual decision of the Court was. In another case, the Court seems to incline to the opinion that the Probate Court might open up an account upon notice. But it is merely *obiter dicta.*[157]

§ 747. Error and appeal.

The statute specifically provides that an appeal may be taken to the Court of Common Pleas from any order, decision or judgment of the Probate Court in settling the accounts of executors, administrators, etc.,[158] and no doubt error could be prosecuted to any finding made by the Court upon the settlement of an estate. Error, however, is not the remedy usually pursued, as an appeal is the simpler and brings the matter to the Probate Court for an adjudication *de nova.*[159]

156 § 53, Power over entries.

157 Snider vs. Grayham, 14 C. C. 386; 8 C. D. 3.

Proceedings in equity for relief against fraud or mistake in the final settlement of administrators' accounts are governed by the same rules and principles as if the relief were sought against an ordinary judgment at law. The party seeking it must show himself to be free from fraud or negligence. If the question brought before the Court of Equity by bill to open and correct a final settlement passed on by the Probate Court was there presented and adjudicated, either directly or by necessary implication, and the party complaining had an opportunity to be heard, and to have the error corrected by appeal, the failure to do so constitutes such laches as will prevent redress in equity. Woerner on Admin. 1132.

In a recent case a Common Pleas Judge, sitting as Probate Judge, held, that all settlements may be opened up for fraud, mistake, or error in intervening accounts: That where the account itself, together with its vouchers filed, does not show that the item is a proper charge against the estate, the burden rests upon the executor to show that it was a proper charge. While the court refrains from stating that the account is opened up for fraud, yet the facts in the case justify that conclusion. All improper charges and mistakes or error, this decision seems to so hold. *In re* Ludigh, 15 Dec. 193 (1902); affirmed, 71 O. S. 485.

It is difficult to reconcile this decision with the Circuit Court in Campbell vs. McCormick, 1 C. C. 504; 1 C. D. 281.

See §§ 743, 745.

If an account charges a person fraudulently, such person might have relief in a Court of Equity. Gantz vs. Grease, 82 O. S. 41.

158 § 11206 G. C., § 39.

159 An administrator, not executor, however, should be careful and file a written notice in the Probate Court of his intention to appeal. See § 1297, Trustee's appeal.

The Common Pleas Court acquires no jurisdiction on appeal so long as an item of an account remains undetermined in Probate Court. Gregg vs. Klein, 22 O. C. C. 968.

§ 748. Statement in lieu of account.

It often occurs that at the time that an account is due from an executor or administrator that nothing has been administered upon. When this is the case it is the practice of some Courts to permit the executor or administrator to file a written statement of that fact under oath in the Probate Court, and accept the same in lieu of an account. If notice of the hearing of such a statement be given as provided for accounts, a finding thereon would have the same effect. The practice, however, in some Courts is not to give such published notice. Such statement then merely acts as a showing of the then condition of the estate by the administrator. It may be in the following form:

(*Title.*)

A. B., administrator of the estate of C. D., represents to the Court that there was due to the estate of the said C. D. (or there was due to the said A. B., as executor or administrator, from the estate of C. D.) the sum of.....dollars, and the filing of his former account made on the.....day of..... That since the filing of said former account he has collected no assets belonging to said estate nor paid out anything in his hands belonging to said estate for the following reason: And there is now in his hands the sum of.....dollars, belonging to (to the said estate) (or to the administrator or executor).

Wherefor he asks the Court may accept the above statement in lieu of an account.

.....

Sworn to and subscribed before me and in my presence this.....day of.....

.....

§ 749. Ancillary account.

It sometimes happens that the administrator or executor appointed by the Court at the domicile of the deceased person is also appointed, or acts as an ancillary administrator, over the property in another State. It is a rule of law that the administrator must account to the Court of the domicile of the deceased for all the assets of the estate of the deceased. The question then arises, how are the accountings to be made in the different jurisdictions, and what effect is to be given to the orders made in the foreign jurisdiction?

The manner in which the Court will require this to be fulfilled will be for the executor or administrator to obtain a certified copy of the account he may render there, with a state-

ment in the certificate, under the seal of the Court, that the same has been examined, allowed and confirmed (if such be the fact), and that the original account, together with the necessary vouchers for the items stated in the same, are on file in his office. When this account and vouchers thus certified are presented and filed here, the Court, upon examination in the usual mode required by the laws of Ohio, for the settlement of estates, will, if the same are found to be correct, order them to be recorded, and thus preserve here the evidence connected with the entire settlement of the estate.[160] And the orders and finding made in such foreign Court cannot be attacked in the domicillary Court, and thus the matters passed upon in the foreign Court cannot be readjudicated in a domicillary Court; and the administrator in the domicillary Court can only be held accountable for the balance which was found in his hands by the foreign Court.[161]

[160] *In re* Phelps, Weekly Law Gaz. 161.

[161] *In re* Crawford, 21 C. C. 554; See § 165 *et seq.*, Ancillary administration.

It is a general rule that the power of an administrator or executor over the estate emanates from the laws of the state where he receives his appointment. Crawford, *In re*, 68 O. S. 58.

A consul of another government with which this country has treaty relations, has a right to intervene in the administration of the estate of a decedent who was a citizen of that country. *In re* Vincenzo Arduino, 9 N. P. (N.S.) 369; 20 Dec. 461.

See Pagano vs. Cerri, 92 O. S. 345; Cerri vs. Montalto, 93 O. S. 482; *In re* Costango, 15 N. P. 225; *In re* Todarallo, 15 N. P. 593; *In re* Balbo, 16 N. P. 9.

CHAPTER XLII.

DISTRIBUTION IN KIND.

§ 750 Methods of distribution.
§ 751 Executor or administrator may distribute certain assets in kind.
§ 751a Partial distribution.
§ 751b Return of assets when necessary.
§ 752 Application for, etc.
§ 753 Hearing and order.
§ 754 Form of indemnity bond.
§ 754a Application to distribute in kind, and order to transfer stock.

§ 750. Methods of distribution.

Provision is made by our statute for distribution of the assets among persons entitled thereto in two methods — one in money, and the other in specie or kind. The first method will be the subject of the subsequent chapter, and the other will be discussed in the present. We have heretofore seen, in the discussion of the law relating to the administration of estates, that the purpose and necessity of an administration, was to pay the debts of the decedent, and distribute the remainder to those entitled. The legislature in its wisdom has provided that where the parties in interest so desire, and the debts of creditors have been paid or secured, certain kinds of assets of the estate may be distributed without conversion. The first legislation of our State giving such authority appears to have been engrafted into our statute by the codifiers in 1880. It is not intended by such legislation to affect the general rights of the parties to assets distributed in this method; that is, the administrator or executor is entitled to commission just the same as if such assets had been converted into money.[1]

Likewise the distributee may be compelled to account to an unpaid creditor for the value of the assets he may receive.[2]

A distribution in kind may be made at any time during the administration of the estate, for under our law the personal

[1] § 655.
[2] §§ 10877-8 G. C., § 587. It is not contemplated that an order of court be required to permit the executor to distribute or deliver property specifically devised.

property of an intestate vests in the distributee at the time of his decedent's death.[3]

It is not dependent upon any other account having been filed in the Probate Court; and while the statute seems to confer upon the executor or administrator the right of initiating the proceedings, yet I have no doubt that if all the parties entitled to a distribution would unite in an application in the Probate Court showing that the debts were all paid and that assets in kind were still in the possession of the administrator, upon their giving the bond provided by law, the Court would compel an administrator to make a distribution. The statute in reference thereto is as follows:[4]

§ 751. Executor or administrator may distribute certain assets in kind. "An executor or administrator who has paid all the debts of an estate, but has in his possession notes, bonds, stocks, claims, or other rights in action, belonging thereto, with the approval of the probate court entered on its journal, and the assent and agreement of the persons entitled to the proceeds of such assets as distributees, including executors, trustees and guardians, may distribute and pay these over in kind to those of such distributees as will receive them." [R. S. § 6189.][5]

§ 751a. Partial distribution. "When the debts are all paid, except claims in suit and contested, or liabilities not due and payable, or both, such executor or administrator may provide for the payment of such claims and liabilities, by setting apart to the satisfaction of the probate court, enough assets for that purpose, and having done so, with the approval, assent, and agreement, aforesaid, he may distribute and pay over in cash, or in kind, all or any part of the assets in his hands, not set apart to such of the distributees, including executors, trustees and guardians, as are willing to receive them." [R. S. § 6189.][5*]

§ 751b. Return of assets when necessary. "Such executors, trustees and guardians shall be liable to return such assets, or the proceeds thereof, should they be necessary to pay such claims or liabilities. Each of the other distributees, must give an indemnifying bond to the executor or administrator, to the

[3] Armstrong vs. Grandin, 39 O. S. 368.

[4] As to how distribution in kind may be made where there is an heir under guardianship. See § 1390.

[5] § 10839 G. C.

[5*] § 10840 G. C.

The statute seems to contemplate that a distribution in kind be made only of notes, stocks, bonds, etc., but I see no reason why any kind of property could not be disturbed if all the heirs agree and the debts are paid.

satisfaction of the probate court for that purpose. A distribution in kind, in either case, shall have the same force and effect as the distribution of the proceeds of such assets." [R. S. § 6189.][5†]

§ 752. Application for, etc.

The proceeding contemplated by the above section should be commenced by the filing of a proper application in the Probate Court that has jurisdiction of the administrator or executor. As before stated, it is the opinion of the author that the application might be filed by the distributees as well as the administrator, and that it could be done as soon as it was shown that the debts of the estate have all been paid. The application may be in the following form:

(Title.)

Now comes C. D., administrator (or executor) of the estate of A. B., deceased, and represents to the Court that all the debts of said deceased, so far as he has any knowledge thereof, have been paid, and that there are no claims against the estate; and that he still holds the following notes (or bonds, stocks, claims, or other rights in action), belonging to said estate. That he believes that it will be to the interest of persons entitled to the distribution of the assets of said estate, that the same may be distributed to them in kind. He further presents as a part of this application the written consent of the parties entitled thereto.

Wherefor he prays that the Court may make an order authorizing him upon the giving of a proper bond of indemnity to distribute the said assets.[6]

.....

Sworn to and subscribed before me and in my presence this.....day of.....

The distributees should join in said application, and the following may be used as a form:

We the undersigned, all the persons entitled to distribution of the estate of A. B., deceased, hereby join in the above application of C. D., executor, and give our approval to the same, and request that the Court make the order as therein prayed for.

.....

§ 753. Hearing and order.

If the Court is satisfied that the debts have all been paid, and the distributees have all agreed to such distribution, it should make the order prayed for. If the administrator does not re-

5† § 10841 G. C.

6 If eighteen months has elapsed since the date of the appointment of the administrator or executor, provided he has given notice of such appointment, then no indemnity bond should be required, unless it were shown in the application that there is a claim in suit or a liability not yet due (now eighteen months).

quest an indemnity bond the same might be omitted. The following may be used as a general form of entry:

(*Title.*)

It appearing upon the application of C. D., executor (or administrator) of the estate of A. B., that all the debts of said estate having been paid, and that there remains in his hands certain bonds belonging to said estate, and that it is the desire of the parties entitled to the distribution of the assets of said estate that the same be distributed to them in kind, and that said parties have filed in this Court their written consent thereto, it is hereby ordered that said executor distribute the said notes and bonds among the distributees of said estate as follows: To G. W. (here describe what the nature of the assets is that is to be distributed, and its value, and likewise proceed and make similar designation to all the distributees).

It is further orderd that said (here mention the names of distributees) give to the said C. D. as executor, an indemnity bond in the sum of..... .....dollars, as in such cases made and provided by statute.

Said entry might conclude as follows:

And thereupon came the said (here mention distributee) and filed herein for approval their bond in the sum of.....dollars with V. W. and X. Y. as sureties. And the same having been examined by the Court, is approved.

§ 754. Form of indemnity bond.

Know all Men by these Presents:

That we, B. B. (the distributee) as principal, and V. W. and Y. Z. as sureties, are bound unto C. D. as administrator of the estate (or executor of the last will) of A. B., deceased, in the sum of.....dollars (double the estimated value of the property distributed to B. B.), to the payment of which we jointly and severally bind ourselves.

The condition of this obligation is such, that whereas, the distributees of the estate of the said A. B., deceased, have assented and agreed to the distribution of certain assets of said estate, which agreement has been approved by the Probate Court of.....county, Ohio, all as provided for in § 6189 of the Revised Statutes of Ohio, which distribution said C. D. as administrator (or executor), as aforesaid, is willing to make if duly indemnified, as by said section provided; now therefore, if said C. D., as administrator (or executor) as aforesaid, shall distribute to said B. B. the following described property, to-wit: (Here describe the property to be distributed to B. B.) we will indemnify and hold harmless the said C. D., administrator (or executor), from any loss or damage that may arise from said distribution to said B. B., and from not having in his possession and control said property so distributed to said B. B.[7]

Witness our hands this.....day of....., 190...

.....

.....

.....

[7] Giauque's settlements, § 611.

§ 754a. Application to distribute in kind, and order to transfer stock.

In the matter of the Estate of ———— } PROBATE COURT ———— COUNTY, OHIO.

The undersigned respectfully represents that on the 29th day of April, 1919, he was duly appointed and qualified as administrator of ....., deceased, by the probate court of Clark County, Ohio, and is still acting as such. That no claims or debts against said estate have been presented to him for payment and he believes there are none.

The said ..... died leaving ....., his widow, and ....., his child and only heir at law.

That said ..... died the owner of 2 shares of the preferred stock, No. C. F. 3059, of the International Harvester Co. of the face value of $100.00 each, and also the owner of 6 shares of the common stock, No. C. F. 6677, of the said International Harvester Co. of the face value of $100.00 each. That it is the desire of the said widow, ..., and the said ....., that said shares of stock be distributed in kind and transferred to said ..... Wherefore this administrator, ..., of said estate of ....., asks that he may assign and transfer the said shares of stock in said International Harvester Co. and distribute the same in kind to said .....

.....

State of Ohio, ... County, ss:

....., being first duly sworn, says the above allegations are true as he verily believes.

.....

Sworn to and subscribed before me and in my presence this 7th day of February, 1920.

....., Notary Public.

We hereby approve of the above request and ask that the order be granted.

.....

.....

Even where there was no formal order of distribution, where a note was indorsed over by the administrator, and where the debts were all paid, and the distribution of the note has appeared in the account, it was held the indorsee could maintain an action on the note. Maister vs. Fenerstein, 19 C. C. (N.S.) 460.

ENTRY—ORDER TO TRANSFER.

In the matter of the Estate of ———— } PROBATE COURT ———— COUNTY, OHIO.

This ..... day of ....., 1920, this matter came on to be heard on application of ....., administrator of said estate, to distribute in kind, and assign and transfer 2 shares of preferred stock, No. C. F. 3059, of the International Harvester Co., and 6 shares of common stock, No. C. F. 6677, of said International Harvester Co, each of the face value of $100.00, to ....., widow of said decedent, and it appearing to the court that the same is not necessary to pay the debts of said estate, and that ....., the sole heir at law of said decedent, joins in the request of said application, it is hereby ordered that the said ....., as administrator of said ....., assign and transfer to ....., all right and title that the said ..... or he as such administrator may have in and to said stock to said .....

.....

CHAPTER XLIII.

DISTRIBUTION OF ASSETS CONVERTED INTO MONEY.

§ 755 Definition, etc.
§ 756 Kinds and when made.
§ 757 Real and personal estate.
§ 758 Law of domicile controls.
§ 759 Creditors of heirs.
§ 760 Set-off against heirs.
§ 761 How payment of distribution enforced. Petition therefor.
§ 761a Citation.
§ 762 Nature of proceedings, etc.
§ 763 Parties.
§ 764 Petition.
§ 765 Form of petition.
§ 766 Citation.
§ 767 Entry ordering citation.
§ 768 Form of citation.
§ 769 Service of citation.
§ 770 Service, when executor or administrator non-resident.
§ 771 Order for publication.
§ 772 Form of notice.
§ 773 Proof of service.
§ 774 Hearing and judgment. Execution.
§ 774a Lien.
§ 775 Trial, proof, etc.
§ 776 Entry, finding. Judgment.
§ 777 Probate Court may bring in all necessary parties and determine all questions.
§ 778 Comments.
§ 779 Probate Court shall on motion of either party send the case to the Common Pleas.
§ 780 Motion, etc.
§ 781 Common Pleas to have concurrent jurisdiction to enforce order of distribution.
§ 782 Comments.
§ 783 Sureties. Their liability. May be made parties to judgment. Defense.
§ 784 Comments.
§ 785 Appeal from Probate Court and from Common Pleas. Bills of exception.
§ 785a When an appeal may be taken in enforcement of orders of distribution.

§ 755. Definition, etc.

In the sense of the statute, and in the sense in which the term is generally used, the distribution of an estate has reference to the division and apportionment of the personal property and money arising from the sale of real estate by the administrator among the heirs of the decedent after the payment of all the debts and legacies. Where there is no will, the land is not distributed, but descends directly to the heirs. Nor where there is a will are the lands distributed in the statutory and ordinary sense; but its descent is controlled by the will. In the absence

If there are no intervening equities an executor may maintain an equitable action to have restored to the trust estate which by mistake has been conveyed away. Wentzel vs. Chesley, 7 C. C. (N.S.) 181; 18 Cir. D. 192; 28 O. C. C. 192.

of anything to the contrary, it will be presumed that the word "distribution" is used in the statutory and ordinary sense.[1]

The administrator of an estate is a trustee for the person or persons entitled by law to a distributive share of that estate, and such is a direct one.[2]

§ 756. Kinds and when made.

For reasons satisfactory to the legislative mind, power has not been conferred on the Probate Court when passing upon an account, to designate in the final order to whom the residue should be distributed. It is now well settled that the Probate Court has not jurisdiction in making an order of distribution to determine the persons to whom distribution is to be made and the amount going to each. But its power is exhausted in that particular when upon final settlement of the account of an executor or administrator it enters a general order of distribution.[3]

It has no doubt frequently occurred to those upon whom devolved the execution of our administration laws why the Probate Court should not have such authority. Upon investigation of the subsequent sections it will perhaps suggest itself that the method provided for the enforcement of distribution of shares is better than if made on the hearing of the account. We have what we might term a voluntary and an involuntary distribution. A voluntary distribution would be a distribution made by the administrator or executor without proceedings to enforce the same, and is generally followed where the administrator and the executor is sure of the persons to whom distribution should be made. If he makes payment to a wrong person

[1] Beard vs. Loftin, 102 Ind. 408.

[2] Smith vs. Calloway, 7 Blkf. 86; Nugent vs. Laduke, 87 Ind. 482; Raugh vs. Weis, 138 Ind. 42.

"Anciently the administrator or ordinary in right of the king, himself appropriated the residue of an intestate's estate, after payment of the debts, assuming to devote certain portions to pious uses, and to give certain other portions to the widow and children, if there were any. Statutes were afterwards passed which provided in detail for the distribution of the surplus of all estates. Enactments of this character are found in all the States." Sherwood vs. Thomasson, 124 Ind. 541.

See § 907 *et seq.*, Descent and distribution; See § 921, Distribution personal estate; see § 810, Sale and distribution.

The fact that upon the filing of his account the Probate Court discharged an administrator from further liability on his bond, does not relieve him or his surety for wrongfully or illegally distributing any part of the personal estate. Harbeson vs. Mellinger, 2 O. App. 75; 35 O. C. C. 195; 18 O. C. C. (N. S.) 504.

[3] Bank vs. Beebe, 62 O. S. 41.

In re Maholm, 51 Bull. 209.

Where the Circuit Court attempted to make an order of distribution the Probate Court held that the

he does so at his peril.[4] He might, however, recover the same from such person.

If the settlement of a final account of an executor or administrator shows the payment of money to a person not entitled thereto, it is no bar to a subsequent action against him for the recovery of the same by one who is legally entitled thereto. An involuntary distribution might be said to be one made by an executor or administrator by judgment of the Court, and it is a method which an administrator is perfectly justified in having pursued, if there is any doubt about to whom payment should be made. The statute is ample in its provisions as to the settlement of all claims that may arise as to such a fund. As a general thing distribution is had on a final account, yet it might be required upon an intermediate account where the account shows[5] the debts are all paid and there are assets in the hands of the administrator or executor. If a distribution be made before eighteen months from the appointment an indemnity bond should be given by the distributees to the administrator or executor.[6]

The action is barred in six years from the time of the administrator's or executor's default.[7]

Interest cannot be allowed on widow's distributive share until the distribution is ordered.[8]

The administrator might bring an action under sec. 10857, G. C. (§ 33), in Court of Common Pleas, if the distributee fails so to do, and have the court determine to whom distribution should be made.

Circuit Court did so without authority, that as the Probate Court could not, in the approval of an account, make a specific distribution, neither could the Common Pleas or the Circuit Court.

[4] Banning vs. Gotshawl, 62 O. S. 210; *In re* Estate of Joseph P. Cloud, 7 C. C. 67; 3 C. D. 666; James vs. West, 47 Bull. 750, 857.

[5] Disney vs. Hawes, 12 Bull. 322. Where a person occupies a double relation of administrator and guardian and it becomes his duty to pay over the fund to himself as guardian, the law will generally presume such payment to have been made. Wilson vs. Wilson, 17 O. S. 151.

[6] See §§ 10753-4 G. C., §§ 696-754.

[7] Duhme vs. Mehner, 3 N. P. 266; 5 Dec. 107; 18 C. C. 706; 6 C. D. 78; Lease vs. Downey, 5 C. C. 480; 3 C. D. 235.

[8] *In re* Hutchens, 21 C. C. 721.

§ 757. Real and personal estate.

Formerly we had a special section [9] of the Revised Statutes providing for the distribution of personal estate. This, however, has been repealed and such provision has been inserted in the statute relating to the laws of descent and distribution.[10]

When a person dies intestate and leaves no children, or their legal representatives, the widow or widower is entitled, as next of kin, to all the personal property which is subject to distribution. If there are any children, or their legal representative, the widow or widower gets one-half of the first $400 and one-third of the remainder of the personal property. The law relating to the distribution of personal property to the next of kin is the same as that applying to the inheritance or descent of real estate, and the only difference being that in real estate the widow or widower, in case there are no children, or their legal representative, and the property comes by descent, has a life interest in the real estate. If there are children, the widow or widower has a life interest in one-third of the real estate. If there be no children, and the title to the real estate came by purchase, the widower or widow acquires all of it. But for further discussion of this matter the reader is referred to the chapter on descent and distribution.[11]

It should not be forgotten, however, that the proceeds of real estate which is converted into money by the administrator or executor for the payment of debts, after such debts have been paid, is to be distributed not as personal property, but as real estate.[12]

§ 758. Law of domicile controls.

It is too well settled now to require discussion other than to call attention to the fact that in the distribution, or descent, if the word may be so used, of personal property and real estate, a different rule applies where the property is not all located at the domicile of the decedent. Personal property is

[9] § 6194 R. S.
[10] § 8592 G. C., § 938.
[11] § 907 *et seq.*
[12] § 10816 G. C., § 905.

See § 1206, when real estate undevised shall be applied to payment of debts instead of personalty.

always to be distributed according to the laws of the place where the decedent has his domicile at the time of his death. Real estate in its descent is controlled by the laws of the place where it is located.[13]

§ 759. Creditors of heir.

Whatever the law may have formerly been, it is now without controversy that the assignee of the share of a distributee or legatee may enforce his claim in the same manner that the distributee or legatee himself could; and that he is entitled to recover whatever the distributee or legatee himself could have recovered, were he still the owner of his claim. And it therefore follows that an assignee can have no greater right in the legacy or distributive share than the assignor had; and that any right of set-off which existed against the assignor, is good against the assignee; and where distributees give their notes to the administrator for property of the estate purchased by them, and then assigned their interest in the estate, the administrator or executor was allowed to set-off the amount of the note against the assignees.[14]

[13] Evans vs. Beaver, 50 O. S. 190, § 74.

As to what will constitute domicile, see § 1016, governing wills.

Personal property has no fixed situs, but adheres to the person of the owner, and upon his death, the sucession to it is governed by the law of his domicile. The final account of distribution made by an administrator, appointed upon the estate of a non-resident of this estate, approved by the Probate Court, and ordered to be recorded, is no bar to an action brought to compel distribution according to the law of the decedent's domicile, when the distribution actually made and approved does not conform to such law. Swearingen vs. Morris, 14 O. S. 424.

See § 922, Distribution and personal estate; § 907, Descent and distribution.

[14] Woerner on Admin. 1235; Haskin vs. Teller, 3 Redf. 316; Dull's Estate, 137 Pa. St. 116.

But if the assignee (where the Court has such jurisdiction) omit to present his claim before the order of distribution is made, *he will* be bound by the order in favor of the assignor, (Freeman vs. Rahm, 58 Cal. 111), and he stands in the same relation to the estate as the heir would if he had not assigned; hence he is estopped from objecting as to any matters to which the heir could not have objected.

Vanhorn vs. Walker, 27 Mo. App. 78.

The assignment or sale of one's interest in the estate of a living person does not pass his distributive share in such person's estate after her death intestate; hence such assignee has no interest therein.[15]

An executor or administrator may be garnisheed by a creditor of a legatee or distributee, and anything coming to him therefrom, on final settlement, will be bound.[16]

§ 760. Set-off against heirs.

From a number of recent decisions of our Supreme Court, I think it may now be said to be a settled rule in this State that whatever the indebtedness may be between a legatee or distributee and the estate, the executor or administrator has a right to deduct such indebtedness from the portion coming to the legatee or distributee. This general doctrine was first announced by an inferior Court.[17]

Where it was held that a debt due from an heir or legatee to an estate is an asset of such estate, and where the distributive portion of such heir or legatee is equal to, or greater than such debt, the administrator or executor should charge himself with the full amount of the same.

In a subsequent case,[18] the Supreme Court held that the personal property of an intestate who leaves neither wife nor child, passes to such of his brothers and sisters as survive him, and to the legal representatives of those who died before him, and children of a pre-deceased brother take in a representative character and subject to the *indebtedness* of their principal to the intestate.

And later,[19] it was held that when the lands of an intestate descend to his children, there being no personal estate for distribution, the interest of each child in the lands is subject to his indebtedness to the intestate. In this latter case the follow-

[15] Smith vs. Baylis, 3 Dem. 567.

[16] Sampsell vs. Sampsell, 17 C. C. 455; 9 C. D. 510.

The Supreme Court now holds that it can not be attached until after distribution is ordered. Orloff vs. Schueller, 4 C. C. (N.S.) 611; 16 Civ. D. 127; 72 O. S. 42 (1905).

Contra, Bently vs. Strathers, 5 Bull. 288.

The executor or administrator can not be held liable as garnishee before the filing of a final account in an action brought by a creditor of the estate. *In re* Carl Heller, 58 Bull. 445.

[17] Estate of Ellis, 5 N. P. 207.

See § 392, as to Debt due from heir, etc.

[18] Martin vs. Martin, 56 O. S. 333.

[19] Keever vs. Hunter, 62 O. S. 616.

ing is cited from Judge Woerner's works with approval:

"The distinction between debts owing by an heir and advancements made to him by the intestate is sharply drawn; in some States debts so owing cannot be deducted from the share of the heir in the real estate, and from the personal estate only by way of set-off, but the true principle seems to be that a debt owing by an heir constitutes part of the assets of the estate, as much as that of any other debtor, for which he should account before he can be allowed to receive anything out of the other assets; and it is so held in the United States." [20]

A recent case seems to draw a distinction between property devised specifically and in a residuary manner. The distinction being that, as to property specifically devised, the off-set cannot be applied, and that a judgment and levy upon such property specifically devised would have priority over the right of the administrator or executor to a set-off against the same.[21]

This decision was made without citing the recent case of Keever vs. Hunter,[22] and whether it would have been so held in the light of the decision in that case may be questioned. The doctrine as to advancements is provided for in sec. 8585, G. C., which will be discussed in a future chapter in this work.[23]

The statute of limitations does not operate the extinguishment of debts, but bars the remedy only; hence such debts may be set off to legacies or distributive shares, notwithstanding the efflux of the statutory period of limitation.[24]

Our Circuit Court, however,[25] has held the contrary of the above doctrine as set forth by Woerner, and it may be said to be somewhat of an open question so far as this State is concerned.[26]

§ 761. How payment of distribution enforced. Petition therefor. "After thirty days from the time of the settlement of the account of an executor, administrator, or guardian is made, and an order of distribution made thereon by the probate

[20] American Law of Admin., § 71; Keever vs. Hunter, 62 O. S. 619.

[21] Woodruff vs. Snowden, 7 N. P. 520.

[22] 62 O. S. 616.

[23] See § 928, *et seq.*

[24] Woerner on Admin. 1237–8.

[25] Harrod vs. Carter, 3 C. C. 479; C. D. 274.

[26] See § 796.

court, if such executor, administrator or guardian neglects or refuses to pay to a person interested in such order distribution as creditor, legatee, widow, heir, or other distributee, or otherwise when demanded, his or her share of the estate or property ordered to be distributed, the person so interested may file a petition in the probate court against the executor, administrator, or guardian, making such settlement of his or her account, briefly setting forth therein the amount and nature of the claim of the party filing it." [R. S. § 6195.][27]

§ 761a. Citation. "Thereupon the probate judge forthwith shall issue a citation against such executor, administrator, or guardian, setting forth the filing of the petition, the amount claimed by the petitioner, and commanding him to appear before his court on the return day thereof to answer and show cause, if any, why judgment shall not be rendered and execution awarded against him or her for the amount claimed by the petitioner, and found due upon such settlement and order of distribution. Such citation must be made returnable not less than twenty nor more than forty days from its date, and be served and returned by the sheriff or other proper officer, as in the case of a summons. It may issue to any county in the state." [R. S. § 6195.][27*]

§ 762. Nature of proceedings, etc.

The above section provides the method of procedure where an executor or administrator or *guardian* fails to pay over to the party entitled thereto his portion of the estate in the trustee's hands. The remedies provided for this and the subsequent sections are cumulative to those provided in a previous chapter for suit on administration bonds, etc.,[28] and is intended to provide an expeditious remedy against neglectful administrators and executors.[29]

Proceedings in relation to the settlement of an estate in the Probate Court are generally *ex parte*.[30]

27 § 10848 G. C. See §§ 607, 1303.

27* § 10849 G. C.

The surviving husband's distributive share in his wife's estate not asserted until nineteen years after the estate has been settled, is barred by the statute of limitations. Larkin vs. Robinson, 21 Dec. 14.

These sections afford a complete remedy to the heir to enforce distribution. Bowen vs. Bowen, 38 O. S. 426; Gray vs. Case School, 62 O. S. 1.

28 § 260 *et seq.*

29 Dawson vs. Dawson, 25 O. S. 443.

30 Johnson vs. Johnson, 26 O. S. 357.

But the provisions of the above section clearly provide for an adversary proceeding; and secs. 10848 to 10856, G. C., furnish a complete, adequate remedy for the recovery by any person who is entitled to a distributive portion of an estate.[31]

While the statute does not say that the proceeding is a civil action, yet it does not seem different in its characteristics from what the Code terms to be a *civil action.*[32] It retains its character, however, as a proceeding in chancery to enforce the performance of the duties devolving upon a trustee; and is therefore not subject to a trial by jury. However, it has been held that when the estate is settled and distribution ordered, the trust terminates — that then a personal liability attaches; and that the remedies provided for distributees to recover their distributive shares are actions at law and the recovery had are judgments at law,[33] and that an action will be barred unless brought within six years after the expiration of thirty days from the date of the order of distribution made in the Probate Court.

In sec. 10851-2, G. C. (§ 774), it is provided that the *Probate Court* shall render judgment in favor of such plaintiff, etc.; and again in sec. 10853, G. C., it is provided that the *Probate Judge* may hear and determine all such questions necessary to ascertain and fix the amount due the plaintiff in such petition. It would therefore seem that when the action is originally begun in the Probate Court that a jury trial can not be demanded, but if the action were originally instituted in the Court of Common Pleas, under sec. 10855, G. C. (§ 781), where it provides that it shall be governed in all respects as other civil actions, a more difficult question suggests itself. In one case it was held that the right to trial by jury does not depend on the principle upon which relief is asked, but upon the nature and character of relief sought. If the relief sought is a judgment for money only, the fact that before the adoption of our reform system of procedure the

[31] Bowen vs. Bowen, 38 O. S. 426.

[32] In § 10855 G. C., providing for the Court of Common Pleas to have concurrent jurisdiction, it is referred to as a civil action.

[33] Lease vs. Downey, 5 C. C. 480; 3 C. D. 325.

The judgment may be enforced by execution. McLaughlin vs. McLaughlin, 4 O. S. 508.

proper remedy would have been by a suit in equity, does not affect the right of either party to a trial by jury.[34]

In another case it was held that a suit to compel a trustee to account to the beneficiaries of his trust for a judgment for the amount, upon such accounting, found in his hands, is not an action for the recovery of money only.[35]

While the action in this case seems to be an action for the recovery of money only, *it is in fact a method provided for the enforcement of distribution of a trust,* and it would hardly seem probable that the legislature intended to place it within the power of a party by bringing the action in the Court of Common Pleas to change the nature of the proceedings, and make it a jury trial instead of a trial by the Court. Another reason for leading to the opinion that the matter is not triable by jury is the fact that the right of appeal, which ordinarily does not exist in jury trials, is reserved in a trial, under these sections, when the case is brought originally in either the Probate Court or Court of Common Pleas.[36]

§ 763. Parties.

The statute confers authority upon any person interested in said order of distribution as creditor, legatee, widow, heir, distributee, or otherwise. This is certainly broad enough to cover any case in which a person might be interested in the recovery of such a share. It would apply, I presume, to a person who had a *pro tanto* assignment, as well as to one who had an assignment of the entire fund. A question has sometimes arisen whether two or more persons, each entitled to a certain distributive portion, may join as plaintiffs in the proceedings. The better opinion seems to be that they cannot.[36*] Neither can other heirs be made parties defendant, unless some matter of dispute arises as provided in sec. 10853, G. C. The action may be brought against the executor, administrator or

[34] Gunsaulus vs. Pettit, 46 O. S. 27; Black vs. 50 O. S. 46.

[35] Bricker vs. Elliot, 55 O. S. 577.

[36] See § 6203 R. S., § 785.

[36*] See Waldsmith vs. Waldsmith, 2 O. 156.

guardian making settlement. As before stated, the Court has ample power to make other parties defendants so as to completely determine the rights of all parties to the fund in question. The action could only be brought in the Probate Court in which the account had been filed, and the general order of distribution made. The usual rules applying to plaintiffs and defendants should be applied in this kind of a proceeding. The person bringing the action being styled the plaintiff and the executor or administrator the defendant. It should be brought against the executor or administrator in his individual name and not merely against the executor or administrator of the estate, etc.[37]

When one of two executors or administrators has in his hands the balance remaining for distribution, an action may be maintained against him without joining his co-executor or administrator.[38]

§ 764. Petition.

The action is to be brought by the filing of a petition, in which should be briefly set forth the amount of the claim and the name of the party filing it. These are the requirements of the statute, yet I apprehend that the petition must have other allegations. It must state that thirty days have elapsed from the time of the settlement of the account at which the order of general distribution was made. It must also set forth that the executor or administrator has neglected and refused to pay, to the person filing the petition, the amount of the claim. It is

[37] Suit may be brought against an administrator by a distributee, individually, as for money had and received without naming him as administrator.

Waldsmith vs. Waldsmith, 2 O. 156.

[38] Negley vs. Gard, 20 O. 311.

An action brought and prosecuted under §§ 10848-9 and 10854 G. C., by the distributees of a decedent's estate, to recover an unpaid balance remaining in the hands of the administrator, is barred by the Statute of Limitations, unless such action is commenced within six years after the expiration of thirty days from the date of the order of distribution made by the Probate Court. Lease vs. Downey, 5 C. C. 480; 3 C. D. 325.

See § 1475, *et seq.*, as to Collection by foreign guardians. § 10944 G. C.

necessary to allege and prove a demand made before the filing of a petition.* It would seem to be the duty of the administrator or executor to make payment without a demand. The statute requires a demand in all cases where the same can be made, and such fact becomes jurisdictional and must be alleged in the petition. There may be some doubt whether the petition must be verified, but the safe rule and the one which the Court ought to enforce would be to have it verified as other pleadings. The petition should also state the appointment and qualification of the administrator or executor and the time when the account was heard and passed upon. The person bringing the action should fully state in what character he claims the fund, whether as legatee, next of kin, assignee, or creditor, etc.

§ 765. Form of petition.

(*Title.*)

Now comes A. B. and respectfully represents to the Court that he is a son and heir-at-law of C. D., deceased. That on the.....day of..... .....E. F. was appointed executor of the estate of C. D. by the Probate Court of.....county, Ohio; and thereafter said E. F., having filed his account in said Probate Court, said Court made an order directing said E. F. to distribute the funds remaining in his hands amounting to .....dollars, which order of distribution was made on the..... day of....., and that more than thirty days have elapsed since said order of distribution was made; and the said E. F. has neglected and refused to pay the portion, or any part thereof, belonging to the said A. B., although often requested so to do. That the portion thereof which this plaintiff claims amounts to.....dollars.

Wherefore the plaintiff prays that a citation may be issued against the said E. F. as required by law and that he may have judgment and execution against the said E. F. for the said sum of.....dollars with interest thereon from the.....day of....., and such other relief as the nature of the case requires.

.....

State of Ohio, Clark County,ss.

A. B., being duly sworn, says that he is plaintiff in the above petition and that the allegations therein contained are true as he verily believes.

.....

Sworn to and subscribed before me and in my presence this.....day of.....

§ 766. Citation.

Upon the filing of such petition, the Probate Judge shall forthwith issue a citation against the executor, administrator or guardian. Such citation must set forth the fact of the filing of the petition and the amount claimed therein, and commanding such executor, administrator or guardian to appear before

*The Supreme Court affirms this doctrine. Henry vs. Doyle, 82 O. S. 113.

said Probate Court on the day named to answer said petition. The object and purpose of this citation is that of a summons in an ordinary case. The citation shall be made returnable not less than twenty, nor more than forty, days from the date of its issue; and it may be served by the sheriff or other proper officer. It is a requisite of this notice that it be served upon the executor or administrator as summons in ordinary actions. Of course, the administrator or executor might enter his appearance as in any other action.

§ 767. Entry ordering citation.

This day came A. B. and filed in this Court a petition against E. F., administrator (or executor) of the estate of C. D., alleging therein that he is the son and heir-at-law of said C. D., deceased, and that he is entitled under the order of general distribution made in this Court upon the filing of the account of E. F. the sum of.....dollars, and praying that a citation may be issued against said E. F., and that judgment for said amount may be rendered against said E. F. and he may have execution thereon as provided by law. Wherefore it is ordered that a citation be issued against said E. F. returnable on the.....day of....., at.....o'clock, at which time said cause is set for hearing; and that said E. F. be required to show cause why judgment should not be rendered and execution awarded against him for failure to pay the said amount claimed, to-wit: .....dollars, by said A. B., that said citation be directed to the sheriff of this county returnable according to law.

§ 768. Form of citation.

(Title.)
To the Sheriff of said County, Greeting:
You are hereby commanded to make known to said..... that said.....has this day filed in said Court a petition claiming the sum of.....dollars, as due to him upon defendant's settlement with the Probate Court of this county, as guardian of....., and command him to appear on the.....day of....., 190.., and answer said petition, and show cause, if any he has, why judgment should not be rendered and execution awarded against him for the amount claimed, and interest. You will make due service of this citation, and return the same upon the day last above mentioned.
Witness my hand and the seal of said Court, this.....day of....., A. D. 190...
(Signed, etc.)[39]

§ 769. Service of citation.

This citation must be served and returned by the sheriff, or other proper officer, as in the case of a summons; and it may be issued in any county in the State, that is, when the person is a resident of the State; if he is a non-resident of the State,

[39] Whittaker's Probate Code.

service may be made by publication as provided for in the next section. The statute does not seem to make any provision for service made by any one except a sheriff or an officer. Yet I apprehend that if the Court would order the service to be made by some other officer or person, it would be binding. In such cases a person making the service should file an affidavit as to the manner and time in which the service was made.

§ 770. Service, when executor or administrator non-resident. "If such executor or administrator resides out of this state, on being satisfied of that fact, either before or after the return of the citation, the court may order such non-resident to be brought in by publication in some newspaper of the county wherein the petition is filed, for six consecutive weeks before the time fixed for the hearing of such cause." [R. S. § 6196.][40]

§ 771. Order for publication.

The above section says that if the Court is satisfied that the executor or administrator shall reside out of the State, it may order publication in some newspaper. No direction is given as to the manner in which the Court shall be convinced or satisfied of the fact that the defendant is a non-resident. In such cases, I presume, it is the intention of the statute that the ordinary rules applying to service by publication be followed, that is, that the plaintiff file in the Court an affidavit setting forth the fact that the defendant is a non-resident of the State. If this fact of non-residence was brought to the attention of the Court before the issue of a citation to the sheriff or other officer, the former entry should be made to conform to such fact. If it is made afterwards, the Court should make an additional entry ordering service by publication. In all cases it must appear somewhere that the Court has ordered a service by publication. The entry may be in the following form:

[40] § 10850 G. C. The codifiers omit guardian, which was in the original act.

(*Title.*)

It appearing to the satisfaction of the Court that E. F. is a non-resident of the State of Ohio, it is ordered that he be brought into Court by publication as required by section 6196 of the Revised Statutes.

§ 772. Form of notice.

C. D., who resides in the State of....., will take notice that A. B., on the.....day of....., A. D. 190.., filed his petition in the Probate Court in the county of....., and State of Ohio, alleging that as one of the creditors of the estate of said X. Y., deceased, he is entitled to the sum of.....dollars, with interest thereon from the.....day of....., 190..., under the order of distribution made by said Court upon settlement of the account of said C. D., as executor of the last will and testament (or administrator of the estate) of X. Y., deceased, and that although more than thirty days have elapsed since said order of distribution was made and although payment has been demanded of said C. D., he has neglected and refused to pay said A. B. the amount claimed by him as aforesaid. The prayer of the petition is for judgment and execution against the said C. D. for the amount due said A. B., as aforesaid.

Said petition will be for hearing on the (at least six weeks after date of first publication).....190..

A. B.[41]

§ 773. Proof of service.

In these proceedings, like all other proceedings of an adversary character, or in which the law requires notice to be given, it is vitally important that proof of service when made either by an officer personally or by publication, be filed with the Court. If made by an officer, he need merely endorse on the original writ the time and method of service; if made by private persons personally or by publication, an affidavit should be filed with the writ, or the notice of publication setting forth the fact of its publication. It has been held that where the record says affirmatively that the law in regard to service by publication under sec. 10850, G. C. (§ 770), has not been complied with, all proceedings under the same are void, and may be set aside and vacated on motion of an interested party. In this case the record showed that publication had been ordered for five weeks instead of six, as required by the statute, and it was set aside eleven years after it was made.[42]

In the settlement of an account of a guardian, it is held that the Probate Court of a county in this State having ap-

[41] Whittaker's Probate Code.

[42] Estate of Cloud, 7 C. C. 69; 3 C. D. 666.

pointed a guardian for the person and estate of a minor, does not lose jurisdiction of such guardianship by the removal of the guardian from this State, and may compel the foreign administratrix of such guardian after his decease to account to said ward, and that service may be had upon such foreign administratrix by publication.[43]

§ 774. **Hearing and judgment. Execution.** "On the return of the citation served, or the service of notice by publication, the cause shall be for hearing, unless for good cause shown it is continued for trial and judgment, as in other cases of continuance. If no good defense be shown to the claim in such petition, the court shall render judgment in favor of the plaintiff, against such executor or administrator, for the amount found to be due to him, and unpaid, upon the settlement and order of distribution, with interest and costs of suit, and award execution thereon, as in other cases of judgments. Such execution must be served and returned, as if issued from the court of common pleas." [R. S. § 6197.][44]

§ 774a. **Lien.** "Judgments rendered under the next preceding section shall have like liens upon the real estate of the parties as do judgments rendered in the court of common pleas, and be governed by the same rules." [R. S. § 6197.][44*]

§ 775. Trial, proof, etc.[44†]

On the day of the return of the citation, the cause shall be heard unless continued, and the usual ground for continuance is applicable, and the court will proceed to hear the matter, and if no good defense be shown, it shall proceed to render judgment. If a defense be made, the usual order of trial would be followed. The court should examine and ascertain that proper service has been made, and that proof of the same is in the court. The court must be satisfied from the proof that the party applying therefor is either by virtue of a will of the deceased, or by relationship, or by valid assignment of the

[43] Netting vs. Strickland, 18 C. C. 136; 9 C. D. 841.

[44] § 10851 G. C.

[44*] § 10852 G. C.

[44†] Cited approvingly, Jackson vs. Warsignary, 56 Bull. 1.

Codifiers (1880) have omitted guardians, which was in original act.

Action barred unless commenced within six years after expiration of thirty days. Lease vs. Downey, 3 C. D. 236; 5 O. C. C. 480.

claim, entitled to the fund or a claim. It must be proven not only that the party is one of a class entitled to such distribution, but also that there are no other next of kin of the same degree. Thus it has been said where father, mother, brothers and sisters are entitled to equal shares, it must be proven whether the father or mother is living or had died before the intestate, and also how many brothers and sisters, or descendants of deceased brothers or sisters survived him.[45]

Distribution of an estate will not be delayed by reason of a contingent claim arising, from decedents having signed a title bond to protect a defective title to lands sold.[46]

In the settlement of an estate before the Probate Court, such Court cannot make provision for claims against the estate which no creditor is asserting, neither can it, in the order of such settlement, determine the state of accounts between an administrator and the distributee. But in a proceeding by the distributee against the administrator or executor all matters of accounts between them can be gone into and the administrator or executor might set off against them any liquidated demand that he might hold.[47]

In some States it is held that the Probate Court has power only to determine who is a primary legatee entitled to receive payment from the executor, and cannot adjudicate as to the right of successive legatees for themselves.[48] It seems, however, the object and purpose of our statute is to confer ample power upon the Court to determine all rights between the parties.[49]

[45] Woerner on Admin. 1234, citing Hopkins vs. Claybrook, 5 J. J. Marsh. 234; Delany vs. Noble, 3 N. J. Eq. 441; Compo vs. Jackson, 50 Mich. 578; Anson vs. Stein, 6 Iowa 150.

[46] Bates Estate, 7 N. P. 625; 5 Dec. 545.

See § 569.

[47] Cox vs. John, 32 O. S. 534.

[48] Woerner on Admin. 1234, 351.

[49] The Probate Court has complete power to determine the rights of all parties and the administrator is protected by its order. Jackson vs. Wasignary, 56 Bull. 1.

An administrator having distributed all the assets under a decree of Court, finding who were entitled thereto, and a will being afterwards admitted to probate, the executor seeks to compel the administrator to pay over again, and to compel purchasers of assets from former distributees to surrender them: *Held*, neither relief can be granted. The former decree is evidence for the administrator, though the complainant was not a party to it. The only remedy is to make the legatees parties and compel the former distributees to pay back, and

Where a distributee, pursuant to a private arrangement with one of two joint executors, accepts his individual check for the amount of her distributive share and executed her receipt in full to the executors, it is held she could not maintain an action under the provisions of the sections referred to in this chapter. If the check was dishonored, she would be compelled to sue the executor for the non-payment of said check.[50]

§ 776. Entry, finding. Judgment.

The subsequent section provides that the Court may bring in all necessary parties, and such being done, the entry would need to be varied to adopt itself to the circumstances. Very often no other persons are made parties, and the judgment and finding is merely against the administrator or executor, and may be in the following form:

(Title.)

This day this cause came on to be heard upon the petition and the returns of service and testimony. Whereupon the Court finds that the said E. F., administrator (or executor) of the estate of C. D., has been duly served with citation in this case as required by law. That the allegations of the plaintiff's petition herein filed are true and that there is due the said A. B. from the said E. F., as executor (or administrator) of the estate of C. D., on his distributive share thereof the sum of.....dollars.

It is therefore adjudged by the Court that the said plaintiff recover against the defendant as his distributive share of the estate of C. D., the sum of.....[51] dollars, with the costs of this suit taxed at..... .....dollars; and that execution be issued against the goods and chattels of said defendant in the same manner as if said judgment had been rendered in the Court of Common Pleas.

§ 777. Probate Court may bring in all necessary parties and determine all questions. "If the amount coming to an heir,

this can be done by amendment. Barkaloo vs. Emerick, 18 O. 268.

Where the residuum is left to children and their issue, and the executors had published all statutory notices and a grandson by a deceased daughter was, without their fault, unknown to them, but he knew his relationship before decedent died and that he might inherit and could readily have ascertained the fact of death, but did not inform the executors of his existence or make any claim until eleven years after final settlement, and brought suit for his share eighteen years after final settlement: *Held*, his action against the executors is barred. Stewart vs. Welsh, 41 O. S. 483.

And the court can make no order until account is filed, etc. *In re* Cloud, 7 C. C. 67; 3 C. D. 667.

[50] Riggin vs. Creath, 60 O. S. 114.

[51] A person is not entitled to interest until the order of distribution is made. *In re* Hutchins, 21 C. C. 721.

legatee, widow, or other distributee, under such order of distribution, be uncertain, or in dispute, the probate judge may hear and determine all questions necessary to ascertain and fix the amount due the plaintiff in such petition, and, if necessary, hear, determine, and settle the rights and claims of all parties interested, in such order of distribution. For that purpose the probate court may cause all the heirs, legatees, or other distributees, parties in interest, to be made parties to such petition, when necessary, by amended or supplemental petition, and service of notice, as provided in section ten thousand eight hundred and fifty-one and in such case to render judgment and award execution against such executor or administrator in favor of the parties, for the amounts, respectively, found due them, with interest and costs, unless the court is of opinion that the costs should be paid out of the estate to be distributed, or by the parties, in which case it shall make such order respecting costs as seems equitable." [R. S. § 6198.][52]

§ 778. Comments.

The above section confers upon the Probate Court ample jurisdiction to try all questions of dispute in reference to the funds in the hands of the administrator or executor; and incidentally in that way the Probate Court might be required to give construction to a will as well as the effect of a conveyance, a contract or what would constitute an advancement, and the rights of assignees to all, or part of the funds, and it might be necessary in such a case to make all the heirs or legatees parties, in order to determine the whole controversy. The object and purpose of the law generally being to prevent a multiplicity of suits, and that when a matter is in controversy, to settle all matters pertaining thereto. In making such persons parties, the general rules of pleading should be observed, and service of notice is to be made upon any such other person who is made a party, as is provided in sec. 10848, G. C., and sec. 10850, G. C., providing for notice upon executor or administrator.

[52] § 10853 G. C. Codifiers (1880) omit guardian.

Furnishes a complete remedy to heir. Bowen vs. Bowen, 38 O. S. 426.

It is not exclusive, and administrators may commence action in Common Pleas. Davis vs. Hutchens, 8 C. D. 52; 15 O. C. C. 174.

§ 779. Probate court shall on motion of either party send the case to the Common Pleas. "In cases relating to the enforcement of an order of distribution, the probate court before which a proceeding is pending, on motion of any party thereto, shall reserve and send it to the common pleas court for trial, judgment and execution. In case of such reservation, the probate judge forthwith shall make out a transcript of his proceedings in the cause, so far as it has progressed, which, with the petition and other papers therein, forthwith shall be filed with the clerk of the common pleas court. Thereafter the cause shall be carried on to final judgment and execution therein as a civil action." [R. S. § 6199.][53]

§ 780. Motion, etc.

The provisions of the foregoing section seems to be mandatory, and if a motion be made that a case be transferred to the Court of Common Pleas, the judge must allow it; and he must also make out the transcript of his proceedings and file the same with the clerk of the Court of Common Pleas; and thereafter the case shall proceed as if originally filed there, like any other civil action. The motion may be in the following form:

(*Title.*)

Now comes A. B. by X. Y., his attorney, and moves the Court that the proceedings herein be reserved and sent to the Court of Common Pleas of this county for trial, judgment and execution.

.....

On the filing of such motion, it will be the duty of the Court to terminate his proceedings in the case by an entry, which may be in the following form:

(*Title.*)

On motion of A. B., one of the parties in this cause, this case is reserved to the Court of Common Pleas of this county for trial and judgment and execution; and it is ordered that a transcript of the proceedings as far as the same has progressed, be made out and, together with the petition and all other papers in this cause shall be forthwith filed with the clerk of the Court of Common Pleas of this county.

§ 781. Common Pleas to have concurrent jurisdiction to enforce order of distribution. "The court of common pleas has concurrent original jurisdiction with the probate court in all

[53] § 10854 G. C.

cases provided for in the next seven preceding sections and any creditor, legatee, widow, or other distributee, as aforesaid, may bring an action in the common pleas court of the proper county, against such executor or administrator for his or her share of the estate upon such settlement and order of distribution, and it shall go on to final judgment and execution like other civil actions. All persons interested therein may be made parties thereto, if deemed necessary by the court, which shall determine their respective rights, render judgment thereon, and award execution, as in other cases." [R. S. § 6200.][54]

§ 782. Comments.

This section retains to the Court of Common Pleas original jurisdiction in a suit brought to enforce a distribution of an estate. The case may therefore come into the Court of Common Pleas in three ways. It may be brought there originally, as provided by sec. 10853, G. C. (§ 777). It may be brought there by reservation from the Probate Court, as provided in sec. 10854, G. C. (§ 779). It may be brought there by appeal, as provided in sec. 10859-60, G. C. Only under the provisions of sec. 10853, G. C., does the Court of Common Pleas have actual original jurisdiction, and therefore no appeal will lie to the Circuit Court where the action was brought into the Court of Common Pleas by virtue of the provisions of either sec. 10854, G. C., or sec. 10859-60, G. C.[55]

When an action is brought in the Court of Common Pleas, it is brought as any other civil action, and service is had by summons in conformity to the rules applicable to civil actions generally. It differs in this respect from the action when brought in the Probate Court, for there a citation is issued returnable not less than twenty, nor more than forty, days, otherwise the action seems to be similar to that of the Court of Common Pleas.

[54] § 10855 G. C.

Under a former statute when the Probate Court had power in passing upon the account to determine the matter of distribution, the Common Pleas had no jurisdiction. McLaughlin vs. McLaughlin, 4 O. S. 508.

[55] Estate of Correy, 4 C. C. 220; 2 C. D. 510.

See Puder vs. Azler, 242 Fed. 95.

While the question has not been adjudicated so far as we know, yet we are of the opinion, that like the action brought in the Probate Court, it is not triable by jury. If the action were brought against the executor or administrator individually as for money had and received, it would then be triable by jury. Although some of our Courts [56] have spoken of the action as a judgment at law, yet it seems that it is more in the nature of the termination of a trust, and is certainly not that kind of an action which was triable by jury at common law. The mere fact that it is referred to as a civil action does not make it a common law action, for under our Code civil action includes both proceedings in chancery and action at law.

§ 783. Sureties. Their liability. May be made parties to judgment. Defense. "The sureties of every such executor or administrator moreover shall be liable upon the official bond of the executor or administrator against whom a judgment may be rendered under the provisions of the preceding sections, either in the probate or common pleas court. Such sureties may be made parties to such judgment by petition or action to be commenced and prosecuted, in the manner above provided against executors or administrators, to final judgment and execution. In cases in which service of process has been made upon such executors or administrators, by publication, the surety shall be permitted to make any defense that the executor or administrator could have made." [R. S. § 6201.] [57]

§ 784. Comments.

In some matters the above section is clear and in some not. It is evident that it was the intention of the legislature to reserve all the rights of the plaintiff, which he might have on the bond given by the administrator or executor, and that he might pursue his action on the bond as elsewhere provided.[58]

[56] Lease vs. Downey, 5 C. C. 480; 3 C. D. 325.

[57] § 10856 G. C. Camp vs. Boswick, 26 O. S. 337.

[58] § 260 *et seq.*

It is also plain that a surety on a bond has a right to appear and make any defense that the executor or administrator could have made where service is made on such executor by publication; and having made an exception that the surety could only appear when service is made in that manner, the inference is strong that if service is made on the administrator or executor in any other manner the surety has no right to defend. When the statute provides "that such sureties may be parties to any judgment by any petition or action to be commenced, and prosecuted in the same manner as above provided for the commencement and prosecuting causes against executors and administrators to final judgment and execution, it is not clear whether the legislature intended to confer upon the Probate Court jurisdiction to entertain such action or not. If an action is brought against sureties, it must be brought on the bond, and sec. 10874, G. C. (§ 261), specifically provides that an action on the bond must be brought in the Court of Common Pleas or Superior Court of the county in which it was given; and it therefore rather negatives the idea of the above section that an action on the judgment may be commenced and prosecuted as is provided in the preceding sections in this chapter.[59]

§ 785. Appeals from Probate Court and from Common Pleas. Bills of exception. "From any order, judgment, or decree of the probate court, an appeal may be taken to the court of common pleas, by any person against whom it is made, or who is affected thereby, in the manner provided in other cases. Bills of exception may be taken and allowed upon any decision of the probate, common pleas or circuit court, in such proceedings as in other cases." [R. S. § 6203.][60]

§ 785a. When an appeal may be taken in enforcement of orders of distribution. "An appeal may be taken from an order or judgment of the common pleas court to the circuit court, in proceedings under the provisions relating to the enforcement of orders of distribution, by executors or administrators by a person against whom it is rendered, or who may be affected thereby, in the manner provided in other cases." [R. S. § 6203.][60*]

[59] § 260 *et seq.* See § 261.

[60] § 10859 G. C.

[60*] § 10860 G. C.

The provisions of the above section, in providing for appeal and proceedings in error, apply only to actions and proceedings brought under secs. 10848, G. C. (§ 761), 10850, G. C. (§ 770), 10853, G. C. (§ 777), 10854, G. C. (§ 779), 10855, G. C. (§ 781).[61]

[61] Barr vs. Closterman, 2 C. C. 387; 1 C. D. 546; Ebersole vs. Schiller, 50 O. S. 701; Miller vs. Miller, 19 C. C. 243; Gartner vs. Meyer, 19 N. P. 353.

As to appeals generally, see § 43, § 11207 G. C.

See Kislingberry vs. Donovan, 8 N. P. (N.S.) 476; 11 Dec. 542; Pierson vs. Pierson, 5 N. P. (N.S.) 235; 18 Dec. 825.

CHAPTER XLIV.

INVESTMENT OF UNCLAIMED MONEY, AND ACCOUNT OF DISTRIBUTION.

§ 786 How unclaimed money to be invested.
§ 786a Disposition of note or bond.
§ 786b Limitations.
§ 787 Application for order to invest.
§ 788 Entry authorizing investment.
§ 789 Return of investment.
§ 790 If fund can not be invested.
§ 791 When and how such money paid to owner.
§ 792 Application, and order to pay money to owner.
§ 793 Entry ordering money turned over to claimant.
§ 794 Judge responsible for safe keeping of certificates, etc.
§ 795 Account of final distribution.
§ 796 Objects of the above provision.
§ 797 Form of account of final distribution.
§ 798 Entry and order of discharge.
§ 798a Probate Court to order receipt for payment of incumbrances recorded, etc.
§ 798b Application to have receipt recorded, etc.
§ 798c Entry. Notice.
§ 798d Hearing and order.

§ 786. How unclaimed money invested. "If a sum of money directed by a decree or order of the court to be distributed to heirs, next of kin, or legatees, or by a judgment or decree of court in favor of a creditor, remains for six months unclaimed, the executor or administrator shall loan it on bond or mortgage, as the court directs, to accumulate for the benefit of the persons entitled thereto. Such loan shall be made in the name of the judge of the court for the time being, and be subject to the order of the judge and his successors in office, as hereinafter provided." [R. S. § 6191; 103 v. 435.] [1]

§ 786a. Disposition of note or bond. "The person making such loan shall file in the court a memorandum thereof, with the original bond or note and mortgage, as the case may be, which shall be allowed as a sufficient voucher for such payment under the order or decree. If the amount is not so loaned during another six months, it shall be turned into the county treasury and credited to the general fund, without liability for interest thereon. The receipt of the county treasurer taken for it and filed shall be a sufficient voucher." [R. S. § 6191.] [1*]

[1] § 10843 G. C.

[1*] § 10844 G. C.

§ 786b. Limitations. "The statute of limitations shall not be set up as a defense or bar to an action against an executor or administrator who fails or neglects to comply with the requirements of the next two preceding sections." [R. S. § 6191.][1†]

§ 787. Application for order to invest.

The above section is designed to furnish a method whereby an administrator or executor may be relieved of funds in his hands which remain uncalled for after six months from the time the order of distribution is made. If he does not invest it, he will be chargeable with interest whether he has any use of the funds or not. It has been held that the word "may" in this statute means "must," and if an executor or administrator fails to make the application for the order he must pay interest.[2]

The matter ought to be brought to the attention of the Probate Court by an application filed for that purpose, which application may be in the following form:

(*Title.*)

Now comes A. B., administrator (or executor) of the estate of C. D., and represents to the Court that on the.....day of.....the Court made an order finding that there was in the possession of the said A. B. as administrator (or executor) of the estate of C. D. the sum of..... .....dollars. That more than six months have elapsed since said order was made and that there yet remains in his hands the sum of .....dollars uncalled for by the parties entitled thereto. He further represents that he is informed that the said E. F., who he believes is entitled to said fund, has gone to parts unknown.

Wherefore he asks that the Court may order and authorize him to invest the said money in his hands in stocks or loan on mortgage as the Court may see best.

.....

Sworn to and subscribed before me and in my presence this.....day of.....

.....

§ 788. Entry authorizing investment.

(*Title.*)

This day came A. B., administrator of the estate of C. D., and filed his application in this Court, praying that the Court might authorize and direct that the funds remaining in his hands uncalled for, as stated in his

[1†] § 10845 G. C.

[2] Thornton's Estate, 7 N. P. 335; 5 Dec. 151. Statute now uses "shall" instead of "may."

said application, might be invested in stock or mortgage loans, and it appearing to the Court that the statements of said application are true, it is ordered that said executor invest said sum in (here mention how the same shall be invested), in the name of E. F., judge of this Court, for the time being and report his doings hereunder for further order of the Court.

§ 789. Return of investment.

The administrator or executor having invested the fund as the Court has directed, ought to make a report of his doings, which may be in the following form:

(*Title.*)
Now comes A. B., administrator (or executor) of the estate of C. D., and reports to the Court that he has invested the funds as directed by the former order of the Court in (here state what), and files herewith the evidences of said indebtedness. (Here state whether mortgage or bond, with such a description of it as will identify it.)

If the same has been filed in the Probate Court, the judge should make an entry of the fact, which may be in the following form:

(*Title.*)
This day came A. B., administrator (or executor) of the estate of C. D., and filed herein his report of the investment of funds remaining in his hands uncalled for; and the same appearing to the Court to be regular and correct, it is confirmed and it is further ordered that these proceedings shall be a sufficient voucher to the said administrator (or executor) for his payment of the same, and that the costs of this proceeding be taxed against said fund.[3]

§ 790. If fund cannot be invested.

The statute makes it the duty of the administrator or executor to invest the fund. If, however, for good reasons the same cannot be invested, then the Court may order the same to be turned into the county treasury, and there it is to be credited to the general fund, and the County Treasurer is to give a receipt therefor, which receipt may be filed as a voucher. If the fund is invested, the statute makes the judge of the Probate Court and his successors a trustee for the fund, and it would be the Judge's duty to look after the same and collect the interest and accumulations thereon, and possibly reinvest the same. As a general rule such funds are turned over to the county treasury.

[3] It is usual to ascertain the cost and take them out of the fund before the investment is made.

§ 791. When and how such money paid to owner. "When a person entitled to the money invested, or turned into the treasury, satisfies the court of his right to receive it, the court shall order it to be paid over and transferred to him. In case it has been turned into the treasury, the auditor shall give to him a warrant therefor, upon the certificate of the judge." [R. S. § 6192.][4]

§ 792. Application, and order to pay money to owner.

Whenever the Court is satisfied that the person has a right to receive the money, it may order it to be paid over to him. The statute does not seem to provide any guidance for the Court as to what will be sufficient evidence that the claimant is the person to whom the funds should be paid. It simply provides that the Court should be satisfied. The most difficult matter that is experienced in these cases arise from the unexplained absence of an heir or legatee. And Courts generally in such cases, I believe, have gone on the presumption that seven years of unexplained absence is sufficient evidence of the death of such heir or legatee to justify the Court in ordering it paid to the next of kin of such absent or unknown heir. Before the Court makes an order it should require an application to be filed setting forth the facts upon which the claimant rests his cause. Such application may be in the following form:

(*Title.*)[5]

Now comes G. H. and represents to the Court that on the.....day of .....an order of this Court was made directing A. B., administrator (or executor) of C. D., to invest certain funds in his hands, ordered by the Court to be distributed, the same having remained in the hands of said A. B. for the period of six months uncalled for. Thereafter said funds were invested and a report thereof was made to the Court of the same having been invested in (here state how invested), that said G. H. claims that (here state in what manner party making the application claims that he is entitled to the fund).

Wherefore said G. H. prays that the Court may make an order directing that said (here state how the money has been invested) be turned over to him as the person entitled to the same.

.....

[4] § 10846 G. C.

[5] The title to proceedings under this chapter, should always be in the name of the estate of the deceased person, so that all matters pertaining thereto will be in a connected manner.

Sworn to and subscribed before me and in my presence this.....day of.....

.....

§ 793. Entry ordering money turned over to claimant.

This day this matter came on to be heard upon the application of G. H. for an order of the Court directing that certain funds invested by A. B., as administrator of C. D., be turned over to him as the person entitled thereto, and the same was heard by the Court.

Whereupon the Court finds from the evidence produced that the said G. H. is entitled to said money so invested (here describe same), and that the Court is satisfied that he is the person entitled to the same, and orders that the same be transferred to him as provided by law.

If the money has been invested in the county treasury, conclude the above entry with the following:

And that a copy of this journal entry be given to the auditor, and that the auditor issue a warrant therefor directing the county treasurer to pay the same, and the costs of this proceeding be paid by said G. H.

§ 794. Judge responsible for safe keeping of certificates, etc. "The judge with whom such certificates or evidences of title are deposited, for the time being, and each succeeding judge to whom they come, and his sureties, shall be responsible for their safe-keeping and application, as provided in the next four preceding sections." [R. S. § 6193.][6]

§ 795. Account of final distribution. "When an executor or administrator has paid over or delivered the money or other property in his hands to the persons entitled thereto as required by the order of distribution, or otherwise, he shall perpetuate the evidence thereof by presenting to the court, within six months after such order was made, an account of such payments or the delivery over of such property; which, being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as his final discharge, and ordered to be recorded. Such discharge shall forever exonerate the party and his sureties from liability under such order, unless his account be impeached for fraud or manifest error." [R. S. § 6190; 102 v. 205.][6*]

§ 796. Objects of the above provision.

The purpose of the above sections is to enable the administrator or executor to place upon record evidences of the completion

[6] § 10847 G. C.

[6*] § 10842 G. C.

See Opening up account, §§ 745, 746.

of his trust; and to have the same acted upon by the Court and be relieved from all further liability, unless he has in some manner been guilty of fraud or manifest error. In order to impeach the finding for fraud or error, the action must be commenced within four years from the discovery of the same.[7]

It has also been held that a debt of a distributee to the decedent, which was barred by the statute of limitation in the lifetime of the decedent, cannot be set off against or retained out of the distributive share of such distributee.[8]

Under the provisions of the above section, as it formerly existed, it was within the option of the administrator or executor, whether or not he should file such account of distribution.[9]

Formerly the words which now read that "he shall perpetuate the evidence," etc., were "he may perpetuate the evidence," etc. It is evident that the legislature by this change intended to make it mandatory upon the executor or administrator to file such account of distribution within six months from the time the general order of distribution is made, and I have no doubt but what the Court may enforce an account of distribution in the same manner that other accounts are forced to be filed. If an account of distribution were filed and all the distributees were not paid, such as were not paid would not be affected by the filing of such account of distribution.[10]

§ 797. Form of account of final distribution.

.....of the Estate of....., ..., deceased.
In account with said estate, said.....charges h.....self as follows:

Amount found due estate as per final settlement with said Court, made.....190.....	$.....
Paid Attorney fees preparing this account.....	$.....
Paid Probate Judge's fees on this account.....	$.....
Balance for distribution.....	$.....
Said.....credits h.....self as follows:	
Amounts paid to heirs and legatees, as per distributive order of said Court made....., 190.., viz:	
To.....	$.....

[7] § 11224 G. C.

[8] Harrod vs. Carder, 3 C. C. 479; 2 C. D. 274.

See § 760 where this matter is discussed and it is said that the doctrine of this case is contrary to the law as given in Woerner on Admin.

[9] Negley vs. Girard, 20 O. 310.

[10] Negley vs. Guard, 20 O. 310. Where a receipt is given by a distributee upon distribution, and the account of the administrator is properly published and confirmed by the Probate Court, the evidence thus perpetuated is complete and binding upon the parties so far as the giving of the receipt is concerned, but is not conclusive as to whether the distributee actually received the money, or the distribution was made according to law.

The State of Ohio,.....County, ss.

.....of the estate of....., deceased, being sworn, says that the foregoing account presents a true and complete statement of the final distribution of the assets of said estate, as required by the order of this Court, as...he verily believes; and said .....asks that the same be allowed as h....final discharge, and ordered by the Court to be recorded.

.....

Sworn to before me and signed in my presence this.....day of..... .....190..

.....

Probate Judge.

.....

Deputy Clerk.

§ 798. Entry and order of discharge.

The statute does not require that an account of distribution should be advertised as other accounts, and it is the general practice not to advertise them. However, it seems that it would not be a bad practice to have them advertised like other accounts and set down for hearing, although the finding would be just as valid in the absence of such notice as with it, for the proceeding is strictly *in rem*, and the Court has full jurisdiction of the subject matter.

We have seen in a former discussion as to the manner of the termination of an administrator's or executor's trust,[11] that if the estate had not been fully administered upon, the administrator or executor could, even after an order had been made on an account, collect the unadministered estate. The question might arise whether the same rule would be applied to an order made on an account of distribution.

In the case of Weyer vs. Watts,[12] in which the doctrine was announced that an order made on a general account did not relieve the administrator or executor from collecting unadministered assets, it is said that "it is not intended that the proceeding in the Probate Court was under or in conformity with sec. 10842 (§ 795) of the General Code, which provides for perpetuating the evidences of distribution. The account filed by the plaintiff was not of that description." The inference to be gathered from this language, as well as the purpose of the statute, leads to the opinion that the entry made on an account

But the filing of this account does not have the effect of discharging the administrator of his trust where there are assets still to be administered. *In re* Estate of Koehnken (1903), 1 C. C. (N.S.) 126; 15 Cir. D. 245; 27 O. C. C. 840.

[11] See § 231, Termination of trust.

[12] 48 O. S. 545.

An account of distribution is final unless impeached for fraud. Henry vs. Doyle, 82 O. S. 113.

The verity of an account of distribution can not be opened up in

of distribution when such account purports to be a complete administration of the estate acts as a *discharge* of the administrator or executor from further acting in his official capacity; and thereafter an administrator *de bonis non* would be required to be appointed to administer upon unadministered assets. The better way, in order to avoid a question of this kind, is to provide in the entry that the administrator or executor is discharged.

Upon the filing of such account of distribution, the following may be used as a general form of entry:

(*Title.*)
This day came A. B., the executor (or administrator) of the estate of C. D., and presented to the Court his account of final distribution in said estate, duly verified; and the same was examined by the Court. Whereupon it is ordered that the same be allowed as a final discharge of such executor, and be placed on the files of this Court and also recorded in the records of accounts, and the said A. B. is hereby discharged as executor (or administrator) of said trust.

§ 798a. Probate Court to order receipt for payment of incumbrances recorded, etc. "When any lands or real estate are left incumbered by the provisions or conditions of a deed, will, or other instrument of record, with the payment of money, or the performance of any act or acts, by the grantee or devisee, such grantee or devisee or their heirs or assigns, upon the payment of the money or the performance of the act or acts, may present the receipt of the payment of the money, or the proof of the performance of the act or acts, to the probate court of the county in which the lands or real estate is situated, who must enter such payments and the proof of the performance of such act or acts, on its journal, record the receipts and the proof of the performance of the act or acts, on the margin of the will record wherein such incumbrances are created, and order that this be done in like manner on the margin of the deed record in the recorder's office by the county recorder, which, when done, will relieve such lands and real estate from the incumbrances except for fraud." [95 v. 571, § 1.][12*]

"No such record of receipts or orders can be made by the probate judge nor shall he enter proof of the performance of such act or acts as hereinbefore required until notice thereof has been given as is required by law for the settlement of administrators' and executors' final accounts." [95 v. 571, § 1.][12†]

the Probate Court, when. *In re* Koehnken, 1 C. C. 126.

In order to protect the administrator an account must be filed and the court make an order thereon. Fewlass vs. Keesham, 88 Fed. 573.

A debt which was barred by the statute of limitations during the lifetime of the ancestor can not be deducted from the interest of the heir. Harrod vs. Caseler, 3 C. C. 479; 2 C. D. 274.

12* § 8544 G. C.

12† § 8545 G. C.

§ 798b. Application to have receipt recorded, etc.

The above act is of recent date, and in order to properly bring the matter before the Probate Court, an application setting forth the facts ought to be filed. This application might be in the following form:

In the matter of Application of A. B. to record receipt. } Probate Court, Clark County, Ohio. APPLICATION.

The undersigned respectfully represents that by item.....of the last will and testament of C. D., deceased, it was provided (here insert the provision of the will, etc.). Said A. B. further represents that he has performed the conditions of said will, a receipt acknowledging the same is herewith attached and marked "Exhibit A."

Wherefore he prays that such proceedings may be had as authorized by law, and that said receipt be recorded on the margin of said will in the record of wills in said office.[12*]

.....

Sworn to and subscribed before me and in my presence this.....day of.....

§ 798c. Entry. Notice.

Upon the filing of such an application, an entry should be placed upon the journal, ordering that the same should be set down for hearing on a certain date, and that notice thereof be given in some newspaper of general circulation for once a week for at least three consecutive weeks, the law requiring the same to be advertised the same way as accounts of administrators.[13]

This notice should briefly state the fact that an application had been made in the Probate Court by ..... for an order of the Court to place upon the margin of the will of ....., a receipt showing the performance of a certain condition in item ..... of said will. The entry therefore might be as follows:

(*Title.*)

This day came A. B. and filed herein his application to have a receipt evidencing the performance of a condition in item.....of the will of ....., deceased, ordered by the Court to be placed upon

[12*] If the condition to be performed is one in a deed instead of a will, the application should be accordingly changed.

[13] § 11201 G. C., § 729.

the margin of said will in the records thereof; and it is ordered that the same be set for hearing on the.....day of....., 190.., and publication thereof be given as required by law.

§ 798d. Hearing and order.

At the time the same is set for hearing, the Court should ascertain whether publication has been made as required by the former order of the Court, and if no contention arises as to the validity of the receipt, it should order that the same be placed upon the margin of the will record. If no receipt is given, then the Court should hear the testimony of witnesses as to the performance of the condition and order its findings placed upon the margin of the will record or deed record as the case might be. The entry, therefore, might be as follows:

(*Title.*)

This day this matter came on further to be heard upon the application of A. B. to have a receipt evidencing the performance of certain conditions of the will of....., deceased, placed upon the margin of the will in the records thereof; and the same was submitted to the Court upon the exhibits and testimony, wherefore the Court finds that notice of the time and hearing of said application has been given as the law requires, and it further appearing to the Court that the receipt marked "Exhibit A" attached to the application is genuine, it is ordered that the same be recorded on the margin of the record of the will of....., deceased, in the records of this office, and it is further ordered that the costs of this proceeding, taxed at.....dollars, be paid by ...., and that the entire proceedings be recorded in the record of accounts.

CHAPTER XLV.

REAL ESTATE. SALE WITHOUT ORDER OF THE COURT.

§ 799 Possession of, etc.
§ 800 Land liable for debts.
§ 801 The right to mortgage and lease, etc.
§ 802 When sale is authorized by will no order of sale is required.
§ 803 Sufficient authority.
§ 804 Title. Devise to sell.
§ 805 Construction of power.
§ 806 Who can execute.
§ 807 Expiration of power.
§ 808 Control of Court over the execution of the power of sale.
§ 809 Form of deed of executor or administrator with the will annexed.
§ 810 Sale and distribution.

§ 799. Possession of, etc.

We have heretofore discussed the power of an administrator or executor to collect rents, etc., arising from the lands of the deceased.[1] Generally it may be said that an executor or administrator has no power over a decedent's real estate except that which may be given to him by statute or by will; and in the absence of such authority he cannot take or pay out money for it, as such executor or administrator,[2] when no authority exists in the will an executor must get an order of Court.

Neither can an executor or administrator prevent the heirs and devisees of the decedent from exercising their right to the title and possession of their ancestor's real estate.[3] Such heirs may have partition of such real estate and the title will vest in them until it passes to the purchaser at a sale by the administrator or executor for the payment of the debts of such ancestors.[4]

1 See § 364, § 373.

2 When no authority exists in the will an executor must get an order of Court. Goforth vs. Longworth, 4 O. 129; Ludlow's Heirs vs. Park, 4 O. 5; Newcomb vs. Smith, 5 O. 447; Ludlow's Heirs vs. Wade, 5 O. 494; 18 Cyc. 746; 17 Cyc. 504.

Where the sole devisee of land is appointed executor and sells land in his individual capacity, the proceeds come into his hands as executor, and if the personal property is insufficient to pay the debts he must apply the proceeds. Railway vs. White, 85 O. S. 410.

In this case the real estate was sold under a defective petition.

3 Reed vs. Brown, 10 C. C. 44; 6 C. D. 15.

See subsequent section, Construction of devise to sell.

4 But no partition shall be ordered by the Court within one year from the death of the decedent, unless the petition shall set forth and it be

The title to the real estate of the ancestor intestate, vests at the instant of his death in his heirs, and they take and retain such title with all the rights and incidents belonging thereto, until the administrator of the ancestor effectively asserts his right thereto for the purposes provided in the statute.[5] And until it becomes necessary to sell an intestate's land to pay debts, his administrator's rights therein is a mere naked power resting only upon the contingency that the personal property will be insufficient to pay such debts. Until the happpening of that contingency the possession belongs to the heirs; and if there should be no debts, or sufficient personal property to pay them, the administrator has no right to the possession of the real estate.

This same rule would apply to an executor where the power granted him in the will, was a mere naked power to sell for the purpose of paying debts and making distribution. But if the power has a trust connected with it, such for instance, as that the executor may make sale of the lands when in his opinion a sale can be made to good advantage, and the proceeds is devised to children as they become of age, he then is entitled to the possession of lands.[6] Even when a will directs land to be sold and the proceeds divided, the parties may defeat the sale by electing to take the land.[7]

§ 800. Land liable for debts.

At common law the title to real estate vested absolutely in the heirs upon the death of the ancestor, and it was not subject to be made assets for the payment of debts. This common law doctrine, however, has been overthrown by statute, and now

proved that all the debts and claims against the estate of such decedent have been paid or secured to be paid. Or that the personal property of said decedent is sufficient to pay the same. § 11943 G. C. See § 1879 *et seq.*

[5] Shaw vs. Hoadley, 8 Blkf. 165; Beckett vs. Selover, 7 Cal. 215; Streeter vs. Paton, 7 Mich. 341; Jones vs. Billstein, 28 Wis. 221; Overturf vs. Dugan, 29 O. S. 230.

[6] Dabney vs. Manning, 3 O. 321; Roberts vs. Roberts, 1 Diz. 197; Williams vs. Beach, 17 O. 171.

[7] Holt vs. Lamb, 17 O. S. 374; 9 Cyc. 857.

Where road material is taken an executor or guardian may receive the money. § 7178 G. C.

the right of a creditor to have the land subjected to the payment of his claim is always regarded as superior to the right of an heir; and although the heir may have sold and conveyed the land, the conveyance made by the administrator under the order of the Court is not in any wise affected or impaired by the previous incumbrances or conveyance by the heir.[8]

The wasting of the personal assets of the decedent by his executor or administrator does not relieve the real estate from liability for the debts.[9] If, however, such wasting is a wrongful one by the administrator, he would be liable on his bond.[10] But if the assets are wasted or destroyed without fault of the executor or administrator; or by reason of a decrease in the value of such assets, or the insolvency of the administrator or executor and their sureties, the loss falls on the estate.[11]

A purchaser from the heir acquires precisely the same right and interest which the heir has from whom he takes a conveyance, and nothing more. He is, therefore, bound to know that, until the estate is finally settled, the sale of the real estate may become necessary for the payment of debts.[12] The heir and purchaser alike, however, have the right to insist that the personal property shall be first applied to the payment of debts, unless the testator by a testamentary provision has otherwise provided.

[8] Sidener vs. Hawse, 37 O. S. 532; See § 55.

[9] Conger vs. Cook, 56 Ia. 117; Smith vs. Brown, 99 N. C. 377; Van Bibber vs. Julian, 81 Mo. 618.

[10] *In re* Merritt, 62 Mo. 150; Foley vs. McDonald, 46 Miss. 238; Carlton vs. Byers, 70 N. C. 691.

[11] Faran vs. Robinson, 17 O. S. 242; Evans vs. Fisher, 40 Miss. 643; Lilly vs. Wooley, 94 N. C. 412; May vs. Parham, 68 Ala. 253.

[12] Piatt vs. St. Clair, 6 O. 227; McDonald vs. Alten, 1 O. S. 293; Weakley vs. Conradt, 56 Ind. 430; Baker vs. Griffitt, 83 Ind. 411; Fiscus vs. Moore, 121 Ind. 547.

Where several tracts of land have descended to the heirs, and some have been sold and conveyed by them, and some have not, a court of chancery will so far control a creditor of the ancestor in asserting his lien in chancery as to require him to resort first to land remaining unsold, and if that be not sufficient to liquidate the debt, resort must be had to the sold lands, in regular order, beginning with that last sold. Pratt vs. St. Clair, 6 O. 227.

Creditors must first exhaust their remedy against the personal representative, before they can have recourse to lands in the hands of purchasers from the heirs. Stiver vs. Stiver, 8 O. 217.

§ 801. The right to mortgage and lease, etc.

As the power of an executor or administrator over the lands of a deceased person exist entirely by virtue of the power of some provision in the will or statutory enactment in the absence of such power, it therefore follows that unless the statute provides for mortgaging and leasing lands, or the testator has so provided, the executor or administrator can neither mortgage nor lease lands of a deceased. There is no such power conferred by the statute in our State. There may be some instances when such power might be advantageously used by an administrator. The prevailing idea of our statute, however, is to have a speedy settlement of an estate. If the conditions were such that the lands should be leased, a receiver might be appointed by the Court for that purpose.[13]

The weight of authority, apparently, is that power to sell and convey does not carry with it the power to mortgage.[14] A power to sell and convey real estate to pay testator's debts can not be exercised by a conveyance to one of the heirs who is to mortgage it to secure money for the executors and then reconvey it to the executor subject to the mortgage.[15] A power to distribute after a life estate "by cash sale or division" does not give a power to confirm a lease made by the life tenant.[16] A power of sale cannot be exercised by an exchange.[17] The power to sell real estate conferred by will upon executors for the purpose of paying debts of the testator, and dividing his estate, does not authorize the executors to make a perpetual lease of the premises with privilege of purchase.[18]

§ 802. When sale is authorized by will no order of sale is required. "If an executor or administrator, duly qualified,

The debts of a decedent are a lien upon his real estate, and purchasers from his heirs take the same with this burden upon it, and subject to the maxim *caveat emptor*. Faran vs. Robison, 17 O. S. 243.

[13] See § 372.

[14] Hoyt vs. Jaques, 129 Mass. 286; Arlington State Bank vs. Paulsen, 57 Neb. 717.

[15] Arlington State Bank vs. Paulsen, 57 Neb. 717; S. C. 80 N. W. 263.

[16] Johnson vs. Grantham, 104 Ga. 558.

[17] Taylor vs. Galloway, 1 O. 232.

[18] Breuer vs. Hayes, 21 B. 29. See Prather vs. Foote, 1 Diz. 434.

is authorized by will or devise, to sell real estate, no order is required from the court to enable him to act in pursuance of the power vested in him by such will." [R. S. § 6167.][19]

§ 803. Sufficient authority.

The first question that arises under the above provisions of our statute is, what words in a will are sufficient to authorize an executor or administrator to sell real estate. A power is defined to be "an authority whereby the person is enabled to dispose of an interest in real estate vested in himself or another."[20] A power of sale may be conferred by will without the employment of any technical words. Any expression of testator's intention to confer upon the designated persons the power to dispose of testator's property by deed of conveyance will be sufficient.[21]

A power of sale is often implied with directions to executors or trustees to divide property, where from the nature of the property or the context of the will it is evident that a division in specie is either impossible or is not contemplated by testator.[22] An implied power of sale does not extend any further than the necessity from which the power arises.[23] A power of sale of realty may also be implied from a direction that some part of testator's property, it not appearing clearly what, was to be sold and paid upon testator's debts, where the debts exceeded the amount of the personal property.[24] And where the devisees may take personalty but can not take realty, as where they are non-resident aliens, it was held that a general power of sale in the executor imposes on him a duty to convert realty into money and distribute.[25]

[19] § 10812 G. C. See Woerner on Admin., § 1023, § 716.

[20] Page on Wills, 821.

[21] Page on Wills, 821, with collection of cases conferring power to sell.

It seems that if an executor is sole legatee and he makes sale in a defective proceeding, the sale will be considered valid and he will be required to account for the proceeds to a creditor. Hocking Valley Ry. vs. White, 87 O. S. 413.

If the will confers power on an executor and such power is personal, it can not be exercised by an administrator with the will annexed. If the power is annexed to the position and part of the trust, it may be. Westwater vs. Guidner, 18 N. P. 209.

[22] Stoff vs. McGinn, 178 Ill. 46; Mulligan vs. Lambe, 178 Ill. 130; Iasigi vs. Iasigi, 161 Mass. 75; Thompkins vs. Miller, — N. J. Eq. —; 27 Atl. 484; Story vs. Palmer, 46 N. J. Eq. 1; Wilson vs. Wilson, 46 N. J. Eq. 321; Parker vs. Seeley, 56 N. J. Eq. 110; Mimms vs. Delk, 42 S. C. 195.

[23] Smith vs. Hall, 20 R. I. 170.

[24] Schroeder vs. Wilcox, 39 Neb. 136; 57 N. W. 1031.

Such power becomes legally inoperative when estate is settled. Ward vs. Barrows, 2 O. S. 241. See Hunter vs. Yocum, 18 N. P. 14; 27 Dec. 31.

When will be set aside. Pollock vs. Pine, 1 C. D. 529; 2 O. C. C. 359.

[25] Greenwood vs. Greenwood, 178 Ill. 387; citing Hunt's Appeal, 105

A power of sale was implied from a devise of the use of certain realty "until the sale and conveyance of said premises by my executor as hereinafter provided," there being no subsequent provision.[26] Power in an executor to convert land into money is a power to sell.[27] A devise in trust "to invest, manage and control" as deemed best to combine safety with productiveness, gives power to sell real estate at discretion.[28]

Investing an executor with "full, ample and complete power to dispose in such manner as he thinks proper," gives him power both to convey and to sell.[29] The direction in a will that property be sold and the proceeds divided and the mere nomination of one as executor, has been held does not give such executor authority to sell.[30] Where a will provided that an executrix should hold in trust certain property and collect rents for a term of five years, and after the expiration of five years the property was to be sold and divided, there was an implied power for the executrix to sell real estate.[31] A power to sell does not authorize an exchange.[31a]

§ 804. Title. Devise to sell.

A mere direction to an executor to sell lands for the purpose of paying legacies, or making distribution, does not vest any title to the land in the executor.[32] To cut off the heir at law

Pa. St. 128; Penfield vs. Tower, 1 N. D. 216; Cook vs. Cook, 20 N. J. Eq. 375; Frazer vs. United Presbyterian Church, 124 N. Y. 479; Lent vs. Howard, 89 N. Y. 169; *In re* Gantert, 136 N. Y. 106.

[26] Cahil vs. Russell, 140 N. Y. 402.

[27] Dean vs. Lowenstein, 6 C. C. 587; 3 C. D. 597; Schaupp vs. Jones, 12 Dec. 197.

[28] Sargent vs. Sibley, 11 B. 177.

[29] Steele vs. Worthington, 2 O. 182.

[30] Weymouth vs. Irwin, 5 N. P. 248; 7 Dec. 291.

As a general proposition, the above may be a doubtful authority, but see case as to its application.

[31] Lawton vs. Lawton, 5 N. P. 441; 7 Dec. 493.

[31a] Fleishman vs. Shumaker, 2 C. C. 152; 1 C. D. 415; Taylor vs. Galloway, 1 O. 232.

Where two are named executors and one declines to serve, the other may sell. *Id.*

[32] See § 1192, on Interest devised.

If the only disposition of real estate is directing the executors to sell it and pay the proceeds to a trustee for others, the legal title descends to the heirs subject to the power, but the right of possession is in the executors to enable them to carry out the will. Elstner vs. Fife, 32 O. S. 358.

No title is vested in executors by a naked power to sell and convey to pay debts if necessary, but the title is in the heirs-at-law until the power is executed. Mimmons vs. Westfall, 33 O. S. 213, 223.

Where the will gave the widow power to sell, if necessary to maintain herself and children, and she exercised the power, reciting in the deed that it was necessary to sell the same to provide maintenance for herself and children, the burden is upon attacking parties to show that it was not necessary. Haun vs. Block, 9 C. C. (N.S.) 328; 29 O. C. C. 460.

See Hiatt vs. Simpson, 5 N. P.

the title must be devised, expressly or by implication, to some other person. Where there is merely a naked power to sell the estate and distribute the proceeds, it is not necessary that the executor should have the title to the estate to enable him fully to carry into effect the intentions of the testator. In that case the legal title to the estate will be divested the moment the executor executes his trust, but in the meantime, and until a sale is made, the heir is entitled to the profits.[33]

The doctrine is thus stated in an old work: "A devise of land to executors to sell passes the interest in it, but a devise that executors shall sell the land, or that lands shall be sold by the executors, gives them but a power, and it seems that even a devise of land by a testator to be sold by his executors, without words giving the estate to them, will invest them with a power only, and not give them an interest." [34]

Where the power given to the executor is not merely to sell but vests a discretion in the executor in the nature of a trust, the executor is entitled to possession. [35]

(N.S.) 513; 18 Dec. 390, for construction of will where life tenancy was given without disposing of the remainder.

[33] H. devised his farm to his wife for the period of 12 years; at the end of 12 years he directed: "All my real estate shall be sold by my executor, hereafter named, at public sale, and the proceeds divided in three equal shares, as follows: To my son G. H., one share; to my daughter C., one share; to the children of my daughter E. A. S., one share. *Held*, that the fee to the real estate vested in the legatees at the death of the testator subject to be divested, upon the exercise of the power of sale resting in the executor. Barkman vs. Hain, 5 N. P. 508; 5 Dec. 474.

[34] Sugden on Powers, 129.

In the absence of a will a decedent's land is not distributed, but descends to his heirs; nor, where there is a will, are such lands distributed in the statutory and ordinary sense of the term distribution, but such distribution is made according to the terms of the will. Where a will gives to the executor a mere naked power to sell the real estate, neither the title nor the right to the possession of such real estate passes to such executor, nor is he liable for the rent thereof. Dunn vs. Renick, 40 W. Va. 349.

Where the testator vests in his widow a life estate in his lands, with the provision that within a reasonable time after the death of the widow certain land shall be sold the executors named in the will and the proceeds divided equally among his five children, or if any child should decease before distribution the share of such child or children should go to his or their heirs, so that the proceeds of said lot may vest in my children and their heirs forever, the power given to the executors vests the fee in them. Knisely vs. Young, 33 O. C. C. 439.

[35] A bequest to a wife of all property, real, leasehold and personal, is qualified by a clause directing the executors to lease certain premises and pay ground rents and taxes and the balance to the wife, and shows that her interest is only in the proceeds thereof and that the title is in the executors. Boyd vs. Talbert, 12 O. 212. See also Lessees vs. Veach, 17 O. 171; Dabney vs. Manning, 3 O. 321.

On devise to the wife for life, the executors to divide the remainder among children, the fee is in the executors and does not vest in the

§ 805. Construction of power.

The power to sell must be strictly pursued and must be executed according to the manifest intent of the testator,[36] and the power simply to sell does not include or imply a power to dispose of the same by exchange or barter.[37] Likewise the power to sell must be a sale for cash, yet if land be taken in payment and received by the estate, authority might be presumed.[38] Neither will a power to sell be held to include a power to mortgage.[39]

A power of sale for a specific purpose, such as for the payment of testator's debts and for the support of the donee of the power, does not confer a general power of sale for all purposes.[40] Therefore, a power of sale to pay debts of testator can not be exercised if the personal property undisposed of is sufficient to pay the debts.[41] And such a power of sale can not be exercised where the debts of testator are barred by the Statute of Limitations.[42]

A power to sell, to provide for the support of testator's widow in her lifetime, and for her burial, with a provision that the trustees shall divide the residue of the proceeds, does not authorize a sale for the mere purpose of dividing the property.[43]

Where an express power of sale is given, but the purpose for which it is to be used is not specified, it is held to be a power of sale in order to pay the proceeds to the devisees in lieu of the devise.[44] And, therefore, such a power of sale is not repugnant to the devise of the property in fee.[45] Where the exec-

children. Sinton vs. Boyd, 19 O. S. 30-35; Roberts vs. Roberts, 1 Dis. 117; Williams vs. Mead, 4 Gaz. 293; 2 Dis. 604. See § 1190.

[36] Taylor vs. Galloway, 1 O. 233. A testamentary provision that "whenever it may be necessary for the welfare of my wife * * * my said executor shall have power and authority to give a good and valid deed or other evidence of title," does not authorize the widow to consume the estate. And if authority to consume exists, it is an authority that must be exercised during the lifetime of the widow. McCoy vs. McCarthy, 23 Dec. 176.

[37] Cleveland vs. State Bank, 16 O. S. 236.

§ 801.

[38] Webster vs. Harris, 16 O. 490.

[39] Breuer vs. Hayes, 21 B. 29; 22 B. 144; Fleischman vs. Shoemaker, 2 C. C. 152; 1 C. D. 415.

[40] Griffin vs. Griffin, 141 Ill. 373.

[41] Sweeney vs. Warren, 127 N. Y. 426; 24 Am. St. Rep. 468; Seeds vs. Burke, 181 Pa. St. 281.

[42] Hemphill vs. Pry, 183 Pa. St. 593.

[43] Hammond vs. Conkright, 47 N. J. Eq. 447.

[44] Ness vs. Davidson, 45 Minn. 424.

[45] Sneer vs. Stutz, 93 Ia. 62; distinguishing Halliday vs. Stricker, 78 Ia. 388; Mellen vs. Mellen, 139 N. Y. 210.

utor is given power to sell to pay debts, the purchaser need not inquire as to debts unless the time between the death and sale is so long that it may be presumed that the debts are paid. Seven years will not raise presumption.[46]

§ 806. Who can execute.

If only one of those named as executors accept and qualifies he may execute the power to sell, though such power is not coupled with an interest.[47] But if all are living and acting, all must join in the exercise of the power.[48] An executor directed to sell real estate and pay the proceeds to a trustee cannot exercise such power after he has ceased to act in that capacity.[49] In such cases the administrator with the will annexed would have power to complete the sale.[50]

Before the enactment of sec. 5980, R. S., sec. 10590, G. C., (§ 107), it was held that the power given to an executor named in a will to sell lands without any trust being attached, could not be exercised by an administrator with the will annexed.[51]

Where a power of sale is clearly given, but the will does not provide who is to exercise it, the omission may be supplied by construction. Thus if the context of the will shows that the

A testator, whose estate consisted of a single tract of land, occupied as a homestead, and some personal property, devised and bequeathed to his wife one-half of all his real and personal estate, and the other half to this brothers and sisters, and the children of a deceased sister naming each, and specifying the proportion or share of each. He appointed an executor, and authorized and empowered him to sell and convey "all said real estate to the purchaser or purchasers thereof, if necessary for the purpose of distributing" it "among the devisees and legatees aforesaid." It was held, that this was a devise in fee, to each of the devisees by name, on an undivided estate in land, in the proportions specified, and not a bequest of the proceeds of said land. That the power of sale vested in the executor was a naked power only, not a power coupled with an interest in the land, and could only be exercised, if necessary, for the purpose of making distribution among the devisees. Hoyt vs. Day, 32 O. S. 101.

[46] Smith vs. McIntire, 13 Fed., Dec. 14.

[47] Taylor vs. Galloway, 1 O. 232.

[48] Fleischman vs. Shoemaker, 2 C. C. 152; 1 C. D. 415. See § 203.

[49] Elstner vs. Fife, 32 O. S. 358.

[50] § 5980 R. S., § 107.

[51] Wills vs. Cowper, 2 O. 124.

executors are to receive and expend the proceeds of the sale, it is held that the power of sale is given to them.[52]

A power of sale given to the executor is substantially complied with by a sale by the devisee of the property subject to such power of sale, when the proceeds of the sale are given to the executor and are applied by him to the purposes set forth in the will.[53]

The question as to the right of the successors of executors, or trustees to exercise the power, turns entirely upon the intention of the testator as manifested in the will. If he absolutely gives a power of sale, and leaves the executors or trustees only the ministerial duty of carrying this mandatory power into execution, it is generally held that the successors may exercise this power without any suit for that purpose, or without the authority of the Court.[54]

But if the power of sale conferred is not absolutely and unconditionally, but is entirely discretionary with the person to whom it is given, his successors in office can not exercise it.[55]

§ 807. Expiration of power.

The power given to executors by will to sell and convey land, becomes legally inoperative and ceases to exist, when the estate is settled, or all claims against it are presumptively satisfied[55a]

[52] Rathbone vs. Hamilton, 4 App. D. C. 475; Van Brocklin's Estate, 74 Ia. 412; Mandlebaum vs. McDonell, 29 Mich. 78; Ogle vs. Reynolds, 75 Md. 145; Porterfield vs. Porterfield, 85 Md. 663; Belcher vs. Belcher, 38 N. J. Eq. 126; Vaughan vs. Farmer, 90 N. Car. 607; Collier vs. Grimesey, 36 O. S. 17; Wood vs. Hammond, 16 R. I. 98.

[53] Dean vs. Loewenstein, 6 C. C. 587; 3 C. D. 597.

[54] Meddis vs. Bull (Ky.), 18 S. W. 6; Bay vs. Posner, 78 Md. 42; 26 Atl. 1084; Venable vs. Mercantile Trust Co., 74 Md. 187; Schroeder vs. Wilcox, 39 Neb. 136; 5 N. W. 1031; Potts vs. Breneman, 182 Pa. St. 295; O'Rourke vs. Sherwin, 156 Pa. St. 285; Boutelle vs. Bank, 17 R. I. 781; *In re* Blakely, 19 R. I. 324; Smith vs. Hall, 20 R. I. 170; Bredenburg vs. Bardin, 36 S. Car. 197.

[55] Chambers vs. Tulane, 9 N. J. Eq. 146; Farrar vs. McCue, 89 N. Y. 139; Page on Wills, 830.

See § 10590 G. C.

Railroads vs. Hutchins, 37 O. S. 282; Sargent vs. Sibley, 11 Bull. 177; Allen vs. Globe Ins. Co., 19 Bull. 198.

[55a] See Clark vs. Neil, 27 Dec. 328, for interesting discussion holding that the trust continues and the executor had power to sell without order of court.

by lapse of time. and no object of the testator remains to be attained.[56]

A power given for a specific purpose exists until the accomplishment of such purpose.[57] In a devise to executors to sell realty and to divide the proceeds in four shares, one of which was to be held during the life of the beneficiary, the power of sale existed after division of the realty into four shares.

A power of sale to be exercised under specific contingencies can not be exercised unless those contingencies exist.[58] Thus a power to sell under direction of the Probate Judge could not be exercised by a sale without such direction.[59] And where power of sale of certain described property under specific contingencies is given, it is not enlarged by a subsequent general power of sale of testator's property.[60] When the contingencies have been complied with, however, the power of sale may be exercised.[61]

[56] Ward vs. Barrows, 2 O. S. 242.

[57] Johns Hopkins University vs. Middleton, 76 Md. 186. (A devise in trust for testator's children to terminate when each should reach the age of thirty, with power of sale to make a division of the property between the children, was held to confer a power which lasted after the first child reached the age of thirty.) Hallum vs. Silliman, 78 Tex. 347.

(A direction that, upon the arrival of the eldest son at majority, the balance of the property left after the exercise of a power of sale, the proceeds to be devoted to the support and education of the children, should be divided, was held to create a power of sale for the education of the minor children which did not terminate with the arrival of the eldest son at majority.)

[58] Petit vs. Flint, etc., Ry. Co., 114 Mich. 362. (A power to sell land after it was platted does not authorize the exercise of sale before it is platted.) Mersman vs. Mersman, 136 Mo. 244. (A power to sell a homestead when none of testator's unmarried children desire to reside there, does not authorize a sale to reinvest the proceeds in another dwelling to be used as a homestead by such children.)

[59] Bates vs. Leonard, 99 Mich. 296; 58 N. W. 311.

[60] Petit vs. Flint, etc., Ry. Co., 114 Mich. 362. (A power to sell certain real estate when surveyed and platted can not be exercised before survey.)

So Rice vs. Tavernier, 8 Minn. 248; Mersman vs. Mersman, 136 Mo. 244.

[61] Harp vs. Wallin, 93 Ga. 811. (A power to sell lands in case devisee saw fit to send testator's widow to an insane asylum may be exercised validly, and will pass good title if in good faith when the devisee decides to send testator's

A power of sale in a certain time is not destroyed by failure to exercise it within the time limited.[62] Where a power of sale is given solely as a means of accomplishing some purpose which the law will not permit, the power itself is invalid.[63] However, an absolute power of sale, given without any reference to its purpose is not avoided by the fact that the disposition of its proceeds may be in part invalid.[64] The attachment of the share of the devisee does not defeat the right of the executor to sell.[65] Neither does the sale of a share by a devisee defeat the right of the executor to sell.[66]

§ 808. Control of court over the execution of the power of sale.

It is a very common method for testators to provide that executors may sell the real estate upon such terms and at such time and in such a manner as they may deem best. Questions sometimes arise as to what control the Court has over the execution of such a power. It is said that where a power is given to trustees to do or not to do a particular thing, at their discretion, the Court has no jurisdiction to lay a command or prohibition upon the trustees as to the exercise of that power, provided their conduct be *bona fide* and their determination is not influenced by improper motives.[67]

But where the power is accompanied with a *duty*, the Court will compel the execution of it.[68] And it has been held where a sale is directed, but the time and manner of the same is reposed in the discretion of executors, such executors must

widow to an asylum and gets an order adjudging her insane, even though she may not actually be sent.)

[62] Fahnestock vs. Fahnestock, 152 Pa. St. 56; Marsh vs. Love, 42 N. J. Eq 112, Hale vs. Hale, 137 Mass. 168.

[63] *In re* Piercy (1898), 1 Ch. 565; 67 L. J. Ch. N. S. 297; 78 Law T. Rep. 277; Dana vs. Murray, 122 N. Y. 604; Petit vs. Flint, etc., Ry. Co., 114 Mich. 362. (In the above cases the power of sale was void as given in order to carry out a scheme which involved an invalid restraint of alienation. Huidekoper vs. Perry, 14 C. C. 68; 7 C. P. 326.

[64] Pearson's Estate, 98 Cal. 602; Page on Wills, 826.

[65] Smyth vs. Anderson,, 31 O. S. 144.

[66] Hoyt vs. Day, 32 O. S. 101.

[67] Lewin on Trusts, Page 773.

[68] Pomeroy's Equity, § 835.

exercise such discretion with fidelity to the interest of the beneficiaries and in a reasonable and prudent manner.[69]

There is no doubt but that a Probate Court has jurisdiction to entertain a complaint by a party interested, but when it should be exercised, is another question.[70] Creditors undoubtedly have a right to have real estate sold in a reasonably short time where the personal property will not pay their debts, and no doubt the Court would at all times apply the rule made by statute for administrators, that as soon as it is ascertained that the personalty is insufficient to pay the debts action shall be had for the purpose of selling the real estate.[71] But when there is no necessity for selling real estate to pay debts, and the only parties interested are beneficiaries under the will, the Court would be slow in making an order controlling or directing the exercise of what appears to be a discretionary power. In such cases the court would look to the intention of the testator in creating the power. So long as there was no immediate danger of defeating the right of the beneficiaries the Court would not interfere in the discretion of the executor. But as a general rule the testator means and intends that his real estate shall be sold in a reasonably short time and in a reasonable and proper manner.[72]

§ 809. Form of deed of executor or administrator with will annexed.

Know all Men by these Presents:

That, whereas, on the.....day of.....190.., the last will and testament of....., deceased, was admitted to Probate and record in the Probate Court of.....County, Ohio, and on the.....day of.....190.., ...w.....duly appointed and qualified as..... of said decedent by said Probate Court, and.....now the lawful .....of the estate of said testat.....

That said last will and testament, among other provisions, contained the following, to-wit:

And, whereas, the said testat.... died seized in fee simple of the real estate hereinafter described, and in order to carry out the provisions of said last will and testament and ..... it is necessary to sell said real estate.

[69] Corrington vs. Corrington, 16 N. E. Rep. 252.

[70] See Gates vs. Pond, 12 C. C. 66; 5 C. D. 297.

[71] § 10762 G. C.

[72] Reynold's Estate, 2 Dec. 11; 3 N. P. 292.

Now, therefore,.....as.....as aforesaid, in pursuance to the said provisions of the said last will and testament of said....., deceased, and by virtue of the statute in such cases made and provided, and of the powers vested in..... and for and in consideration of the premises, and the sum of..... .....dollars ($.....), paid, or secured to be paid to.....by said.....the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said..... ..h....heirs and assigns forever, the following real estate, situated in the county of.....in the State of.....and in the.....and bounded and described as follows:

To have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said.....h....heirs and assigns forever, as fully and completely as....., the said..... as such.....by virtue of said last will and testament, and of the statute made and provided for such cases, might and should sell and convey the same.

In Witness Whereof, The said.....as such..... .....ha....hereunto set..h....hand.., this.....day of.....A. D. 190..

Signed and acknowledged in presence of

.....
.....
..... of .....

The State of Ohio,.....County, ss.

Be it remembered, that on this.....day of.....190.. before me, the subscriber, a.....in and for said county, personally came the above named.....as..... of.....the grantor..in the foregoing deed, and acknowledged the signing of the same to be..h....voluntary act and deed as such .....for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

.....

§ 810. Sale and distribution.

The same law applicable to the fidelity required of an executor or administrator in the sale of real estate, under an order of the Court, is applicable here. Except that, perhaps, where broad discretionary power is conferred on the executor by will, the Court might excuse an error of judgment where it was not so great as to impute a gross degree of negligence, or manifest fraud. As the sale is made without confirmation of the Court, therefore, in order that interested parties may be fully informed it has been held that in the executor's account, where different tracts have been sold, it must be so stated, separately, the price received for each tract, as well as the name of the purchaser given.[73]

[73] *In re* Williamson, 4 N. P. 282; 7 Dec. 24.

The Probate Court has full authority upon exceptions being filed to an account to enter into the question as to the proper exercise of a testamentary power to sell lands for the payment of debts. If the executor in bad faith sells them for a price that is manifestly less than their true value, he should, on exception to his account in the Probate Court, be charged with the difference between such inadequate price and the true value of the lands.[74] An administrator's sale of real estate by order of the Probate Court, is a judicial sale.[75] But a sale under a power in the will is not strictly a judicial sale.[76]

It would seem, therefore, that when an executor sells by virtue of the power in the will, the same rule is applied as to a private individual. In the distribution of the proceeds of a sale, the executor should follow the rule laid down for a sale made under an order of Court,[77] so far as debts and expenses of the estate is concerned, unless the will provides otherwise. As to the remainder, the same must be distributed in accordance with the provisions of the will; and if no specific provisions are made, the ordinary rules applicable to descent and distribution should be followed. If the executor has doubts as to how it should be distributed, he may himself bring an action in the Court of Common Pleas to have the will construed,[79] or may permit a suit to be brought against him to enforce distribution as provided for administrators.[80]

[74] Brown vs. Reed, 56 O. S. 264; 10 C. C. 44; 6 C. D. 15.

[75] Noland vs. Barrett, 122 Mass. 189; Maul vs. Hellman, 39 Neb. 322.

[76] Woerner on Admin. 1022, citing *in re* Pearsons, 102 Cal. 574.

The dividing line seems to be in such cases, that if the Court must confirm the sale it is judicial, if the Court is not required to pass upon such sale then it is not judicial. This might be important in our State in reference to the payment of taxes; for land sold at a judicial sale, all taxes that are on the tax duplicate October first, must be paid out of the proceeds of the sale Hoglen vs. Cohan, 30 O. S. 436; Ketcham vs. Fitch, 13 O. S. 201; Creps vs. Baird, 3 O. S. 278.

See §§ 5635-6 G. C.

[77] See § 10809 G. C., § 903.

[79] §§ 10857-8 G. C., § 33.

[80] See § 755, *et seq.*

See also §§ 492, 493, as to duties in sale of property.

CHAPTER XLVI.

REAL ESTATE. SALE BY COURT PROCEEDINGS.

§ 811 Direction of will. Or statute must be followed.
§ 812 Nature of the action.
§ 813 In what Court action to be brought.
§ 814 Power of the Court.
§ 814a May release lien.
§ 815 Nature of power.
§ 816 When action to be brought.
§ 817 Limitation as to the time of bringing.
§ 818 For what the action may be brought.
§ 819 For the payment of legacies.
§ 820 What may be sold.
§ 821 When can not be sold.
§ 822 When real estate fraudulently conveyed liable to sale.
§ 823 How executor or administrator to get possession of land fraudulently conveyed and avoid such conveyance.
§ 824 Proceedings where property is fraudulently conveyed.
§ 825 Petition for sale of equitable interest.
§ 825a The order and sale.
§ 826 Persons interested may give bond and prevent sale.
§ 827 Comments.
§ 828 Form of bond.

§ 811. Direction of will. Or statute must be followed.

In the previous chapter our attention was addressed more particularly to the sale of real estate, by virtue of a power in the will of a decedent. It will be the purpose of this and subsequent chapters to treat of the sale by virtue of a Court proceedings. As we have had an occasion to say before, but which is a matter we think will bear repetition, an administrator or executor has no power to sell real estate except such as is given to him by will or by statute. It, therefore, becomes very essential that all the requirements of the statute be complied with.[1]

In reference to the importance of the exercise of prudence and care in such matters, I cannot do better than to quote from Judge Woerner's most excellent work. "While it is manifestly the policy of the law to uphold judicial sales made without fraud, so as not to deter purchasers by encouraging the appre-

[1] Such power can not be set up in a Court of Equity. Lieby vs. Parks, 4 O. 469.

Statute strictly construed. Kummer vs. Lapp, 1 N. P. (N.S.) 209; 13 Dec. 491.

Prior to 1795 our courts had no power to order a sale of decedent's property, nor between 1805 and 1808. At all other times there has been such power. Walker's Am. Law, 460, note.

hension that their substantial rights and interests may be sacrificed to technical considerations,— while Courts will go very far to insure protection to innocent purchasers in collateral proceedings, even in cases of gross error arising out of blunders or carelessness of Probate Courts or their officers,—it is obviously of the gravest importance that every step taken in subjecting the real estate to sale for the payment of debts be as nearly as possible in literal compliance with the method pointed out by the statute upon which the proceeding is based. Where particular forms are pointed out for the execution of a power, however immaterial they may appear in themselves, these forms are conditions that cannot be dispensed with. It is a pernicious error, fruitful of trouble and mischief, to suppose that any vague, inartificial statement of circumstances is sufficient to authorize an order for the sale of real estate, if the applicant and the judge both know all about the matter; or that the good faith and honesty with which the application is made are a sufficient safeguard against ruinous complications and litigation that may follow an oversight or mistake. The anxiety of Courts to vindicate the validity of judicial sales should not be relied on as a pretext for the carelessness of executors and administrators, or the supineness of Probate Courts, in the several steps necessary for the sale of real estate. Even if the sale should be held good as against a collateral attack,— and it is distressingly uncertain to what extent the trial, and even appellate, Courts will go in that direction,— yet many acts of commission or omission which will not be allowed to invalidate the transaction in a collateral investigation, may in a direct proceeding subject the administrator to serious liability, the estate to loss and delay, and all parties concerned to vexatious and oftentimes ruinous litigation. No part of an administrator's duty claims more careful attention, and demands more imperatively the advice and assistance of a competent professional man, than his relations to and duties concerning the real estate of the deceased." [2]

See Goforth vs. Longworth, 4 O. 129; Newcomb vs. Smith, 5 O. 447; Miami Exp. Co. vs. Halley, 7 O. 11 (pt. 1).

[2] Woerner on Admin. 1021.

§ 812. Nature of the action.

Previous to the adoption of our present Code, an action to sell real estate was entirely a proceeding *in rem*. And minor defendants not served with process, but for whom a guardian *ad litem* was appointed and answered, are bound by the decree, as the statute required them to be made parties but did not prescribe what notice should be given.[3]

But whatever the former practice or law may have been, it is now settled that the action brought by an administrator or executor to sell real estate to pay debts is a civil action, adversary in its character,[3*] whether the same be prosecuted in the Court of Common Pleas or the Probate Court; and the Probate Court has jurisdiction to try any question of fact arising in such action, and to afford the parties a trial by jury when the nature of the issues entitle them to a jury trial or render it appropriate.[4] In this case it was further said, that the proper practice in such cases requires that all persons claiming an interest in, or a lien on the land, be brought before the court and all questions affecting the title adjudicated and settled, in order that the purchaser may buy with safety and the property may bring its fair value.

The case of Doan vs. Biteley [5] was a pioneer in its line and settled decisively and beyond question the jurisdiction of the Probate Court in such proceedings.

However, the action can not be made to include the recovery of the possession of real estate conveyed by a decedent, with the intent to defraud his creditors. Such an action must be brought in the Court of Common Pleas in accordance with secs. 10777 and 10778 of the General Code.[6]

[3] Robb vs. Irwin, 15 O. 689; Sheldon vs. Newton, 3 O. S. 494; Sneveley vs. Lowe, 18 O. 368; Benson vs. Cilley, 8 O. S. 604; Biggs vs. Bickel, 12 O. S. 49.

[3*] Holloway vs. Stuart, 19 O. S. 472.

The personal representative is the only person authorized to maintain an action to sell the real estate of a decedent for the payment of debts. Rheinfurt vs. Hurr, 98 O. S. 439. A creditor can not maintain such action.

Where a person was executor and sole legatee and did not file an account, but sold the real estate of deceased and on her death an administrator *de bonis non* with the will annexed was appointed, who filed a petition to sell real estate, it was held this was not the proper proceeding. The creditor should have compelled the administrator of the deceased executor to file an account and therein account for the proceeds of sale. Hocking Valley Ry. Co. vs. White, 87 O. C. 413.

[4] Doan vs. Biteley, 49 O. S. 588.

[5] 49 O. S. 588.

[6] Doney vs. Clark, 8 C. C. 163; 4 C. D. 388; 55 O. S. 294; Spoors vs. Coen, 44 O. S. 497.

See § 1619.

§ 813. In what court action to be brought. "To obtain such authority, the executor or administrator shall commence a civil action in the probate or common pleas court of either the county in which the real estate of the deceased, or a part thereof, is situated, or of the county in which his letters testamentary or of administration were issued." [R. S. § 6137.][7]

In unequivocal language, the above section makes the Probate Court and the Court of Common Pleas, courts of concurrent jurisdiction in the sale of real estate. This is also specifically declared by sec. 10493 G. C. (§ 28). It is a well settled principle of law that where Courts have concurrent jurisdiction the Court first acquiring jurisdiction will retain it to the exclusion of the other. It has also been held that where Courts have concurrent jurisdiction, that that Court will retain jurisdiction which is best able to determine the matters arising in the case; and that therefore where a mortgage lien holder brought an action in the Court of Common Pleas to foreclose his mortgage, making the heirs, but not the administrator, a party, and thereafter the administrator brought suit in the Probate Court, it was held that the Probate Court would retain jurisdiction.[8]

The action may be brought in the county in which the real estate is located, or in the county in which the letters of administration were issued. The better practice seems to be that if the land is located in the county in which the letters of administration have been granted, the proceedings to sell real estate should be brought in the Probate Court, as all other matters of administration are in such court. If the proceedings are brought in a county other than that which granted letters of administration, it might be better to bring the proceedings in the Court of Common Pleas, although the statute is broad enough to permit the action to be brought in the Probate Court.

7 § 10775 G. C.

8 Bateman vs. Morris, 4 N. P. 397; 7 Dec. 287.

The doctrine of this case is criticised by Kinkead in his work on court practice, page 86. But it certainly seems that the administrator was not bound by an action to which he had not been made a party; and not being bound, he could bring the action.

An action can not be brought in the Court of Common Pleas if the records of the Probate Court show that the administrator has filed a final account which disclosed no debts. Hunter vs. Yocum, 18 N. P. 14.

§ 814. Power of the Court. "The court in which such action is pending, may determine the equities between the parties and the priorities of lien of the several lien-holders on such real estate, and order a distribution of the money arising from its sale, according to the respective equities and priorities of lien as found by the court." [R. S. § 6145.][9]

§ 814a. Release of lien. "When such action is determined by the probate court, the judge thereof shall make the necessary order for an entry of release and satisfaction of all mortgages and other liens upon such real estate, and enter such release and satisfaction, together with a memorandum of the title of the case, the character of the proceedings and the volume and page of record where recorded, upon the record of such mortgage, judgment or other lien in the office where they appear as matter of record. He shall tax in his cost bill the fee provided by law for entering such release and satisfaction, and also a fee of twenty-five cents to himself for such entry. This section and the next preceding section shall apply to proceedings by guardians, assignees, and trustees to sell lands to pay debts." [R. S. § 6145.][9*]

§ 815. Nature of power.

The above section confers a complete jurisdiction upon the Probate Court to pass upon any equity which might arise in the case.[10] As was well said in another case,[11] "The policy of our Legislature has long been opposed to the necessity of a resort to different jurisdictions and multiplicity of actions, in order to obtain the full and final relief to which parties may be entitled, and in favor of clothing tribunals once acquiring control of the subject-matter of a controversy, and of the parties, with jurisdiction, if capable of exercising it, to determine the ultimate rights of the parties, and administer to them their complete remedy. The policy is a commendable one, with which the statute making actions like that under consideration, civil

9 § 10783 G. C. See § 895, Entry, confirmation of sale, etc.

9* § 10784 G. C.

10 Borntrager vs. Borntrager, 3 Bull. 891.

11 Doan vs. Bitely, 49 O. S. 594; Field vs. Bloch, 4 C. C. (N.S.) 216; 26 C. C. 113.

Lien judgment against heir determinable. Seitz, *In re*, 11 C. C. (N. S.) 204; 31 O. C. C. 32.

The Court of Common Pleas can not fix costs of administration and matters over which the Probate Court has exclusive jurisdiction. Field vs. Bloch, 4 C. C. (N.S.) 216; 26 C. C. 113.

actions, and giving the Probate Court co-ordinate jurisdiction with the Court of Common Pleas, is in harmony."

But the fact that the action is a civil action and that the Court has power to try every question at law that may arise and that sec. 10783-4, G. C., authorizes it to determine every equity between the parties, does not yet place the Probate Court in all cases on a plane with the Court of Common Pleas; and there may actions arise in which the Probate Court for want of a general equity power would be unable to give relief. Thus if two parties were tenants in common of a certain tract of real estate and gave a joint mortgage on such tract, and one of such joint tenants would die, it is very doubtful whether the administrator of the deceased joint tenant could procure adequate relief to all parties in the Probate Court. In such cases the mortgagees' rights would demand a sale of the living tenant-in-common's share; and a foreclosure of a mortgage is not within the power of the Probate Court. There has been some contention that the same rule should be applied to the sale of land by an administrator as by an assignee. But the Courts hold that such is not the case.[12]

It is not within the power of a Probate Court to order land sold subject to a mortgage,[13] the purpose of the statute being to convey land to the purchaser free from all liens or claims; and therefore the liens are transferred by the action from the land to the fund.[14] The title may be quieted in an action brought by an administrator or executor.[15] It has been held in

[12] The question in this case is whether, where a person executes a mortgage on real estate and dies, the mortgagee can bring and maintain a suit, a foreclosure suit, in the Common Pleas, making heirs, administrators, executors and lienholders defendants, or is compelled to work out his rights through the executor or administrator in the Probate Court. The Circuit Court holds that he can bring and maintain foreclosure in the Common Pleas. There is nothing in the claims of the administrator in this case which requires a construction of § 6108, Revised Statutes, different from what has been placed upon it by the Courts and the profession for more than half a century. Public policy, if no other consideration, requires that a construction so long accepted and acquiesced in should not be distributed. Bank vs. Ide, 20 C. C. 665; 10 C. D. 800.

[13] Stone vs. Strong, 42 O. S. 53.

[14] Bank vs. Carpenter, 7 O. 21.

[15] Doan vs. Biteley, 49 O. S. 588.

Partition of deceased's real estate can not be had within one year after his death unless it is averred and proved (1) that there is sufficient personal property to pay the debts; (2) that all the debts are paid, and (3) that payment of the debts are secured. Smith vs. Montaig, 32 Bull. 153; 1 Dec. 224; Swichart vs. Swichart, 7 O. C. C. 338; 4 O. C. D. 624.

a case where an assignee brought suit to sell real estate, making a person who held a mortgage in which the property was incorrectly described, that the court might reform the mortgage upon the cross-petition of the mortgagee for that purpose.[15*]

Whether or not the Probate Court would have such jurisdiction in proceedings brought by an administrator or executor is not so clear. Yet under the general policy of the law, it seems that such jurisdiction might be entertained.[16]

§ 816. When action to be brought. "As soon as the executor or administrator ascertains that the personal estate in his hands will not pay all the debts of the deceased, with the allowance to support the widow and children for twelve months, and the charges of administering the estate, he must apply to the probate court or court of common pleas for authority to sell the decedent's real estate." [R. S. § 6136.][17]

§ 817. Limitations as to the time of bringing.

It is the duty of the administrator to apply for a sale of the real estate as soon as he ascertains there is a deficiency in the personal assets,[18] and if he neglects to do so, the creditor may compel him or the heir, or even the court *ex moro motu*.[19]

There is no doubt that the court would at once upon sufficient cause being shown, order an administrator or executor to sell real estate to pay debts of the decedent, and in case of refusal, would summarily remove him. In order to carry out the general policy of the law, which requires a speedy settlement of the estate, the administrator ought at the very earliest moment when he ascertains that the personal property will not

But an action brought merely to settle a dispute is an abuse of the statute and ought not to be entertained. Wood vs. Butler, 23 O. S. 520.

15* Adlard vs. Stockstill, 5 N. P. 487; 5 Dec. 493.

16 See § 1619, Assignee's sale.

17 § 10774 G. C.

See § 829, Real estate sale; § 818, For what action may be brought.

Execution levied on land after death of owner is void. Cartney vs. Reed, 5 O. 222.

If the will directs that the land shall be sold and proceeds divided, the parties entitled thereto may elect to take the land. Holt vs. Lamb, 17 O. S. 374.

If there is not sufficient personalty to pay debts, the duty of the administrator to file petition is imperative. Andrews vs. Johns, 59 O. S. 65.

18 Abbott vs. Cole, 5 O. 86.

19 Woerner, Admin. 1027.

An action to sell real estate must be brought within six years from the time that the administrator discovers the necessity for the sale exists. Kemper vs. Building & Loan Co., 5 N. P. (N.S.) 403; 18 Dec. 484; Ling vs. Strome, Admr., 12 C. C. (N.S.) 161.

Such knowledge will be attributed not later than the filing of his final account. *Id.*

It is his duty to bring the action as soon as he finds it is necessary. Stout vs. Stout, 82 O. S. 358.

Right of an administrator to bring action is barred in six years, after the administrator has discovered that the personal property is insufficient to pay the debts. Ling vs. Strome, 12 O. C. C. (N.S.) 161; 31 O. C. C. 569; Kemper vs. Building & Loan Co., 5 N. P. (N.S.) 405; 18 Dec. 484.

pay the debts, file his petition to have the real estate sold. Some states have statutory limitations as to the time in which an action must be brought. In our State there is no special statutory limitation; and it has been held that the statute of limitation does not apply to the claims of heirs in such cases; and therefore where the heir brought a suit in partition twenty-one years after the death of the ancestor, it was held that the administrator could apply for part of the proceeds of the sale in order to pay debts.[20]

In another case it was held that an action might be brought to sell real estate twenty-three years after the death of the ancestor.[21] Of course if such real estate gets into the possession of parties other than the heirs, as to such parties, the general statute of limitations would apply, and there the rule laid down by Justice Story that the statute of limitation furnished an analogy which might be safely followed; and therefore held that no application should be entertained to subject real estate to the payment of debts after the period which would bar the right of entry on lands, would be applied.[22]

It seems to be the rule in Ohio that as long as there is a valid and subsisting debt due from the estate, no one claiming as heir or dowress of the decedent can successfully object to an order to sell the land on the mere lapse of time.[23] A power given to executors by will to sell and convey land becomes legally inoperative, and ceases to exist when the estate is settled or all claims against it are presumptively satisfied by a lapse of time, and no object of the testator remains to be attained.[24]

The above expresses correctly, the rule that should be applied in determining the limitation to be placed upon the power of an administrator to commence proceedings to sell real estate. If a debt is unknown at the time of distribution, which afterwards is reduced to judgment against the administrator, he is

[20] Lafferty vs. Shinn, 38 O. S. 46.

[21] Taylor vs. Thorn, 29 O. S. 569.

[22] Ricard vs. Williams, 7 Wheat. 59, 115.

[23] See Yandell vs. Pugh, 53 Miss. 295.

Authorities are reviewed in Woerner on Administration, pages 1027, 1028.

[24] Ward vs. Barrows, 2 O. S. 241. See note, previous page.

If an heir brings a suit in partition the administrator may come in by cross-petition and have the real estate sold. The partition proceeding will be superseded by the action of the administrator. Myers vs. Myers, 9 C. C. (N.S.) 449; 19 Cir. D. 396; 29 O. C. C. 398.

Or the administrator may commence an independent action and have the real estate sold, and he

entitled to proceed and have the land sold to pay such debts, even though partitioned among the heirs, and by them sold.[25]

§ 818. For what the action may be brought.

The statute provides for two classes of liabilities to be paid by sale of real estate. One is debts,[26] and the other is legacies.[27] The question now presented, is what shall constitute a debt of the deceased. Taxes which had accrued before the death of the testator are such debts as may support an action to sell real estate.[28] Likewise the executor's commission where properly charged against the estate is a debt for which proceedings may be had.[29]

The allowance for the support of the widow and her children is a debt of the estate for the payment of which resort may be had to the lands of the testator.[30] Money loaned to an executrix to pay off debts of the testator is a debt for which real estate may be sold.[31] But a person lending money to the administrator gets no lien on the land.[32] A street assessment is not a debt for which real estate may be sold.[33]

A buyer of the land from an heir who applies the money to discharge liens thereon and preferred claims will be subrogated to the rights of the holders thereof, against the estate when the land is sold by an administrator.[34] A mortgage by heirs to borrow money to pay off a lien on the property is void, as against creditors, but the mortgagee will be subrogated to priorities of the liens so paid.[35]

A person lending money to an executor to pay debts, lends on the executor's personal responsibility, and if he does so, it is

may do so, even though he be made a party to the partition suit. Stout vs. Stout, 82 O. S. 358.

[25] Faran vs. Robinson, 17 O. S. 242. In this case the claim had been presented to the administrator and by him rejected, afterwards a suit was brought against him and a judgment had. See § 10819 G. C.

[26] § 10774 G. C. See § 831.

[27] § 10817 G. C., § 819.

[28] Welsh vs. Perkins, 8 O. S. 52.

[29] Williams vs. Williams, 8 O. S. 300.

See Carr vs. Hull, 65 O. S. 391.

[30] Allen vs. Allen, 18 O. S. 235.

[31] Veldman vs. Lindeman, 4 Bull. 911; Behrens vs. Leucht, 2 C. S. C. R 217.

[32] Lieby vs. Parks, 4 O. 469.

[33] Wilson vs. Hall, 6 C. C. 570; 34 Bull. 298.

[34] Sidener vs. Hanes, 37 O. S. 532

[35] Cate vs. Peck, 30 Bull. 5.

questionable whether he can proceed to compel the executor to sell the land to relieve the executor of such personal responsibility.[36] As a general rule where an executor or administrator has paid debts of the testator in excess of the personal assets of the estate, he will be subrogated in equity to the rights of the creditors whose debts he has discharged.[37] In such case it is incumbent upon him, says Judge Woerner, to prove, in order to obtain a decree for the sale of the land to reimburse him, the validity of the debts which he has paid; the passing of the account in the Probate Court is not even *prima facie* proof thereof, or that they would have been chargeable upon the real estate, either at law or in equity. If, however, he has debts barred by the statute of limitations, or fails to make application until after the time limited for the enforcement of claims of creditors, or pays such debts voluntarily, or with the view of making the heir his debtor, so as to avoid the question of full administration in the proper forum, he will not be entitled to relief in equity.[38]

It seems that under our statute the administrator or executor is to judge in the first instance whether or not the personal property is insufficient to pay the debts. But the court will not order the sale unless it is satisfactorily shown that such is a true state of facts.

While lands may be sold to pay debts of a decedent, and the year's allowance to the widow in case the personal property is insufficient, yet they cannot be sold to pay the costs of administration alone.[39]

§ 819. For the payment of legacies. "When a testator has given a legacy by will that is effectual to pass or charge real estate, and his personal estate is insufficient to pay such legacy, together with his debts, the allowance to the widow and children, and the costs of administration, the executor or administrator with the will annexed, may be ordered to sell his real estate for

[36] Smith vs. Hayward, 5 N. P. 501; 5 Dec. 462; an., 45 Bull. 228.

[37] Woerner on Admin. 1039.

[38] Woerner on Admin. 1039.

[39] Carr vs. Hull, 46 Bull. 271; 47 Bull. 91; 65 O. S. 394.

See § 831, Essentials of petition; § 848, Proof required.

Where the heir has a claim against the estate but conceals it from the administrator and joins in a proceedings in partition, the administrator can not bring an action to sell real estate to pay such claim. Riley vs. Arnold, 19 N. P. 273; 62 Bull. 301.

that purpose, in the manner and upon the terms and conditions prescribed herein for the payment of debts." [R. S. § 6172.][40]

The above section of the General Code seems to place the payment of legacies in the same class as a debt against the estate, so that the administrator or executor may proceed to sell real estate to pay such legacy.[41]

§ 820. What may be sold.

As all the property both real and personal, the legal or equitable title to which is in the man at the time of his death, becomes liable for his debts; it therefore follows that whatever such interest may be, it may be sold by the administrator or executor for that purpose.[42] This would include permanent leaseholds and interests which might be held by the testator as tenant in common, and would include all rights and interest which the testator in his lifetime held in any land, tenements or hereditaments. Generally it may be said that a testator may exonerate his personal property from the payment of his debts, and charge the payment upon the real estate.[43]

Lands and property given away may be sold; even by gift *causa mortis*.[44] The equity of redemption of a deceased mortgagor or grantor in a deed of trust may be sold.[45] Even though

[40] § 10817 G. C.

[41] Whether a legacy is a charge upon the real estate of a testator is to be determined from the provisions of his will and the condition of his property as known to him at the time of making his will. Authority given by will to an executor to convert real estate into money is the equivalent of authority to sell. Dean vs. Lowenstein, 6 C. C. 587; 3 C. D. 597; Aff. 35 Bull. 79.

But if it is not a charge on the real estate it can not be sold to pay it. Furgeson vs. Wentz, 27 Dec. 462; 20 N. P. 13. See Hunt vs. Hayes, 19 C. C. 151; 10 C. D. 388, when held real estate may be sold.

§ 674, *et seq.*, as to Payment of legacies; § 799, *et seq.*, as to Sale without order of court.

Kemper vs. Loan Co., 5 N. P. (N.S.) 403; 18 Dec. 491; affirmed 11 C. C. (N.S.) 372; 30 O. C. C. 700; 80 O. S. 732.

[42] See Avery vs. Dufrees, 9 O. S. 145; Biggs vs. Bickel, 12 O. S. 49.

If an administrator sold property to which deceased had no title in his individual capacity, he would be liable to the purchaser. Fisher vs. Fisher, 33 O. C. C. 555; affirmed no op., 86 O. S. 365.

[43] Scott vs. Morrison, 5 Ind. 551. See § 832.

[44] See Ch. 66, § 1240, Gifts *causa mortis;* McGillicuddy vs. Cook, 5 Blackf. 179; Wyble vs. McPheters, 52 Ind. 393.

[45] Jackson vs. Magruder, 51 Mo. 55; Kenley vs. Bryan, 110 Ill. 652; Jennings vs. Jenkins, 9 Ala. 285; Diehl's Appeal, 33 Pa. St. 406; Briggs vs. Bickel, 12 O. S. 49; Bolling vs. Jones, 67 Ala. 508.

proceedings to foreclose the mortgage are pending.[46] The heirs can not defeat such sale.[47] Land entries paid for but no patents obtained may be sold.[48] So lands to which deceased had no valid title of record, although a title in fact.[49] So head-right certificates,[50] final-settlement certificates,[51] resulting trusts,[52] estates in reversion or remainder,[53] lands conveyed by the heirs after the death of their ancestor,[54] even if sold to the administrator,[55] or sold on execution against the heir or heirs,[56] even if they have been devised to the vendor.[57] The consent of the administrator to the sale of the land by the heir can not divest the creditor of his right to have his debt made out of the land, although such consent might estop him, were the right of creditors not affected.[58]

§ 821. What can not be sold.

Land that is dedicated to the public can not be sold by an administrator for the purpose of paying debts.[59] Likewise land can not be sold which is set apart as a homestead for the widow and her children as required by sec. 10794 G. C. (§ 857). But the adult heirs are not entitled to a homestead or to any

[46] Bateman vs. Morris, 7 Dec. 287; 4 N. P. 377; Fitzsimmon's Appeal, 40 Pa. St. 422.

[47] Wolf vs. Robinson, 20 Mo. 459.

[48] Avery vs. Dupres, 9 O. 145; McDonald vs. Burton, 68 Cal. 445.

[49] Woods vs. Monroe, 17 Mich. 238.

[50] Soye vs. Maverick, 18 Tex. 100.

[51] Strodes vs. Patton, 1 Brock. 228.

[52] Matlock vs. Nave, 28 Ind. 35; Valle vs. Bryan, 19 Mo. 423.

[53] Williams vs. Ratcliff, 42 Miss. 145.

[54] Fiscus vs. Moore, 121 Ind. 547; Scherer vs. Ingerman, 110 Ind. 428.

[55] Smith vs. Anderson, 31 O. S. 144; Carter vs. Lee, 51 Ind. 292; Ferguson vs. Carson, 9 Mo. App. 497; Fike vs. Green, 64 N. C. 665; State vs. Probate Court, 25 Minn. 22; Horner vs. Hasbrouck, 41 Pa. St. 169; Clark's Estate, 3 Redf. 225; Cole vs. Lafontaine, 84 Ind. 446; overruling Pell vs. Farquar, 3 Blackf. 331; Seymour vs. Seymour, 22 Conn. 272; Camp vs. Sherley, 9 Lea, 255.

[56] Smith vs. Seaton, 117 Pa. St. 382; Knowles vs. Blodgett, 15 R. I. 463.

[57] Shaw vs. Nicolay, 30 Md. 99; King vs. Kent, 29 Ala. 542; Greenawalt's Appeal, 37 Pa. St. 95; Hannum vs. Spear, 2 Dall, 291.

[58] Moncrief vs. Moncrief, 73 Ind. 587.

See § 825, Sale of equitable interest; § 1409, What may be sold.

[59] Brown vs. Manning, 6 O. 298.

The Probate Court has no power to order the sale of entailed estates, such power is lodged in the Court of Common Pleas. Jones vs. Wright, 1 O. C. C. (N.S.) 59; 20 O. C. C. 649. See § 11925 G. C.

If the administrator has filed a final account, showing all debts paid the action can not be maintained, in such cases the administrator should, if the eight-months period has passed, file a subsequent account and have the showing of all debts paid corrected, and that there are some debts unpaid. Hunter vs. Yocum, 27 Dec. 31; 18 N. P. 14.

other exemption out of the land against the claims of creditors. The land set apart as a homestead for the wife and children may be sold to pay debts of the decedent whenever the widow remarries, and no unmarried child of the decedent continues to reside on such land.[60]

The widow unless by reason of an ante-nuptial contract or an election to take under the will, is entitled to dower in the real estate and such dower interest of the widow cannot be disposed of without her consent by the executor or administrator of her husband's estate. The real estate may be sold subject to the claim of the widow for dower or homestead.[61]

Real estate cannot be sold to which the owner at the time of his death held neither a legal nor an equitable title, and thus where a husband devised real estate to his wife with power to dispose of the same for her use and support, and the wife failed to exercise such power, it was held that the administrator of her estate cannot maintain an action to sell such devised real estate for the purpose of paying her debts.[62] It cannot be sold to pay costs of administration only.[63]

§ 822. **When real estate fraudulently conveyed, liable to sale.** "The real estate so liable to be sold includes all that the deceased conveyed with intent to defraud his creditors, and all other rights and interests in lands, tenements, and hereditaments; except that lands so fraudulently conveyed, can not be taken from any who purchased them for a valuable consideration, in good faith, without knowledge of the fraud. No claim to lands, so fraudulently conveyed, shall be made unless within four years next after the decease of the grantor." [R. S. § 6139.][64]

§ 823. **How executor or administrator to get possession of land fraudulently conveyed and avoid such conveyance.** "If land which has been so fraudulently conveyed, is to be included

60 Taylor vs. Thorn, 29 O. S. 569.

61 See § 10787 G. C., § 850.

62 Undeported case of Probate Court, Clark County, Ohio. This case is supported by Page on Wills, 836, where it is said, "but where the donee of the power has not ordered such sale in her lifetime, a sale can not be had at the instance of her creditors, the power being purely a personal one."

63 Carr vs. Hull, 65 O. S. 394. See § 829. Commencement of action.

64 § 10777 G. C.

This section is intended to enable the administrator to obtain in one action authority to convert into money all realty which in equity ought to be applied to the payment of the debts of decedent and not make it necessary that the creditors bring the action. However, in such case the action must be in the Court of Common Pleas. Beebe vs. Canada, 18 O. C. C. (N.S.) 104.

in such action, the executor or administrator either before or at the same time, may bring suit to recover possession of it; or, in his action for its sale, allege the fraud and have the fraudulent conveyance avoided therein. But when such land is included in the application before recovery of possession, the action shall be in the court of common pleas." [R. S. § 6140.][65]

§ 824. Proceedings where property is fraudulently conveyed.

Several matters are to be strictly observed in proceedings in which an administrator seeks to sell lands which have been fraudulently conveyed away by the decedent. In the first place the action can not be maintained against a purchaser for valuable consideration and in good faith. In the second place it can not be brought unless within the expiration of four years from the death of the testator. Third, the action can not be brought unless it is necessary to have the proceeds of the real estate so fraudulently sold with which to pay the debts of the decedent.[66]

It should also be observed that the Probate Court has no jurisdiction to order a sale of such lands until after a proceeding is had in the Court of Common Pleas, declaring the sale made by the decedent to have been fradulent.[67] If the action is brought to sell the real estate before the conveyance has been found and decreed fraudulent, then it must be brought in the Court of Common Pleas.[68]

[65] § 10778 G. C.

[66] McCall vs. Pixley, 48 O. S. 379.

[67] Lowman vs. Sewall, 16 C. C. 466; 9 C. D. 177. This same case is reported in 2 N. P. 376; 4 Dec. 1, in which the Common Pleas Court held that when the administrator seeks relief, it can only be had in an action brought in the Court of Common Pleas for the purpose of selling fraudulently conveyed real estate to pay debts. In this case it seems that the Circuit Court or the old District Court having found the transfer fraudulent, dismissed the action intimating that the administrator should proceed in the Probate Court to sell real estate.

After set aside, action may be brought to pay widow's allowance. Allen vs. Allen, 18 O. S. 234.

The Probate Court has no equity power to set aside a deed. Fleming vs. McGuffy, 12 N. P. 19; 21 Dec. 387.

The action can only be brought when needed to pay debts. McCall vs. Pixley, 48 O. S. 379.

A debt barred by the statute of limitations will not support the action. Jones vs. Lehman, 15 Dec. 541.

An administrator may bring his action in the court for the sale of lands to pay debts, and include in such action lands to which the decedent never had title but for which he paid and had conveyed to another. Beebe vs. Canada, 18 O. C. C. 104.

[68] Spoors vs. Coen, 44 O. S. 497.

The reason of this provision doubtless arose from a persuasion in the minds of the Legislature that a recovery of such lands involved an exercise of jurisdiction that should only be conferred on the Court of Common Pleas, they being courts of general jurisdiction in matters of law and equity, and therefore more competent, from the character of their judges, constantly employed in the exercise of such jurisdiction, to hear and determine such matters.

An administrator may maintain such an action against the fraudulent grantee to recover the value of the lands, if the latter has conveyed them to an innocent purchaser.[69] Such an action would be governed by the statutory limitations that it must be brought within four years from the death of the fraudulent grantor, and further upon such a trial either party is entitled to demand a jury. The action brought by the administrator under the above sections of the General Code is not exclusive. The creditor may also bring such an action and a Court of Equity has jurisdiction to entertain the same. But when the assets are reached, they should be placed in the hands of the administrator to be by him administered according to law.[70]

It would, however, not be proper to bring an action to set aside such a conveyance in the joint name of the administrator and creditor.[71] For form of petition to set aside fraudulent conveyance, the reader is referred to the works on Common Pleas practice.[72]

§ 825. **Petition for sale of equitable interest.** "When a petition is filed for the sale of an equitable estate, or equitable interest, which the deceased held in lands, the executor or administrator shall set forth in the petition the nature of such equitable estate or interest, making all necessary parties, including the persons holding the legal title thereto and those who are entitled to the purchase money therefor." [R. S. § 6166.][73]

§ 825a. **The order and sale.** "In such case, notwithstanding the preceding provisions of this title, the court may make such order for the appraisement and sale of the equitable estate, for the indemnity of the estate of the deceased against the claim for such purchase money, and for the adjustment of the dower of the widow or widower of the deceased in the equitable estate,

And so, to avoid a multiplicity of suits, it is provided that an action to set aside a conveyance of lands, that had been made by decedent to defraud creditors, may be united with a proceeding for an order of sale to pay debts, by resorting, in the first instance, to the Court of Common Pleas. Spoors vs. Coen, 44 O. S. 501.

[69] Doney vs. Clark, 55 O. S. 294, reversing 8 C. C. 163; 4 C. D. 380.

[70] Hoffman vs. Kiefer, 19 C. C. 401; 10 C. D. 304.

[71] Webster vs. Ballard, 2 Cleve. Rep. 137.

[72] 1 Kinkead's Pl. 500. Whit. forms 252.

[73] § 10810 G. C.

The Probate Court has no power to order the sale of entailed estates. Jones vs. Wright, 1 O. C. C. (N.S.) 59; 24 O. C. C. 649.

by estimating and directing to be paid to her or him the value of a life annuity in one-third of it, or otherwise, as the court deems just and right, between all parties in interest." [R. S. § 6166.][73*]

A conveyance in trust with a provision for reconveyance is an equitable estate which may be sold under this section.[74] Likewise a perfect equity may be sold to pay debts.[75] Section 10810-11, G. C. simply enlarges the rights given by the previous sections which are confined to cases in which the legal title vests in the decedent, or where it was fraudulently conveyed by such decedent. It must be an equitable interest or an equitable estate in order to come within the statute. This does not mean an equitable claim which may be had, but it means a claim which is in such a position that it may be considered by the rules of equity to be an *equitable estate* or an *equitable interest* in the land. It would likewise be held to be a civil action within the meaning of the code, triable by the Court or by jury as the facts would demand. In such cases the wife's dower interest is to be provided for in proceeds out of the sale.[76]

§ 826. Persons interested may give bond and prevent sale. "An order to sell the real estate shall not be granted if any person interested in the estate gives bond to the executor or administrator, in a sum and with sureties to be approved by the court, conditioned to pay all the debts mentioned in the petition, eventually found due from the estate, with the charges of administering it, and the allowance in money to the widow, so far as the personal estate of the deceased is insufficient therefor." [R. S. § 6146.][77]

§ 827. Comments.

This section provides that any person interested in the estate may by giving a bond, prevent an order of sale. But I apprehend that it is not the intention of the statute to confine the

[73*] § 10811 G. C.

As to what may be sold, see previous § 820.

[74] Biggs vs. Bickel, 12 O. S. 49.

[75] Avery vs. Dufrees, 9 O. 145.

[76] See Annuity tables in last chapter.

[77] § 10785 G. C.

See Davisson vs. Burgess, 31 O. S. 78; heir. Stout vs. Stout, 82 O. S. 358; Swihart vs. Swihart, 4 C. D. 624; 7 O. C. C. 338; widow, Corey vs. Hayes, 7 C. D. 272; 13 O. C. C. 185.

right to give the bond within the period existing before an order of sale has been granted. For the spirit of the law is, that the real estate is to be taken only to pay debts of the decedent when necessary for that purpose, and if some one provides for the payment of such debts, even before the confirmation of sale, it ought to be allowed by the Court; and it has been held that a bond given after the order of sale was granted, is valid and binding on the sureties.[78]

A widow having a dower interest in the real estate of her deceased husband is sufficiently interested in the estate to entitle her in connection with one or more of the heirs of such estate to give the bond provided for in the above section, to obviate a sale of such real estate; and having given such bond, she is entitled to be subrogated to the right of the administrator and fully reimbursed from a fund arising from the sale of such real estate in a proceeding in partition by the heir.[79]

The bond having been given and filed in the Probate Court, the judge should make an entry of that fact, which may be in the following form:

(*Title.*)

This day came A. B., an heir-at-law (or other interested person), and filed herein his bond with C. D. and E. F. as sureties thereon with a consideration of.....dollars (being double the amount of the debts alleged in the petition), unto G. H., executor (or administrator) of the estate of I. J., for the purpose of preventing a sale of the real estate described in a petition filed in the Court by G. H., and the same was submitted to the Court, and upon examination of the same the said bond is proved and it is ordered that the same be filed in this Court and recorded with the proceedings; and that the action to sell real estate brought by said G. H., as executor (or administrator) of the said estate be and the same is hereby dismissed. The costs thereon to be paid by said executor and charged as a debt against the estate.

§ 828. Form of bond.

Know all Men by these Presents:

That we, A. B., C. D. and E. F., are held and firmly bound unto G. H., executor of the last will and testament (or administrator of the estate) of I. J., deceased, in the sum of.....dollars, to the payment of which we hereby jointly and severally bind ourselves, our heirs, executors and administrators. The condition of this obligation is such that whereas the said G. H., as executor (or administrator) as aforesaid, on the.....

[78] Davisson vs. Burgess, 31 O. S. 78.

[79] Corey vs. Hayes, 13 C. C. 185; 7 C. D. 272.

See Stout vs. Stout, 82 O. S. 358.

day of....., made an application to the Probate Court of .....county, Ohio, for an order to sell the real estate of said decedent, alleging that the personal estate of said decedent was insufficient for the payment of his debts and the charges of administering his estate. Now if the said A. B. shall pay all the debts mentioned in the petition that shall eventually be found due from the estate, with the charges of administering the same, and the allowance in money to the widow so far as the personal estate of the deceased shall be insufficient therefor, then this obligation to be void, otherwise to be in full force and effect. (Signed, etc.)

Executed in the presence of.....[80]

[80] Whit. Prob. Code.

CHAPTER XLVII.

REAL ESTATE. PLEADINGS, PROCESS AND TRIAL.

§ 829 Commencement of action, etc.
§ 830 What petition for sale must contain.
§ 831 Essentials of petition.
§ 832 When assets will be marshaled in conformity with the will.
§ 833 Necessary parties.
§ 834 Parties defendant.
§ 835 Administrator *de bonis non* to complete sale made by executor or administrator.
§ 836 Form of petition for sale of real estate to pay debts.
§ 837 Filing the petition.
§ 838 Service. Waiver of. Consent of guardian.
§ 839 Actual service.
§ 840 Constructive service.
§ 841 How publication to be made.
§ 842 Copy of newspaper to be mailed.
§ 843 Waiver.
§ 844 When guardian *ad litem* to be appointed. Such guardian can not waive notice, etc.
§ 845 How appointed.
§ 846 Other pleadings. Answer of widow.
§ 846a Dower and homestead exemptions.
§ 847 When Court to order real estate to be sold. Terms of sale.
§ 848 Proof required.
§ 849 Trial if contested.
§ 850 The estate of the heirs in the land set off to the widow, may be sold.
§ 851 The whole to be sold when a partial sale would injure the residue.
§ 852 Judgment and order of sale.
§ 852a Entry. Appraisement. Dower and homestead.
§ 853 Effect of order.
§ 854 Costs, when there are objections to granting order for sale.

§ 829. Commencement of action, etc.

The Courts have held that the action is a civil action,[1] and the statute provides[2] that the provision of law governing civil proceedings in the Court of Common Pleas shall, as far as applicable, govern like proceedings in the Probate Court, where there is no provision on the subject. It therefore follows that unless otherwise provided, the general rule of pleadings, procese and trial applicable to other civil actions are applicable to

[1] Doan vs. Biteley, 49 O. S. 588.
[2] §§ 10743-44 G. C., § 36.
The filing of the petition gives the court exclusive jurisdiction to try all questions. Baker vs. Lamblin, 11 O. C. C. 103; 5 C. D. 54; Stout vs. Stout, 82 O. S. 358; Thad vs. Bloch, 4 O. C. C. (N.S.) 216; 26 O. C. C. 113.

proceedings brought by an administrator or executor to sell real estate. The provision of the statute referred to in this and other chapters relating to the sale of real estate are largely those that were provided for the sale of real estate before the adoption of the Code; and while they contain some of the requisites that must be followed in such cases, they do not contain all the law applicable thereto. It will not be within the province of this work to enter into a discussion of the general principles of pleadings. For this matter the reader is referred to other works upon such subjects.[3]

The action is commenced by the filing of a petition in the proper Court and the issuance of summons thereon.[4] Before filing such petition, the administrator should examine the condition of the estate and ascertain whether it is necessary to sell the real estate to pay debts or legacies.[5] While the rules of the Probate Court do not generally forbid a person from practicing before it who is not a lawyer, yet in all cases it would be advisable for the administrator or executor to retain competent legal counsel in the very beginning of such proceedings.[6] The statute of Indiana contains a provision that before the filing of such petition, the administrator, etc., shall carefully examine the offices of the clerk, auditor, treasurer and recorder in the county in which the real estate of the deceased may be situated, and ascertain the exact character and extent of each lien thereon created or suffered by the deceased in his lifetime and remaining unsatisfied of record.[7]

This provision, while not in statutory form in our State, should, without exception, be adopted and followed. Formerly it was held, that lien holders might be barred of their lien on the land, although they were not made parties, the Court holding that the proceedings to sell real estate was a proceeding *in rem*, and that the lien was transferred to the fund, but such is not now the case. The action is adversary in its character,

[3] See Kinkead's Pl., Kinkead's Court Practice, Whittaker's Forms.

[4] Kinkead's Pract. 93.

[5] See §§ 816-821. When action may be brought.

[6] See § 811 as to Judge Woerner's advice.

§ 508. Employment of counsel.

[7] § 2290 R. S. of 1894.

and the lien holder not made a party will not be deprived of his lien.[8]

§ 830. What petition for sale must contain. "The petition shall set forth the amount of debts due from the deceased, as nearly as they can be ascertained, the amount of the charges of administration, the value of the personal estate and effects, and a description of the real estate, and its value, if appraised." [R. S. § 6141.][9]

§ 831. Essentials of petition.

The above statutory provision contains some of the essentials of a petition, but not all. A petition must contain the name of the Court and the county in which the action is brought.[10] The names of the parties to an action must be stated and followed by the word "Petition." [11]

This means that the names of all the parties, plaintiffs and defendants, shall be stated in the caption. The names should be set out fully and the plaintiff should describe himself as the administrator of the estate of the deceased peprson. It is a loose, vicious practice to use initials. It is only necessary to give the names in the caption of the pleadings, and they need not therefore be repeated in the body.[12] If the name is unknown, it may be so designated, and it should be averred in the petition that the plaintiff is ignorant of the true name. The petition must be subscribed by the party or his attorney.[13]

The petition must be verified by the affidavit of the party. his agent or attorney.[14]

All matters stated in the petition should be a statement of facts constituting the cause of action, in ordinary and concise language.[15]

The petition should state the representative capacity of the

[8] Holloway vs. Stewart, 19 O. S. 472.

[9] § 10779 G. C.

See § 816, when action may be brought.

[10] Kinkead's Pl. 46.

An averment that the personal is but ———, being wholly insufficient to pay the debts and costs aforesaid, is not a sufficient averment, especially if it be shown that there was some personal property. Railway vs. White, 87 O. S. 413. See also Baen vs. Weller, 12 Dec. 128.

If there are no debts, no valid order can be issued. Hunter vs. Yocum, 27 Dec. 51; 18 N. P. 14.

One who is not affected can not question the averments of the petition. Pirman vs. Gerhold, 7 N. P. 664.

Neither can the fact of the validity of the debts. This must be done by filing a requisition with administrator not to allow the claims.

[11] § 11308 G. C.

[12] Whittaker code forms, p. 1.

[13] § 11351 G. C.

Finch vs. Evers, 25 O. S. 82; Conn. vs. Rhodes, 26 O. S. 644.

[14] § 11351 G. C.

[15] Kinkead's Pl. 50.

executor, and although not essential, the fact and date of the death of the decedent. If he left a will in which the plaintiff or defendant was named as executor, it should be stated, also that the will of the deceased was duly probated, giving the date of the issuance of letters testamentary, that the defendant or plaintiff was duly qualified and entered upon his duties as such administrator or executor, and is still acting in that capacity.[16]

Where the petition shows that property has been in charge of two administrators, the letters of one of whom have been revoked, the petition should state the fact of such revocation.[17]

The petition must contain the amount that it is necessary to sell to pay debts; it is not sufficient to aver that the land has been fraudulently conveyed.[17*]

The omission of the word "as," between the name of the plaintiff and the words descriptive of his representative capacity, is not fatal.[18]

At common law the issue of representative capacity could be raised only by plea in bar or abatement. The rule remains the same under the Code, it being necessary to state the facts relied upon to show that the averment is not true.[19]

[16] Kinkead's Pl., § 546.

In alleging the representative character of an administrator, it is held to be sufficient if the petition shows that the plaintiff filed an application for letters of administration at a certain time in a designated Court, and that such proceedings were had, that he was duly appointed and qualified and that letters of administration were issued to him. Monroe vs. Dredging Co., 84 Cal. 515; s. c. 18 Am. St. Rep. 248.

Merely giving the name of the administrator in the commencement of the petition, and attaching the words "administrator of C. D., late of ——, deceased," being descriptive only, is therefore insufficient. Sheldon vs. Hoy, 11 How. Pr. 11; Dayton vs. Connah, 18 How. Pr. 326; Quinn vs. Newport News Co., 22 S. W. Rep. 223 (Ky., 1893.)

Under an allegation that a person has been appointed administrator by proper authority, it will be presumed as against a demurrer that he has taken the necessary steps to secure the appointment. Gutridge vs. Vanatta, 27 O. S. 366.

[17] State vs. Green, 65 Mo. 528.

[17*] Baen vs. Weller, 12 Dec. 128. See § 818. Avery vs. Pugh, 9 O. 67.

[18] Beers vs. Shannon, 73 N. Y. 292.

[19] Mayes vs. Turley, 60 Iowa 407; Ewen vs. Railway Co., 38 Wis. 614; *Contra*, Gilmore vs. Morris, 13 Mo. App. 114.

The proper method of reaching a defect in an allegation of representative capacity is by motion.[20]

If the real estate has been appraised by the appraisers of the personal estate, the amount of such appraisement should be stated.[21]

The fact should also be stated whether or not the administrator or executor has given bond, and if bond has been given, the amount of the bond should be stated. These two matters should be stated for the reason that the Court is to pass upon the question whether an appraisement may be dispensed with, and also whether an additional bond should be required. If the real estate is liable for debts in a different order from that provided by law, it should be set forth as provided in the next section. The nature of the title or interest of the decedent in the real estate should be set forth, as well as a proper description of such premises. If there are minor defendants, their ages should be given, and if they have guardians, such fact should be stated. If a husband or wife be living, entitled to dower or homestead exemption, the same should be set forth.[22]

§ 832. **When assets will be marshaled in conformity with the will.** "If, in the last will of the deceased, there is a disposition of his estate for the payment of debts, or provision that may require or induce the court to marshal the assets differently from what the law otherwise would prescribe, such devises, or parts of the will, must be set forth in the petition, and a copy of the will exhibited to the court, whereupon the assets shall be marshaled accordingly, so far as it can be done, consistently with the rights of creditors." [R. S. § 6152.][23]

§ 833. **Necessary parties.** "In such action the widow of the deceased, the heirs, devisees, or persons having the next estate of inheritance from him, and all mortgagees and other lien holders, whether by judgment or otherwise, of any of the lands sought to be sold, and all trustees holding the legal title thereto or to any part thereof, and, if a fraudulent conveyance

[20] Gillett vs. Fairchild, 4 Denio. 83; 13 How. Pr. 413; Bangs vs. McIntosh, 23 Barb. 591; Neil vs. Cherry, 1 W. L. M. 155; Kinkead's Pl. 496.

[21] This is an essential. See § 10779 R. S., § 830.

[22] See §§ 818, 1686.

[23] § 10791 G. C.

is sought to be set aside, all persons holding or claiming thereunder, must be made parties." [R. S. § 6142.][24]

§ 834. Parties defendant.

The above is a provision as to what parties are necessary. It is so headed, but it does not forbid making other persons parties. It only provides that under all the circumstances these shall be made parties.[25] And the proper practice in actions to sell real estate by an administrator or executor requires that all persons claiming an interest in, or lien on the land, be brought before the Court, and all questions affecting the title adjudicated and settled, in order that purchaser may buy with safety and the property bring its full and fair value.[26]

A party loaning money to an executor, and taking the executor's note as evidence of such loan, is not a necessary or even proper party in a proceeding brought by an administrator of an heir to sell lands of such heir to pay his debts.[27]

It has been held that lien holders against an heir, and purchaser of an heir's interest in the real estate, are not necessary or even proper parties to the suit.[28]

While it may be true that under our law the purchaser of the land from the heir would not be a necessary party if the land was all absorbed in the payment of debts, as such purchaser takes with full knowledge that the land may be sold to pay debts of the decedent. But if there are any proceeds of the land remaining, he would be a necessary party to enable the Court to determine to whom such remaining proceeds should be paid; and it may be stated as a general rule that a purchaser from the heir or the owner of a judgment which has become a lien on the heir's interest, is a proper and under

[24] § 10780 G. C.

An administrator's sale made under order of the court without showing that the heirs were made parties is void. Adams vs. Jeffries, 12 O. 253. If an heir or interested party is unknown or can not be found he should be made a party, and served by publication. Whit. forms 17.

[25] Biteley vs. Doan, 4 C. C. 10; 2 C. D. 388.

[26] Doan vs. Biteley, 49 O. S. 589; Tidd vs. Bloch, 4 C. C. (N.S.) 216; 26 C. D. 119.

If a wife has been divorced by reason of the aggression of the deceased, she ought to be made a party. Arnold vs. Donaldson, 46 O. S. 73.

A party loaning money to executor for benefit of estate, not a proper party. Smith vs. Hayward, 5 N. P. 501; 5 Dec. 462.

[27] Smith vs. Hayward, 5 N. P. 504; 5 Dec. 462; aff. 45 Bull. 228.

[28] Communication in 25 Bull. 102.

A judgment creditor of a devisee is not a lienholder within the meaning of § 10780 G. C., and is not a necessary party. Kummer vs. Lapp, 1 N. P. (N.S.) 209; 13 Dec. 491.

His remedy is under § 10816 G. C., § 905.

If the party is insane, he may be made a party, if the consent of

some circumstances a necessary party.[29] If the heir has sold out all his interest, the purchaser stands in his shoes, and should be a party so that he may defend if necessary. And it has been held elsewhere that an heir who has conveyed his interest in decedent's real estate is not a necessary party to an application to sell real estate.[30]

Where a testator has made a will, it may not be necessary, unless the will be set aside, to make the heirs at law parties, unless they are also legatees under the will.[31] The widow need not be made a party unless she is interested in the real estate.[32]

If the widow and the heir at law have no interest in the real estate, they could have no interest in the pending suit; therefore it would be an idle formality to make them parties. But the better practice would be to make all, who might have a possible interest in the real estate or in the proceeds, parties. I have no doubt but what under the provisions of sec. 10783-4, G. C. (§ 814), the Court may permit any person possibly interested to come in and be made a party.

As the title of an heir is subject to be defeated by sale to pay debts of an ancestor, the wife of such heir need not be made a party, her dower following her husband's rights.[33]

§ 835. Administrator de bonis non to complete sale made by executor or administrator. "If the executor or administrator, who begins such action, dies, resigns, or is removed, or his powers cease at any time before the conveyance of real estate sold under an order of court, the administrator *de bonis non* shall proceed with such sale, and may convey land sold before or

his guardian can not be obtained, *or if he has no guardian* and *that fact is alleged in the petition.* § 11256 G. C.; 2 Bates' Pl. 1826, As to defense of such person, see § 1384.

[29] Barkman vs. Hain, 5 N. P. 508; 5 Dec. 474.

More properly speaking he is a necessary party in the distribution, and not in making a legal sale. See Kummer vs. Lapp, 1 N. P. (N.S.) 209; 13 Dec. 491. See § 905.

[30] Platt v. Brickley, 119 Ind. 333.

[31] As the statute permits one year in which to contest a will, it would be safer if suit be brought within that time to make all heirs parties, especially if the heirs are minors. § 12087 G. C.

[32] To a suit brought to effect a sale of a decedent's land, the residuary legatees, among whom a portion of the proceeds are to be distributed, are necessary parties, but the heirs of the testator are not, when all the testator's estate is disposed of by the will. Pennsylvania Co. For. Ins. vs. Bauerle, 143 Ill. 459; S. C. 33 N. E. Rep. 166.

[33] See § 943 *et seq.*, Dower.

The proceeds left after payment of debts, is personalty, although it descends as real estate. See § 905.

See Harrington vs. Harrington, 13 Gray, 513.

after his appointment. He also may be required to give an additional bond in like manner as if he had filed the petition." [R. S. § 6138.][34]

If the contingency occurs, as suggested in the above section, it would be advisable, in order that the proceeding show all the facts before the Court, to make an entry, of which the following may serve as a general form:

(*Title.*)
It appearing to the Court that A. B., administrator of C. D., who originally brought this action, has died (resigned or been removed) and that E. F. has been appointed and duly qualified as administrator *de bonis non* of the estate of said C. D. It is ordered that the said E. F. be substituted as plaintiff for the said A. B. in this action and that he proceed therein the same as A. B. could have done had he not died (resigned or been removed).

§ 836. Form of petition for sale of real estate to pay debts.

A. B., Administrator of the estate of C. D., deceased, Pltf.,
vs.
E. F., G. H., adults, and I. J., a minor over fourteen years of age, and K. L., a minor under fourteen years of age, sole heirs-at-law of C. D., deceased; M. N., the widow of said C. D.; O. P. and Q. R., who claim some interest in said land.

Probate Court,
Clark County, Ohio.

PETITION.

The plaintiff represents that he was on the.....day of..... duly appointed and qualified administrator of the estate of C. D., late of Clark county, Ohio, and is still acting as such administrator; that the amount of debts due from the deceased is.....dollars, as near as they can be ascertained (a schedule of which debts is hereto attached, marked Exhibit A).....that the charges of administration of said estate will amount to about.....dollars and that the total value of the personal estate and effects of said deceased is but.....dollars, being wholly insufficient to pay the debts and costs aforesaid. The plaintiff further represents that said C. D. died seized in fee simple of the following described real estate, situate in the County of Clark, State of Ohio, to-wit:

Plaintiff represents that said real estate was appraised in accordance with the order of the Probate Court of Clark County, Ohio, by the appraisers of the personal estate of said decedent free from any dower estate therein and that the amount of said appraisement is..... dollars. That plaintiff has given bond as such administrator (or executor) in the sum of.....

The said decedent died leaving the defendant, M. N., who is..... years of age, his widow, who is entitled to dower in said premises; that the defendants, E. F., G. H., I. J. and K. L., are the only children and heirs-at-law of said decedent, having the next estate of inheritance from said C. D., deceased, in said premises, that the defendants, O. P. and Q. R., claim to have a mortgage lien in said premises. The plaintiff therefore prays that the dower of said M. N. in said premises may be assigned and set off to her, unless she file her answer herein and consent that the same

[34] § 10776 G. C.

may be sold free from her said dower, homestead and other rights she or defendants may have therein; that the rights, interests and liens of the said O. P. and Q. R. may be fully determined, adjusted and protected according to equity, and that your petitioner may be authorized and ordered to.....sell said real estate subject to said dower, unless the widow release the same according to the statute in such case made and provided, and for all other proper orders and relief in the premises.

.....

Atty. for Pltf.

The State of Ohio, Clark County, ss.

A. B., the within named plaintiff, being duly sworn, says that the various matters and things set forth in said petition are true, to the best of his knowledge and belief.

.....

Sworn to before me and signed in my presence this.....day of.....
.....190...

.....

Probate Court, Clark County, Ohio.

A. B., Administrator of C. D., Pltf., vs. E. F., et al., Def'ts. — Petition to sell Real Estate

PRAECIPE.

To the Probate Judge:

Issue summons for said E. F., who resides at 41 Section St., Springfield, Ohio, and I. J., a minor over fourteen years of age, and K. L., a minor under fourteen years of age, who resides with M. N., the mother, at 68 Western St., of said city, and for defendants, directed to the sheriff of said county (or plaintiff), returnable according to law. G. H. will enter his appearance.

.....

Pltf. Atty.

§ 837. Filing the petition.

Having examined the petition and ascertained that the property is correctly described, and all lien holders and others having any claim on the property are made parties, the petition should be filed in the Court in which the proceedings are to be had. A cautious lawyer will not rely upon the Court to make a proper journal entry; indeed, it is not safe to do so, for all Courts and their deputies do not possess an equal degree of ability and carefulness. The petition should have attached a praecipe setting out the names of parties defendant, with their place of residence, who are to be served with process. As Probate Courts are always in session, a very proper practice is to set the case for hearing the first day at which the same can be heard after answer day. The summons is returnable the second Monday after its date,[35] and the answer must be filed on

[35] § 11283 G. C.

or before the third Saturday after the return day of the summons. The earliest date at which the case could be heard then, would be the first Monday after the third Saturday from the return day of the summons. Likewise, if some of the parties were to be served by publication, such fact might be provided for in the entry. Although it seems that there is no necessity for an entry for that purpose. The entry may be in the following form:

(*Title.*)

This day come A. B., administrator (or executor) of the estate of C. D., and filed herein his petition for the sale of the real estate therein described to pay debts of the said deceased. And on his motion summons is issued for E. F., M. N., O. P. and Q. R., adults, and I. J., a minor over fourteen years of age, and K. L., a minor under fourteen years of age, directed to the sheriff (or plaintiff) and returnable according to law. The Court is informed that G. H. will enter his appearance and no summons for him is issued. The said cause is set for hearing on the.....day of....., that being the first day at which the same can be heard after answer day.

If some of the parties are non-residents, the following might be added:

And it appearing by the affidavit of the plaintiff that O. P. and Q. R. are non-residents of the State of Ohio, and that they are such as are authorized by statute to be served by publication, it is ordered that they be notified by publication as provided by law.[36]

§ 838. Service. Waiver of. Consent of guardian. "Service, actual or constructive, shall be made as in other civil actions; except, that if all persons in interest consent in writing to the sale, service or process may be dispensed with. Legal guardians may sign such consent for their wards, except guardians of the person only of minors; or, unless otherwise ordered by the court, the summons may be served by the plaintiff or other person, by copy personally. The return of such service must be verified by the oath of the person who makes it. All proceedings in the action in either court shall be the same as in other civil actions, except as otherwise herein provided." [R. S. § 6143.][37]

[36] See § 1623, Assignees.

[37] § 10781 G. C.

A guardian can not enter an appearance for his ward unless authorized by statute. Roberts vs. Roberts, 61 O. S. 96.

Before a valid decree can be made it must affirmatively appear that the minor defendants have been served. Moore vs. Stark, 1 O. S. 369.

See § 1378 *et seq.*, § 1415.

If the action is brought in the Court of Common Pleas under the code, service may be made as provided by the Civil Code. Calkins vs. Johnson, 20 O. S. 539.

See § 843 for form of waiver.

Heirs who are idiots, are made parties to the record by the filing of an answer and cross-petition by their guardian, wherein the allegations of the petition are admitted, service of summons waived and the court is asked to grant the prayer of the petition. Legal vs. Eagle Bldg. Co., 11 O. C. C. (N.S.) 118; 31 O. C. C. 519.

§ 839. Actual service.

There are two kinds of service or notice provided for by law. One is actual, and the other constructive. Actual service is where the summons is served upon the party by the sheriff or as provided in the above section, by the plaintiff or some other person, when directed so to do by the Court. If the summons is to be served by the sheriff, it is made in the usual manner. That is, a copy of the summons, with the endorsements thereon, is delivered to the defendants personally or by leaving a copy at his usual place of residence.[38]

The statute now requires the same kind of service to be made upon a minor over fourteen years of age as if under that age.

§ 840. Constructive service.

Constructive service is service which is made by publication, and the instances in which service may be made by publication are defined by statute.[39*]

When service by publication may be made. "Service may be made by publication in any of the following cases:

1. In an action for the recovery of real property or of an estate or interest therein, when the defendant is not a resident of this state or his place of residence can not be ascertained;
2. In an action for the partition of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;
3. In an action to foreclose a mortgage or to enforce a lien or other incumbrance or charge on real property, when the

[38] § 11286 G. C.

[39] § 11291 G. C.

Statute now requires that in all cases both guardian or parent, etc., and ward must be notified. 95 v. 235.

See § 1415, Service of notice, Gdns.

See § 1623, Assignees.

See § 1691, Condemnation proceedings.

See Kinkead's Court Pract. 118.

[39*] The reader is referred to the statute and works of general practice as to matters pertaining to constructive or actual service.

defendant is not a resident of this state or his place of residence can not be ascertained;

4. In an action to compel the specific performance of a contract for the sale of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

5. In an action to establish or set aside a will, when the defendant is not a resident of this state or his place of residence can not be ascertained;

6. In an action by an executor, administrator, guardian, or trustee seeking the direction of the court respecting the trust or property to be administered and the rights of the parties in interest, when the defendant is not a resident of this state or his place of residence can not be ascertained;

7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence can not be ascertained;

8. In an action against a corporation organized under the laws of this state, which has failed to elect officers or to appoint an agent upon whom service of summons can be made, and which has no place of doing business in this state;

9. In an action which relates to or the subject of which is real or personal property in this state, when the defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is not a resident of this state, or is a foreign corporation, or his place of residence can not be ascertained;

10. In an action against an executor, administrator, or guardian who has given bond as such in this state, but at the time of the commencement of the action is not a resident of this state or his place of residence can not be ascertained;

11. In an action or proceeding for a new trial or other relief after judgment, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when the defendant is not a resident of this state or his place of residence can not be ascertained;

12. In an action where the defendant, being a resident of this state, has departed from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent;

13. In a proceeding in error when the defendant has no attorney of record in this state and is not a resident of and absent from this state, or has left the state to avoid the service of a summons in error, or so conceals himself that it can not be served upon him." [R. S. § 5045.] [40]

When residence is known. "When in a case in which service may be made by publication, the residence of the defendant is known, it must be stated in the publication. Immediately after the first publication, the party making the service shall deliver copies thereof, with the proper postage, to the clerk of the court who shall mail a copy to each defendant, directed to his place of residence named therein, and make an entry thereof on the appearance docket. In all other cases the party who makes the service, his agent or attorney, before the hearing, must make and file an affidavit that the residence of the defendant is unknown and can not with reasonable diligence be ascertained." [R. S. § 5045.][40*]

Affidavit necessary. "Before service by publication can be made, an affidavit must be filed that service of summons can not be made within this state on the defendant sought to be served, and that the case is one of those mentioned in the next preceding section." [R. S. § 5046.][41]

The affidavit to obtain such publication may be as follows:

(*Title.*)

A. B., the above named plaintiff, being duly sworn, says that E. F., defendant in this action, is a nonresident of the State of Ohio, and service of summons can not be made upon him in this State, that the residence of the defendant, G. H., is unknown and can not with reasonable diligence be ascertained, and service of summons can not be made upon him, and that the case is one of those mentioned in § 11292 of the General Code of Ohio.[42]

§ 841. **How publication to be made.** "The publication must be made for six consecutive weeks, in a newspaper printed in the county where the petition is filed. When made in a daily newspaper, one insertion a week shall be sufficient. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer." [R. S. § 5047.][43]

Service by publication shall be deemed complete at the date of the last publication.[44] The following may be used as a form of notice of publication:

40 § 11292 G. C.

40* § 11294 G. C.

41 § 11293 G. C.

42 Constructive service may be made on a lunatic. Sturges vs. Longworth, 1 O. S. 544.

An affidavit for service by publication made before the attorney for plaintiff is void. Hunt vs. Hunt, 27 Dec. 153; 14 N. P. 522.

There must be a proper affidavit or the adem is void. Endel vs. Leibrock, 33 O. S. 268, Whitehead vs. Post, 2 Dis. 468; Welch vs. Loan Co., 165 Fed. 572.

A paper devoted principally to proceedings in court but giving more or less general news of the day, is a "newspaper." Bigalke vs. Bigalki, 19 C. C. 331; 10 C. D. 395.

43 § 11295 G. C.

44 § 11296 G. C. This means the sixth insertion. Case vs. Oil Co., 40 O. S. 636, and the answer would be the third Saturday thereafter, even if the last day or the sixth insertion was on Friday. 1 Bates' Pl., p. 613.

(*Title.*) Case No.....

Probate Court, ...Court, Ohio.

E. F., who resides at ..... county, State of Indiana, and G. H., whose residence is unknown, will take notice that A. B., administrator of the estate of C. D., deceased, on the.....day of..... ....., 190.., filed his petition in the Probate Court of ....county, Ohio, alleging that the personal estate of said decedent is insufficient to pay his debts and the charges of administering his estate; that he died seized in fee simple of the following described real estate, to-wit: (Here describe the real estate.) That Q. R., the widow of said decedent, is entitled to dower in said real estate, and that S. T. claims to hold a mortgage thereon for.....dollars. The prayer of the petition is for the assignment of dower in said property, that S. T. be required to answer, setting forth the particulars of his mortgage lien thereon and that said property be sold to pay the debts and charges aforesaid. E. F. and G. H. are hereby notified that they have been made parties-defendant to said petition and that they are required to answer the same on or before the.....day of.....190...[45]

ADMINISTRATOR OF ESTATE.

§ 842. Copy of newspaper to be mailed.

The statute further provides[46] that when the residence of a defendant is known, it must be stated in the publication, and immediately after the first publication, the party making the service shall deliver to the clerk[47] copies of the publication with proper postage thereon, and the clerk shall mail a copy to each defendant, directed to his residence named therein, and make an entry thereof on the appearance docket. It will be seen therefore that a duty devolves upon both the parties, and the court, in mailing copies, if the defendant's residence is known. In such cases it would be proper to make a journal entry of the fact, which may be in the following form:

JOURNAL ENTRY.

(*Title.*)

This day came A. B. and delivered to the clerk of this Court copies of

Publishing for the unknown heirs of P. is void, if P. be living. Archer vs. Brushnudit, 5 N. P. 349; 5 Dec. 340.

[45] See § 1415, Service of notice.
See § 1623, Assignments.
See § 1693, Condemnation.

Proceedings when residence of heir or devisee is unknown. When an heir or devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him; and the Court, or a judge thereof, shall make an order respecting the publication of notice, but the order shall require not less than six week's publication. [51 vs. 57, § 76; (S. & C. 965); R. S. of 1880, § 5053; 79 vs. 26; 94 vs. 275, § 11298 G. C.]

A proceeding against unknown heirs is valid if statute complied with. Sullivan vs. Weaver, 10 O. 275; Rhodes vs. Gunn, 35 O. S. 387.

Action against "the heirs of P., deceased," does not estop the children if P. is not deceased. Archer vs. Brockschmidt, 5 N. P. 349; 5 Dec. 348.

[46] §§ 11292, 11294 G. C.

[47] The Court or clerk must do the mailing, not the party.

The publication is deemed complete on the day of the last insertion, and the time set for answer should be the third Saturday thereafter.

The Morning Sun, a newspaper of general circulation in ..... County, Ohio, containing a publication of notice of the pendency and time of hearing of this action. And one copy of the said newspaper was this day mailed to ....., by the Judge (or clerk of this Court).

The publishers of such notice must also file an affidavit with a copy of such notice, which should be made a part of the proceedings in the case.

§ 843. Waiver.[47a]

Summons may be waived by the parties in interest in several ways, provided they are possessed of the capacity to do the same. First they may acknowledge on the back of the summons or petition a waiver of the same,[48] or they may by a separate paper enter their appearance and waive the issuance of summons, or they may do some act in the proceeding that the court will construe as an entry of appearance.[49] The statute further provides that legal guardians may sign such consent for their wards.[50] But guardians *ad litem* can not enter such appearance or waive notice, or issue of summons.[50*]

The following may be used as a waiver of summons, and consent to sell:

(*Title.*)

We, the undersigned, parties-defendant to the petition in said cause, waive issuing and service of summons and voluntarily enter our appearance as such defendants, and we do hereby consent to the sale of the real estate described in said petition.*

§ 844. When guardian ad litem to be appointed. Such guardian can not waive notice, etc. "Unless the prayer of the petition for a sale is contested, it shall not be necessary to appoint guardians *ad litem* for infant heirs or devisees or other persons having the next estate of inheritance from the deceased who are defendants. No such guardian can waive notice or service of summons." [R. S. § 6144.][51]

47a Recently a statute has been enacted to permit service by registered letter, when the judges have made an order to that effect. See § 11297-1 G. C., 107 v. 653.

48 § 11287 G. C.

49 Fee vs. Big Sand Iron Co., 13 O. S. 563; Evans vs. Iles, 7 O. S. 233; Abernathy vs. Latimore, 19 O. 286; Mason vs. Embree, 5 O. 277; Maholn vs. Marshall, 29 O. S. 611; Watson vs. Paine, 25 O. S. 340; Schafer vs. Waldo, 7 O. S. 309.

50 § 10781 G. C., § 838.

Unless consent is given, the order of sale can not be made until after answer day.

A guardian can not enter the appearance of his ward in a proceeding where he sustains an adverse interest. Ream vs. Wolls, 61 O. S. 131. And in no case can a guardian enter the ward's appearance and waive service unless so authorized by statute.

See § 1623.

50* § 10782 G. C., § 844.

51 § 10782 G. C.

See § 838 for power of guardian to enter appearance of minor defendant.

It is generally provided by statute that the defense of an infant must be by a guardian for the suit, who may be appointed by the Court in which the action is prosecuted, or by a judge thereof, or the Probate Judge.[51*]

The above section of the General Code makes an exception, that if the prayer of the petition for sale is not contested, then no guardian *ad litem* need to be appointed, but if the prayer of the petition for sale is contested, then the guardian *ad litem* must be appointed; and a proceeding in which a guardian *ad litem* was not appointed, would not be binding upon such infant. But the judgment could probably not be impeached without showing some fraud or unfairness.[52] It would seem under the statute, that if at any stage of the proceedings it appears that the proceedings are to be contested, a guardian *ad litem* ought to be appointed. It is the duty of the Court to require the guardian *ad litem* to faithfully discharge his obligations.[53]

It may not be improper to call the Court's attention to the provisions of the statute in this respect. The matter of appointing a guardian *ad litem,* I fear is too often regarded as a mere matter of form. Attorneys likewise seem to be imbued with the idea that it is for the purpose of complying with a statutory provision. Such is not its object. The object and intent of the statute is, that such attorney should carefully investigate the rights of his ward and should look after them with a higher conscientious regard of his duty to a client than is required in ordinary cases. This minor defendant by reason of want of years is unable to know his rights or protect them. Attorneys should not be affronted if the Court in such cases makes direct inquiry whether they have carefully looked into the infant's rights.[54] The answer to be put in by such guardian *ad litem* is a general denial.[55]

[51*] See § 11252 G. C. See § 1384, Actions against ward.
See § 1383, Actions for ward.

[52] Johnson vs. Pomeroy, 31 O. S. 247.
See Massie vs. Matthew, 12 O. 351.
The guardian *ad litem* has a right to take an appeal of the case, if decided adverse to his client. In this sense he is a party to the suit. Harper vs. Cilley, 4 C. C. (N.S.) 15 Cir. D. 770; 25 O. C. C. 770; affirmed 74 O. S. 447.

[53] § 11250 G. C.

[54] Long vs. Mulford, 17 O. S. 485.

[55] § 5074 R. S.
See Biggs vs. Bickel, 12 O. S. 49.
Judgment can only be rendered against an infant upon proof—not

§ 845. How appointed.

If the infant is fourteen years of age he may within twenty days after the return of the summons or service by publication, make application to have a guardian *ad litem* appointed. If he is under age or neglects to make an application within such twenty days, the application may be made by the plaintiff or a friend of the infant. But the appointment cannot be made until after service of summons or publication.[56]

The following may be used as a form for such purpose:

.....

Now comes I. J., a minor defendant over fourteen years of age, and applies to the Court for the appointment of a guardian *ad litem* for him in this cause, and asks that X. Y. be appointed said guardian.

.....

FORM OF ENTRY OF APPOINTMENT.

(*Title.*)

This cause came on this day to be heard, and it appearing to the Court that I. J., a minor defendant over fourteen years of age, has been duly served with process herein and has filed in this Court an application to have X. Y. appointed his guardian, and K. L., a minor under fourteen years of age, having been properly served with process, it is hereby ordered that X. Y. be appointed guardian *ad litem* of said minor defendants, and thereby X. Y. having appeared in open Court accepts said appointment.

The following may be used as a general form for an answer of a guardian *ad litem*. If the minor has any other defense which could be better reached by a detailed statement of facts, the guardian *ad litem* should not feel himself limited to the mere formal denial.

FORM OF ANSWER.

(*Title.*)

Now comes K. L. and I. J., minor defendants hereto by X. Y., guardian *ad litem* heretofore appointed in this cause by this Court, and for answer to the petition deny all the allegations therein contained prejudicial to said defendant, and further say that they are of tender years and not acquainted with the law in such cases, and therefore asks the Court to protect their rights in this case and for such relief as may be just.[57]

by default. Massie's Heirs vs. Donaldson, 8 O. 377; Randall vs. Turner, 17 O. S. 262.

It is error to render a decree without an answer from the guardian *ad litem*. Sturges v. Longworth, 1 O. S. 545.

[56] § 11253 G. C.

The appointment can not be made until process is properly served. Keys vs. McDonald, 1 Handy 287.

It would seem that if a minor is over fourteen years of age then no guardian *ad litem* could be appointed, on any person's application, until the expiration of twenty days from return of summons, except the minor. If he is under fourteen, then the appointment can be made on application of plaintiff or his next friend, any time after return of summons, or the date of the last publication.

[57] An insane person is defended in the same way as a minor. Such an answer requires proof of all the material allegations in the administrator's petition. Woods vs. Butler, 23 O. S. 520. See notes previous section.

It need not be verified. § 11725 G. C.

§ 846. Other pleadings.

The subsequent pleadings that may be filed in an action to sell real estate would be governed entirely by the Code of Civil Procedure. Matters of defense would be set up by answers, or the petition might be demurred to or other defects taken advantage of by motion. As before stated, a person would not be in default for answer until the expiration of the third Saturday after the second Monday from the time the summons was issued, or when service is made by publication after the date of the sixth insertion in the newspaper. If the widow desired to have the land sold and take her dower interest in the proceeds, or if she wished to assert her right to five hundred dollars in lieu of a homestead, it should be done by answer. The widow's right to dower will be protected even though she may not have filed an answer where the same is manifest.[58]

The following may be used as a form for the answer of the widow, the first being where there are no homestead rights claimed:

ANSWER OF WIDOW.

Probate Court, Clark County, Ohio.

..... }
..... }
of the Estate of ..... } No.....
deceased, Pltf. } Proceedings to Sell Real Estate.
vs. } ANSWER OF WIDOW.
..... }
et al. Deft. }

And now comes....., one of the defendants in the above entitled cause and voluntarily enters h....appearance herein and for answer to the petition in this case filed, says that..he is the widow...of said....., deceased, and as such is entitled to..... .....dower in the premises described in said petition, that h...age is

Must deny all material allegations prejudicial to defendants.

For insane widow, see §§ 12018, 11322, 12020 G. C.

§ 11326 G. C. provides what the answer of the guardian *ad litem* should contain.

See § 1623.

Under the Act of 1824 no mode was prescribed for notice, etc., and the Court could make such notice it deemed proper. Briggs vs. Bickel, 12 O. S. 49.

And a sale might have been sustained without service on minors. Lewis vs. Lewis, 15 O. 715.

See § 1694. The compensation of a guardian *ad litem* is fixed by the Court and taxed as part of the costs.

§ 12250 G. C.

[58] McDonald vs. Aten, 1 O. S. 293.

.....years, and..he freely consents to said sale as prayed for, and waives the assignment of dower in said premises by metes and bounds, or in rents and profits and asks the Court that said premises may be sold free from h...dower estate therein, and that the value of such..... dower estate may be allowed and paid h...in lieu thereof out of the proceeds of the sale, such sum of money as the Court deems the just and reasonable value of h...dower interest in said real estate.[58*]

.....

The State of Ohio, Clark County, ss.

.....being duly sworn, says that the statements in the foregoing answer are true as he verily believes.
Sworn to before me and signed in my presence this.....day of..... .....190...

.....
Probate Judge.

ANSWER AND CROSS-PETITION OF WIDOW.

(Dower and Homestead.)
Probate Court, Clark County, Ohio.

.... of the Estate of ..... deceased. Pltf. ..... et al. Defts.	No..... Petition to Sell Real Estate. Answer and Cross-Petition of Widow.

And now comes....., one of the defendants in the above entitled cause, and voluntarily enters her appearance herein, and for answer to the petition in this case filed, says that she is the widow of said..... ....., deceased, and, as such, is entitled to.....dower in the premises described in said petition, that her age is.....years, and .....she freely consents to said sale as prayed for, and waives the assignment of dower in said premises by metes and bounds, or in rents and profits.

And, by way of cross-petition, this defendant says, that said decedent left her as his widow and composing a part of his family; that she is still his widow and unmarried; that, at the time of his death, she with her said deceased husband, resided on said premises in the petition described, and were using and occupying the same as their family homestead; that she is still residing thereon and using and occupying the same as such; and that she is entitled to a homestead as such widow, in the lands of her said deceased husband, under the laws of Ohio in such cases. (This defendant further says that she joined with her said husband as his surety only, in the execution of said mortgage to said defendant, which said mortgage precludes the assignment of a homestead to her by metes and bounds as provided by law), and, that it is necessary to sell said premises to pay said mortgage lien.

Wherefore this defendant asks that said premises may be sold free of her dower and homestead therein, and that the value of such dower estate may be allowed and paid her in money out of the proceeds of such sale as the Court may deem the just and reasonable value thereof, and that she be allowed the residue of the proceeds not exceeding five hundred dollars in lieu of her homestead, after the satisfaction of said mortgage lien and the costs of sale herein, and for all relief to which she may be entitled.

.....

58* § 12018 G. C.

The State of Ohio, Clark County, ss.

The within named defendant being first duly sworn, says that the statements in the foregoing answer and cross-petition are true as she verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of.....

.....[59]

§ 846a. Dower and homestead rights.

In the sale of a deceased married person's real estate the matter of fixing the surviving consort's rights therein often becomes one of considerable difficulty. If the real estate was not occupied as a homestead there is little trouble. In such cases, widow and widower stand in a like position; that is, they are entitled to have a one third set off to them in metes and bounds. If it cannot be set off it must be assigned in the rents and profits.[58a]

If there are liens that preclude the assignment in metes and bounds, or the property is such that this cannot be done, it is always advisable for the surviving consort to file an answer waiving such assignment, and consent that it be sold free of the dower interest.

If the deceased left a family homestead, that is a place occupied by himself and family as a home, and left a widow or minor children, a homestead is to be set off.[58b] This seems to be mandatory and one court has so held; it was however, an obiter dictum.[58c] In that case it was merely held that the allowance could be made *on application* while the proceeds were still in court. But Section 10795 does not define what the homestead right is. This is defined by provisions of the general homestead act, and that a family homestead not exceeding $1000.00 in value is to be set off[58d] and under this general statute, it is considered as a personal priviledge.[58e] And that it may be lost on failure to demand it.[58f]

It is laid down as a general proposition that one who is a party to a suit in which a homestead right is available as a defense, must interpose it, and if he fails or neglects to do so, the judgment in such suit will bar his subsequent assertion of

[58a] § 12011 G. C.

[58b] § 10795, §857a.

[58c] Jones vs. Line, 6 N. P. 518.

[58d] § 11730 G. C.

[58e] Conley vs. Chilcote, 25 O. S. 320; Schuler vs. Miller, 45 O. S. 325.

[58f] McCombs vs. Thompson, 42 O. S. 139; Schuler vs. Miller, 45 O. S. 330.

it.[58g] And if a debtor desires to have the benefit of the exemption act he must claim it; if not, his silence will be construed as a waiver.[58h]

Another section of the general homestead law[58i] specifically provides that the homestead shall be set off on *application of the party interested.* So I think the law to be, that to secure the benefit of the homestead exemption in a proceeding to sell real estate by an administrator, unless the same is claimed by either the widow or children, it is waived, and it need not be set off, etc.

Another section of the homestead law provides if the homestead is so covered with liens as to preclude the setting of the homestead by metes and bounds therein, the sum of $500.00 may be allowed, out of the proceeds, after payment of the liens.[58j] This I think also must be claimed or it will be lost.[58k]

If the homestead is not subject to liens, or the lands to be sold are not of a homestead character, nothing in money can be allowed the widow or children.[58l]

If the homestead consists of a house and lot which will not bear division without manifest injury, the widow and children might possibly be allowed to occupy it on payment of a reasonable rent not to exceed $100.00 annually, as the appraisers might allow.[58m] Thus it would be seen, that by reason of the limited and uncertain length of time that a homestead may be enjoyed, it is not often claimed in the sale of lands by an administrator.

When the widow dies or re-marries, and no minor child occupies the premises, and the premises have not been sold, they may then be sold.[58n]

The statute specially provides the order in which the homestead shall be set off. If there is a homestead, then this is first to be set off—by metes and bounds—to the value of $1000.00; then the dower in the whole, all the lands in which she is entitled to dower. When this is done, the premises are to be appraised subject to such dower and homestead rights, and may be thus sold.

58g 21 Cyc. 619.

58h Green vs. Fisher, 7 Bull. 133.

58i § 11734 G. C., § 1599, note.

58j § 11737 G. C.

58k I know there may be some questions about a minor waiving his right, but if he is made a party, and does not assert it, he is estopped.

58l Bliss vs. Fuchman, 6 O. C. C. 203; 3 C. D. 416; Wolverton vs. Paddock, 3 O. C. C. 488, 2 C. D. 279.

58m § 11735 G. C. See Powell vs. Hamilton, 7 Rec. 605.

58n Taylor vs. Thorn, 29 O. S. 569.

It has been held that where an executor sells real estate under a power in a will, that the same homestead rights exist as where action to sell is brought in the probate court.[58o]

§ 847. When Court to order real estate to be sold. Terms of sale. "If the court is satisfied that it is necessary to sell real estate of the deceased to pay his debts, it shall order so much thereof as is necessary for their payment to be sold by the executor or administrator, for cash in hand, or upon deferred payment, not exceeding two years, with interest." [R. S. § 6147, 109 v. 12.][60]

§ 848. Proof required.

If no contest is made and the time for answer has passed, and the Court is *satisfied* that it is necessary to sell the real estate to pay the decedent's debts, it shall order it to be sold or

[58o] Wanzer vs. Smith, 2 W. L. M. 432.

However, the real estate must have been *sold to pay debts*, etc., and application made for the exemption.

See § 868, Assignment of dower.

See § 867, When entitled to homestead.

[59] See § 943 *et seq.*; Dower, § 1623.

In a proceeding by an administrator to sell land to pay judgments, the heir may, by cross-petition, attack the judgments for fraud, and it is error to hold them conclusive of the fact and amount of the indebtedness, thus precluding inquiry into the alleged fraud and collusion. Conway vs. Duncan, 28 O. S. 102; Donley vs. Shields, 14 O. 359.

On petition to sell land to pay judgment creditors, an heir who has an interest may, by cross-petition, attack the judgment for fraud. An heir who had sold the land on warranty still has such interest. Sidener vs. Hawes, 37 O. S. 532.

Such judgment is conclusive evidence of indebtedness of the estate, and can not be collaterally impeached except for fraud or mistake, or perhaps culpable negligence of the administrator in defending. Faran vs. Ewing, 17 O. S. 242.

Denial of the validity of the debts by a surviving husband, subject to whose curtesy a sale is asked, is no resistance to the order, because the Probate Court can not adjudicate the validity of debts, and because his interest is not affected. Pirmann vs. Gerhold, Goebel, 142.

The remedy is for the party to serve notice on the administrator to reject the claims under § 6098 R. S., § 561.

See § 947.

When a cross-petition sets up matters which are not drawn in question in the petition and seeks affirmative relief against a co-defendant, of a nature different from that sought in the petition, summons must be issued therein. Southward vs. Jamison, (Sup. Ct.), 48 Bull. 531.

[60] § 10786 G. C.

Can not order sale subject to liens. Stone vs. Strong, 42 O. S. 55. But where the administrator's report of sale showed that the purchaser took the premises subject to a mortgage, which she assumes and agrees to pay, the grantee of such purchaser will take the property subject to such mortgage, even though the mortgagee did not set up the mortgage upon these particular premises in an action to sell them and there was no finding of the Probate Court of the amount due. Savings & Loan Co. v. Weber, 21 O. C. C. (N.S.) 130. See Leist vs. Savings & Loan Co., 79 O. S. 472.

As a general rule, it is said it may be sold subject to incumbrance. 18 Cyc. 695.

so much as necessary. "It must clearly appear," says Judge Woerner, "that the personal assets are, at the time when the application is heard, insufficient to pay the debts and expenses of administration; and that they were so at the time of the grant of letters, or have become so in the course of administration for causes beyond the control of the executor or administrator and without fault on the part of the creditor or person demanding the sale. Where the personal property was originally sufficient for the payment of the debts, but became insufficient in consequence of *devastavit* or neglect of duty by the executor or administrator, the distributees or legatees may insist on this as a defense against an order for the sale of lands devised or descended; and the remedy of creditors will be against the administrator personally and the sureties on his official bond, and not against the land.[61] But if the personal assets, although ample at the time of the grant of letters become insufficient in the course of the administration, for any cause not arising out of the fault of the executor or administrator, so that neither he nor his sureties can be held liable, and the creditors have no other remedy, they may resort to the Probate Court for an order to sell the real estate for the payment of their claims.[62]

Upon the question whether a *devastavit* or neglect of the executor will be a defense of the heirs against the sale of the land, is a question upon which the Courts are not in accord. Some of the Courts holding that creditors are not bound for the wrongful acts of the administrator, and although he may be liable on his bond, and may have the real estate applied on their debts, there must be some proof of the allegations of the petition if demanded, showing the necessity of the sale.[63]

As against the interest of a minor, the Court must hear proof, and the guardian cannot admit the indebtedness of the estate.[64]

[61] The decisions are not uniform on this.

[62] Woerner on Admin. 1040. Carr vs. Hull, 46 Bull. 271; 47 Bull. 91. See § 818. Power of court.

[63] Martin vs. Starr, 7 Ind. 224; Gavin vs. Graydon, 41 Ind. 559.

[64] See § 838.

Thompson vs. Doe, 8 Blackf. 336; Clark vs. Thompson, 47 Ill. 25;

The fact, however, that the administrator has failed to allow a claim within the time required by the statute does not prevent proof that it is due and owing.[65] If the administrator has paid the debt, he may be subrogated for the creditor, and that is sufficient proof of indebtedness.[66] He must show that the debts he paid were valid and not barred by the statute of limitation.[67] The evidence must show that the personal assets are not sufficient to pay the debts or costs.[68] If the question of title is put in issue, proof of the intestate's title is necessary.[69]

§ 849. Trial if contested.

If the proceedings are contested, then the same rules of evidence and method of procedure should be followed as is proper under the Code of Civil Procedure. If the issues raised are such as are triable by the Court without intervention of a jury, the Court should pass upon them. If, however, the issues are such as by right, are triable by a jury and a jury is demanded by any of the parties, the judge should issue an order for the clerk of the Court of Common Pleas to draw a jury from the jury box, and proceed to the trial in the same manner as other jury trials are conducted in the Court of Common Pleas.[70]

§ 850. The estate of the heirs in the land set off to the widow may be sold. "The court may include in its order of sale the title of the heirs or devisees of the deceased in the premises set off to the widow or widower for dower, which may be sold subject to his or her life estate therein." [R. S. § 6148.][71]

Hooper vs. Hardie, 80 Ala. 114; Fridley vs. Murphy, 25 Ill. 146; Doe vs. Anderson, 5 Ind. 33; Timmons vs. Timmons, 6 Ind. 8; Quarles vs. Campbell, 72 Ala. 64.

[65] *In re* Haxtun, 102 N. Y. 157.

[66] Woolley vs. Pemberton, 41 N. J. Eq. 394; *Ex parte* Street, 1 Bland Ch. 532, note; Pendergass vs. Pendergass, 26 S. C. 19; Ingram vs. Ingram, 5 Heisk. 541; Livingston vs. Newkirk, 3 Johns. Ch. 312; Gist vs. Cockey, 7 Har. & J. 134.

[67] Gilchrist vs. Rea, 9 Paige 66; Heath vs. Wells, 5 Pick. 140.

[68] Thompson vs. Joyner, 71 N. C. 369; Newcomer vs. Wallace, 30 Ind. 216.

[69] Jackson vs. Weaver, 98 Ind. 307.

[70] See § 409, for order and form to draw jury

See § 1701 *et seq.*, for impaneling jury, etc.

[71] § 10787 G. C.

§ 851. The whole to be sold when a partial sale would injure the residue. "If it be represented in such petition and appears to the court that it is necessary to sell part of the real estate, and that, by such partial sale, the residue of the estate, or some specific part or piece thereof, would be greatly injured, the court may order a sale of the whole of the estate, or of such part as it deems necessary and for the interest of all concerned therein." [R. S. § 6149.][72]

It is the general practice to order all of the entire tract to be sold unless it appears to the Court that a part could be sold without injury to the remainder. And as a general rule the Court orders the premises in the petition described to be sold.

§ 852. Judgment and order of sale.

In a great many cases it will happen that the real estate has been appraised with the personal property and sufficient bond has been given and there is no widow or widower or if there be one, she has filed her answer. In such cases the following might serve as a form of entry:

(*Title.*)

This day this cause came on to be heard upon the petition of the plaintiff, filed for the purpose of having the real estate therein described sold to pay the debts and costs of administration of the deceased; and also upon the return of summons issued, and the answer of X. Y., guardian *ad litem*, appointed for the minor defendants, and the answer of O. P. and Q. R., defendants herein named, as well as by the answer of M. N., widow of said deceased. And the Court being fully advised in the premises finds that all the defendants herein have been legally served with process and that G. H. has entered his appearance herein in writing; and that all have been notified of the pendency and prayer of the petition as prescribed by law. And the Court further finds that M. N., widow of the said C. D., deceased, waives as in her answer herein set forth, assignment of her dower in said premises in metes and bounds, and desires that the same may be sold clear and free of her said dower, and that the Court set off to her out of the proceeds of the sale of said premises such a sum of money as may be just and reasonable in lieu of her said dower interest; and the Court finds that the allegations of said petition are true and that it is necessary to sell the real estate in the petition described to pay the debts of the deceased and costs of administration.

The Court further finds that the real estate in the petition described was appraised by the appraisers of the personal estate at..... dollars, and the Court also finds that the bond heretofore given by the plaintiff as administrator (or executor) of the estate of C. D. in the

[72] § 10788 G. C.

See § 858 for entry where appraisement is required.

An order of sale is essential to title. Newcomb vs. Smith, W. 208.

amount of.....dollars is sufficient. It is therefore ordered that further appraisement and additional bond be dispensed with. * It is now ordered that the said A. B. as such administrator proceed to advertise for sale on the premises (or at the door of the Court House) said real estate for four consecutive weeks in a newspaper of general circulation in said county, in which said land is situated and he is further ordered to sell the same at not less than two-thirds of the appraised value and on the following terms, to-wit: One-third cash in hand and the balance in one and two years from day of sale, deferred payments to be secured by mortgage on the premises sold and to bear interest. And said plaintiff is ordered to make return to this Court immediately after such sale. (If it is desired to employ an auctioneer, or have printed posters, the following should be added:)

That said A. B. is authorized to expend.....dollars in employing an auctioneer to cry said sale, and is also authorized to expend .....dollars in printing and posting bills, advertising said sale.

(If he desires to sell said premises at private sale, the above entry should be changed, and the following substituted from the star mark.)

And it further appearing to the Court that it would be to the interest of the said estate to sell the real estate described in the above petition at private sale, it is now ordered that said A. B. as such administrator proceed to sell said real estate at private sale at not less than the appraised value thereof in the following terms (here insert terms).[73]

§ 852a. Entry of appraisement—Dower—Homestead.

(*Title.*)

This day this cause came on to be heard upon the petition of plaintiff, filed for the purpose of having the real estate herein described, sold to pay debts and costs of administration of the deceased; and also upon the return of summons issued and upon the answer of ....., widow of said deceased; and upon the answer of ....., only heir at law of said deceased, and the evidence; and the court being fully advised in the premises, finds that all defendants herein have been legally served with process, and that they all have been notified of the pendency and prayer of the petition as prescribed by law.

And the court further finds that the allegations of the petition are as to the debts and liabilities true and that it is necessary to sell the real estate in the petition described to pay the debts of deceased and the costs of administration.

And the court further finds that ....., widow of said deceased, is entitled to dower in said premises, and that by her answer here she elects to have allowed to her, in lieu of her said dower, such sum of money, out of the proceeds of the sale, as the court deems a just and reasonable value, of her dower interest therein.

And the court further finds that all the allegations in the answer and cross-petition of said ....., as to her right to have a homestead by metes and bounds set apart in said premises are true.

The court further finds that said ....., as widow of said deceased, is entitled to have a homestead set apart to her in the premises first described in the petition, by metes and bounds, at the value of $1,000.00,

[73] See next chapter for entry ordering appraisement.

See § 1623, Assignments.

to-wit: The West parts of Lots Number 13 and Number 14 in ....., Ohio, abutting on High Street in said village, a distance of ninety (90) feet, and abutting on Main Street in said ..... a distance of one hundred (100) feet.

Wherefore, it is considered and ordered by the court that ....., ... and ....., three (3) judicious and disinterested men, freeholders of the vicinity, after being first duly sworn and upon actual view of the premises in said petition described, proceed to set apart to said ....., her homestead in the premises first described in the petition, and hereinbefore described, that they appraise said premises first described in the petition at its cash value, free from dower and subject to said homestead; and that said appraisers proceed upon actual view of the premises, to appraise the other real estate described in the petition at its cash value, and that an order issue to said executor accordingly.

In the event a homestead can not be set off by metes and bounds in the above described property, being parts of Lots Number 13 and 14 in ....., without manifest injury and inconvenience, and if the said appraisers find that the same will not bear division, they will appraise the same at its cash value, and fix the reasonable annual rental value of said homestead property, and make due return accordingly, to this court.

§ 853. Effect of order.

The order of finding made in a proceeding by an administrator or executor to sell real estate is the authority for such executor or administrator to consummate a sale. Without such order, his proceedings are absolutely void. It was formerly held, that the records of the Court must show that such order was made, and the mere endorsement on the back of the petition, and that petition was allowed, was not sufficient.[74]

It is no doubt still the law that there must be an order made by the Court, but it is now held that where the petition shows sufficient facts to have justified the order, the sale would not be set aside because the journal does not contain a record of such order. It will be presumed in such case that the order was made.[75] An order made after its jurisdiction was exhaust-

[74] Newcomb's Lessee vs. Smith, 5 O. 447; Wright, 208.

[75] Sidner vs. Hause, 37 O. S. 532.

In this case the proceedings were had in a Court of Common Pleas, and the Court held that because it was in a Court of general jurisdiction, it would be presumed that proof was sufficient to warrant the judgment.

While the Probate Court is not a Court of general jurisdiction, yet it is a Court of record, and these proceedings being a civil action,

ed could not be cured by a *nunc pro tunc* entry of a prior date.[77]

Under our present existing law, real estate cannot be sold for the payment of the debts of a deceased person, until it is ascertained that there will be a failure of personal assets. The Court must be satisfied of such failure, before it can, with propriety make an order of sale. Yet when a sale has been made, and its validity is questioned, the reviewing Court will go no further back than to inquire whether it was ordered by competent authority. "So far as the interests of the purchaser are concerned, we consider such orders equally available as judgments. The former can be no more impeached collaterally, because there was an abundance of personal estate to have satisfied all debts, than the latter can by showing that the evidence under which they were recovered was insufficient."[78]

Neither can an order be made after the sale has been made.[79] As a matter of course lands could not be sold which were not included within the petition,[80] or where there was no order of sale.[81] And the same would be applied to a sale made under an order of a foreign Court.[82] An heir might, however, by his conduct be estopped from attacking such a sale.[83] It was formerly the law that no order of sale could be issued until after an appraisement. The statute now provides,[84] that if no assignment of dower is required, the order of sale and order of appraisement may be made at the same time. As a matter of practice I would say, that it is better where an appraisement is not dispensed with to first make the order requiring an appraisement and then on the return of the appraisement make

there is no reason why the rule should not be applied to Probate Courts.

77 § 53.

Ludlow vs. Johnson, 3 O. 553.

78 Ludlow vs. Johnson, 3 O. 553.

79 Ludlow vs. Park, 4 O. 5.

80 Ludlow vs. Park, 4 O. 5.

81 Mawhorter vs. Armstrong, 16 O. 188.

82 Nowler vs. Coit, 1 O. 519.

83 Saldmons vs. Price, 13 O. 368. See Price vs. Johnson, 1 O. S. 390.

84 § 10793 G. C., § 856.

Where the proceedings are regular it will be presumed that infant heirs had notice and that the court had jurisdiction. Hamilton vs. Stewart, 5 N. P. (N.S.) 553; 18 Dec. 130.

an order of sale, this will tend to preserve a better order of regularity in the matter. It may not be necessary in this order of sale to make a finding, that the parties have all been properly served and have had due notice as required by law. But as a finding of such fact cannot be impeached collaterally it is very good practice to make a finding on that subject.[85] This, of course, would only be true where the proceedings show that the Court had jurisdiction, and in that respect shows the importance of having the petition set forth all the jurisdictional facts. Until the order of sale is made, the administrator or executor has no power to negotiate for such sale. Even under an order of private sale afterwards had, he could not be held to carry into execution a contract he had made to sell the real estate, which contract was entered into before the order was made. The order of Court in such case is subject to the general rules which govern judgments, that parties thereto are only concluded in the capacity in which they sue or are sued.[86] If the administrator is compelled to take back land once sold under a valid order, by reason of the failure of the purchaser to comply with the terms of his purchase, such land may be resold without any further order of Court.[87]

An order of sale made upon the application of an executor or administrator directing the sale of a decedent's real estate for the payment of his debts, is in the nature of a judgment and can not be collaterally impeached for mere errors or irregularities, if the Court making the order had jurisdiction of the subject-matter and of the person.[88]

§ 854. Costs when there are objections to granting order for sale. "If a party, in his answer, objects to granting an order for the sale of real estate, by an executor or administrator,

[85] Richard vs. Skiff, — O. S. 586.

[86] Barrett vs. Choen, 19 Ind. 56.

[87] Stowe vs. Banks, M. 27 S. W. 347.

But he had better report such fact and get an order.

[88] Pepper vs. Zahnzinger, 94 Ind. 88; Henry Prob. Prac., § 243.

Allowance made to the widow by way of dower or homestead can not be attached by filing exception to the account of the administrator, such would be a collateral attack. *In re* Hess, 33 O. C. C. 449.

and, on hearing, it appears to the court that either the petition or the objection thereto is unreasonable, it may award costs to the party prevailing on that issue." [R. S. § 6153.][89]

[89] § 10792 G. C.

CHAPTER XLVIII.

REAL ESTATE. APPRAISEMENT.

§ 855 Object and purpose.
§ 856 Appraisement when no dower is to be assigned.
§ 857 Appointment of appraisers. Duty as to dower and homestead. Copy of order to issue.
§ 857a Dower and homestead.
§ 857b Lands in two or more counties.
§ 858 Judgment and order to appraise, etc.
§ 859 Copy of order and form of return.
§ 860 Who may ' appraisers.
§ 861 Vacancy in office of appraisers; how filled.
§ 862 Valuation.
§ 863 Appraisers may be sworn by whom.
§ 864 Actual view.
§ 865 Employment of surveyor.
§ 866 Subdividing and platting.
§ 867 Assignment of homestead.
§ 867a Homestead for decedent's family.
§ 867b Money consideration in lieu of homestead.
§ 868 When entitled to homestead.
§ 869 Assignment of dower.
§ 870 Dower specially assigned to be a charge on the land.
§ 871 Report.
§ 872 Compensation of appraisers.
§ 873 Executor or administrator to give bond, etc.
§ 874 Form of bond.
§ 875 And give additional bond to secure further assets if required. I what Court.
§ 876 Confirmation of appraisement and order of sale.

§ 855. Object and purpose.

By appraisement of property, we mean an ascertainment of its just value; it is a preliminary proceeding to the execution of a judicial sale. An administrator's or executor's sale of real estate made otherwise than by authority of the will, is a judicial sale. It is said that an appraisement is necessary to guide the discretion of the Court in approving or disapproving the sale, and as a means of furnishing *prima facie* evidence of value, any question affecting the liability or *fides* of executors or administrators and purchasers.[1]

The statute describes in detail the method to be pursued, in order to have a sale regularly made; and some states hold that

[1] Woerner on Admin. 1053; Citing Noland vs. Barrett, 122 Mo. 187.

a valid judicial sale cannot be held without a regular appraisement. But the rule in Ohio would seem to be, that the sale of real estate by an executor or administrator without first having had the same appraised is a mere irregularity which will cause it to be set aside in a direct proceeding for that purpose; and the purchaser could not be compelled to comply with the terms of sale, and that a sale made without appraisement cannot be attacked in a collateral proceeding.[2]

While the same importance might not attach to the details of an appraisement as would to the statements in a petition and a finding thereon, yet in order to avoid the annoyance and vexation arising from having a sale set aside, which the Courts will always do where the statute is not complied with, it becomes essential that the statute be followed fully and completely. In addition to the ordinary matters attaching to a judicial sale, are those under administrators' and executors' sales relating to the assignment of dower and homesteads. It will be observed that there are three different kinds of appraisements, which seem to be contemplated by the statute. First there is an appraisement of the real estate free from any other claims. Second there is an assignment of dower and appraisement of the real estate, and Third there is an assignment of dower and homestead and appraisement. These will be discussed in the following sections.[3]

§ 856. **Appraisement when no dower is to be assigned.** "If the deceased left no widow or widower, entitled to dower in the estate to be sold, and an appraisement of such real estate is contained in the inventory, the court may order a sale according

[2] But when the judgment debtor, who ought to be vigilant, if he will enjoy his privileges and protect his rights, stands by and suffers the sheriff or other officer to sell his lands, after judgment, execution and levy, receive the purchase money and execute and deliver a deed of conveyance to the purchaser, such sale is not vitiated, nor the deed void, for want of an appraisement, or on account of a defective appraisement. The judgment debtor's remedy is against the officer for neglect of duty; and to him he must look for redress, for the injury he has sustained. Allen vs. Parish, 3 O. 187.

[3] See § 1593, Assignees. Exemption.

to it, or order a new appraisement. If a new one is not ordered, the appraisement set forth in the inventory shall be the appraised value of the real estate. If the court orders a new appraisement, the value returned shall be its appraised value. The order of sale, and for the appraisement, may be made at the same time, if no assignment of dower is required." [R. S. § 6154.][4]

§ 857. **Appointment of appraisers. Duty as to dower and homestead. Copy of order to issue.** "Except when there has been a valuation of the real estate in the inventory, and the court dispenses with another appraisement, upon finding that a sale is necessary, it shall appoint three judicious disinterested men of the vicinity, who are freeholders, to appraise the lands at their true value in money." [R. S. § 6155.][5]

§ 857a. **Dower and homestead.** "If the deceased left a family homestead, and a widow or a minor child or children, or both, entitled to have a homestead set off, the court shall order the appraisers first to set off and assign such homestead. If he left a widow entitled to dower in the premises, the court also shall order them to set off and assign to her in each, or in one or more of the tracts of land, by metes and bounds, one-third part of the whole lands in which she is entitled to dower, as and for such dower, and to appraise the whole premises either as a whole or in parcels, subject to such homestead and dower, or in case there is no such homestead, then subject to such dower so assigned, and in case there is no such dower then subject to such homestead. If, on view, the appraisers find that the dower can not be so assigned, they then must assign such dower specially as of the rents and profits." [R. S. § 6155.][5*]

§ 857b. **Lands in two or more counties.** "If the lands lie in two or more counties, if it deems fit, the court may appoint appraisers in more than one of the counties. In all cases a copy of the order to be executed shall be issued to the executor or administrator, and any lands subject to such homestead and dower, or either, may be sold pursuant to the provisions of this chapter." [R. S. § 6155.][5†]

[4] § 10793 G. C.

The finding and order for sale given in a previous chapter may be used where there is no assignment of dower. § 852.

[5] § 10794 G. C.

[5*] § 10795 G. C.

§ 646a. The dower of the widow will be protected although she has filed no answer. McDonald vs. Aten, 1 O. S. 293.

If the husband was not the owner of a homestead the widow is not entitled to an allowance in lieu of a homestead. Wolverton vs. Paddock, 3 C. C. 488; 2 C. D. 279.

[5†] § 10796 G. C.

§ 858. Judgment and order to appraise, etc.

If upon the hearing of the case it is found necessary to have an appraisement or assignment of dower or a setting apart of a homestead, an entry should be made embodying such facts. The following may serve as a form:

(Title.)

This day this cause came on to be heard upon the petition of the plaintiff filed for the purpose of having the real estate therein described sold to pay debts and costs of administration of the deceased; and also upon the return of summons issued and the answer of the guardian X. Y., for the minor defendants, and an answer of O. P. and Q. R. herein named, as well as by the answer of M. N., widow of said deceased; and the Court being fully advised in the premises, finds that all defendants herein have been legally served with process, and that G. H. has entered his appearance in writing, and that all have been notified of the pendency and prayer of the petition as prescribed by law; and the Court further finds that M. N., widow of said C. D., deceased, is entitled to dower in said premises (and also add if such be the fact) and finds that M. N. as widow of said deceased is entitled to have a homestead set apart in the premises described in the petition; and the Court further finds that all the allegations of the petition are true, and that it is necessary to sell the real estate in the petition described to pay the debts of deceased and costs of administration.

Wherefore it is considered and ordered by the Court that O. P. and Q. R. and X. Y., three judicious and disinterested men, freeholders of the vicinity, after being first duly sworn and upon actual view of the premises in said petition described, appraise the same at its cash value, subject to the dower estate of the said M. N. (and if such be the facts) and also subject to the homestead set apart to said M. N. Said appraisers will proceed to set apart to said M. N., her homestead and dower rights in the premises in the petition described. They may call to their aid a civil engineer to define the metes and bounds of said lands. (If it is desired or thought advisable to have the premises platted, the entry may conclude as follows):

And said appraisers are authorized to divide and subdivide the said premises as in their best judgment they deem proper and appraise the same separately and as a whole, and return the same to this Court for confirmation.[6]

§ 859. Copy of order and form of return.

The statute provides that in all cases the copy of the order to be executed shall be issued to the executor or administrator.[7] This makes it mandatory on the Probate Judge to give to the administrator an order setting forth what is to be done. This is no doubt required to secure regularity in the proceedings. It will vary in different cases, but the following may with slight changes be made to subserve every purpose.

[6] See § 1420, Gdns. order to appraise.

[7] §§ 10794-5-6 G. C.

See § 852 for entry where appraisement was made with inventory.

APPRAISEMENT.

The State of Ohio, Clark County, ss.
Probate Court.
To.....
.....Greeting:

In obedience to an order and decree of the Probate Court, within and for said county, made this day, in a certain cause wherein you as..... .....are plaintiff..and.....et al., are defendants, you are commanded that by the oaths of.....and.....judicious, disinterested men of the vicinity, not of kin to the petitioner, who are freeholders of the county in which said real estate is situated, and upon actual view, you cause to be set off and assigned to....., composing part of the decedent's family at the time of his death, by metes and bounds, a homestead, not exceeding one thousand dollars in value, and to be set off and assigned to....., widow....of the said..... ..... deceased, one full equal third part, as and for h...dower estate in the following described premises, to-wit:

And that said appraisers having set off and assigned said homestead and dower as aforesaid, do upon their oaths and actual view, as aforesaid, make a just valuation and appraisement, according to law, of said real estate, subject to such homestead and dower so assigned.

You will make return of your proceedings to this Court forthwith upon execution of this order.

Witness my signature and the Seal of said Probate Court at....., Ohio, this.....day of.....A. D. 19....

.....
Probate Judge.

RETURN.

To the Probate Court of Clark County, Ohio:

In obedience to the foregoing order, I have caused the same to be duly executed, as will fully appear by the proceedings hereto attached.

Dated the.....day of....., 19....

OATH OF APPRAISERS.

The State of Ohio, Clark County, ss.

We, the undersigned appraisers, do make solemn oath that we will, upon actual view, honestly and impartially appraise the within described real estate at its fair cash value, and perform the duties required of us in pursuance of the foregoing order.

(Sign)

Sworn to before me and signed in my presence, this.....day of..... ....., 19....

APPRAISERS' RETURN.

In obedience to the foregoing order, after being first duly sworn and upon actual view of the premises therein described, we, the undersigned appraisers, do set off and assign to.....composing part of decedent's family at the time of his death, a homestead, not exceeding one thousand dollars in value, being so much of said premises as is contained within the following bounds, to-wit:

And we.....do set off and assign to....., widow of said.....deceased, as and for h...dower estate in said premises, so much thereof as is contained within the following bounds, to-wit:

do find said premises are entire, and that dower cannot be assigned therein by metes and bounds, and therefore we do set off and assign to said....., widow..of said....., deceased, as and for h... dower therein, the sum of.....dollars, yearly, during h...life,

being one-third part of the clear annual rents, issues and profits of said premises. And, subject to and encumbered by said homestead and dower so assigned, we do estimate the value of said real estae at..... dollars.

Given under our hands, this.....day of....., 19....

(Sign). .....

Fees of appraisers $1.00 per day each.[8]

§ 860. Who may be appraisers.

The language of the statute is, that the Court shall appoint three judicious disinterested men of the vicinity who are freeholders.[9] Judicious, means the possession of sound judgment and the exercise of reason and wisdom. Its proper use here is to mean the choice of a person who is in the habit of exercising good common sense, and one who has sufficient knowledge of real estate to enable him to determine its value. A disinterested person is one who is free from self interest. It would be very difficult to define what would in all cases constitute an interested or disinterested person. But as applied to appraisers it should mean one who is not or will not be affected in any manner by either a high or low valuation, or in the portion that may be set off to the widow as her dower or homestead. The person selected ought not to be a relative or a creditor of the deceased. Neither ought he to be a prospective purchaser. Of the vicinity, means in the neighborhood. It is very doubtful whether the appraisers must reside in the county in which the land is located, provided the land is in such a part of the county that the appraiser would be within the vicinity, even though he resides in another county. If the land is in two or more counties the Court may appoint appraisers in each of said counties. In all cases the Court ought to appoint only such persons as are qualified by age, residence, experience and business abilities to determine the true value of the property. As applied to an appraiser, vicinity means the selection of a person who lives close enough to the property to be appraised, to be enabled to fix the value by the general value of the sur-

[8] That the order did not describe the lands is a mere irregularity, and not ground for collateral impeachment, as in ejectment by the heirs against the buyer. Herbst vs. Bates, 13 B. 565.

See § 871, Report dower assigned.

[9] §§ 10794-5-6 G. C., § 857.

The courts have held that vicinity may mean within the county, but it seems it should better be held to mean neighborhood.

See § 872 as to Fees.

rounding property. A freeholder is one who owns the fee or a life estate in real estate. Under our statute the owner of a ninety-nine year lease renewable forever, would be a freeholder. The Court is presumed to appoint the appraisers, but the fact that the administrator selected the appraisers will not avoid the sale.[10]

While the statute does not say so it of course means that the appraisers shall be men over twenty-one years of age. The administrator and the Court should both be careful to ascertain that the appraisers have the statutory qualifications. The absence of such statutory qualification would not make void a sale, after the same had been confirmed.[11]

§ 861. **Vacancy in office of appraisers; how filled.** "When a person appointed by the court as an appraiser fails to discharge his duties, the probate judge or a justice of the peace of the county in which the lands to be appraised are situated, at the instance of the executor or administrator, may appoint an appraiser, of which appointment the officer appointing shall make and sign a certificate which must be returned with the appraisements, or the executor or administrator may apply to the court making the order of appraisement and have another appraiser appointed." [R. S. § 6156.][12]

The above section contemplates that three persons should always act in making the appraisement, and if three persons do act a report signed by two would be sufficient, the action of a majority being binding.[13] Where possible the plaintiff should not exercise the above privilege of having a Justice of the Peace make the appointment, but should have the Court make a new appointment.

§ 862. Valuation.

They are to appraise the lands at their true value in money. This "true value in money" means its fair cash price or what is known as its market value. The market value is not what a

10 Rice vs. Cleghorn, 21 Ind. 80.
11 See § 1595, Assignments.
12 § 10797 G. C.
13 Nichols vs. Balzer, 1 C. C. 47; 1 C. D. 29.

piece of property can be bought at by taking advantage of the necessities of the seller, nor by bringing the property to sale under foreclosure. Such situations have a tendency to diminish the value of the property. Nor on the other hand is it fair to make as a standard of value the case where the buyer may be compelled to take the property by reason of some unusual surroundings or circumstances. It is the highest price which those having the ability and occasion to buy are willing to pay. As a general rule, the market value of real estate is to be ascertained from sales either of property out of the same tract or of property in the immediate vicinity having substantially the same surroundings and the same conditions.[14] The fact that property might be sold for two-thirds of its appraised value is no excuse for the appraisers fixing a value greater than its true value in money.

§ 863. Appraisers may be sworn by whom. "The appraisers shall be sworn by some officer authorized to administer oaths, and a certificate thereof inserted in or annexed to their return. In the absence of such officer, the administrator or executor may administer the oath. Afterward, upon actual view, they must perform the duties required of them by the order of the court, and make return of their proceedings to it in writing." [R. S. § 6157; 103 v. 245.] [15]

This oath may be administered by any one who is authorized to administer oaths generally. The section referring to the oath to be administered to appraisers of personal property permits the same to be administered by an administrator or executor.[16]

However, in proceedings to sell real estate the statute as formerly existing did not confer such power on the administrator[16] and the above section is now amended to permit the same in Real Estate Proceedings. The oath must be administered before they enter upon the discharge of their duties. The form of oath may be as follows:

FORM OF OATH.

State of Ohio.....county, ss.

Personally appeared before me, the undersigned, a notary public in and for said county, B. A., D. C. and F. E., who upon being duly sworn say,

[14] O. S. Ry. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480.

[15] § 10798 G. C.

[16] § 11649 G. C., § 290.

that they will upon actual view, honestly and impartially assign dower and appraise the real estate in the foregoing order described and perform the duties required of them by said order. (Sworn to, etc.)[17]

§ 864. Actual view.

The appraisers shall after they have been duly sworn, upon *actual view* perform the duties required of them. In a recent case in the Insolvency Court at Cincinnati, it was held that appraisers of real estate upon which there are buildings situated must enter such buildings and go through them, so they may ascertain the character of the interior finishings, and the plumbing and fixtures which are in the interior of the building; and where the same had not been done the appraisement was set aside.[18]

In an earlier case, where it was shown that the appraisers had not gone through the buildings, but had returned an appraisement at eight thousand dollars, an affidavit of competent witnesses who had gone through the buildings fixing the valuation at ten thousand dollars, were filed, the appraisement was set aside without specifically holding that they were required to view the interior of the building.[19] Where the real estate to be appraised is naked land, the appraisers ought to go within actual view of every part of the entire tract. If it is shown that an appraisement has been made without actual view, upon application made before the sale or confirmation of sale the Court will set aside the appraisement and order a new one.[20]

§ 865. Employment of surveyor.

Where dower is to be set off or a homestead set apart, it is imperative on the part of the administrator and appraisers to secure the services of a competent civil engineer. There might be a case in which the services of a civil engineer could be dispensed with, but such a one would be exceptional. It is very

[17] See § 1595, Assignments. Appraisers.

[18] See 42 Bull. 89; 9 Dec. 830.

[19] Mills vs. Life Association, 4 Bull. 935.

[20] Creditors vs. Search, 3 W. L. M. 319.

See § 1596, Assignments.

often exceedingly important where old land marks have been destroyed, that a re-survey be made even where there is no dower or homestead to be set off. In all such cases the administrator or executor should use his discretion. It might be advisable to provide in the journal entry for the calling in of a civil engineer to aid the appraisers in the discharge of their duty.

§ 866. Subdividing and platting.

There is no statutory provision in our State like some others, making provision for subdividing and platting.[21] The administrator or executor might sell the land in different tracts, but in such cases the whole when added together must equal two-thirds of the appraised value of the entire tract, or the sale would be set aside.[22]

Likewise an administrator or executor might sell real estate under a power in the will, in separate tracts, provided it was shown that he exercised a reasonable discretion in making the sale in that manner. If it is desired to plat a tract or lay it out in lots it would be advisable for the administrator or executor to have an order of the Court especially authorizing the sub-division, and then have each tract separately appraised. In such cases it might also be well to have the tract appraised as an entirety, and then have it sold in both ways and accepting that bid which will realize the most money for the estate.[23]

[21] § 2507 Ind. R. S.

Recently the statute was amended granting such rights. § 10803 G. C., § 879.

[22] Stall vs. Macalester, 9 O. 19.

The next objection to the defendants' title is, that the land having been appraised as one entire parcel, was sold in two separate parcels. We do not see that there was anything improper in this.

In sales of land by sheriff, administrator, or guardian, the individual making the sale must exercise his own discretion whether the property shall be sold together or in separate parcels. The first object should be to sell in such a manner as to secure the greatest price. If this object can be effected by offering the property in parcels, the officer selling would be censurable did he not divide it. In all cases he must exercise a sound discretion, having reference to the interests of all concerned, and being responsible for every abuse of discretion. 9 O. 24.

[23] The following was held to be sufficient order: "The commissioner is authorized to make such a sub-

An objection by an interested party to a sale that it was made as an entirety instead of in parcels comes too late after sale has been made.[24]

§ 867. Assignment of homestead.

If the deceased left a family homestead and widow or minor child [25] or children or both entitled to have a homestead set off, pursuant to the provisions of sec. 11732 below, the Court shall order the appraisers first to proceed to set apart and to assign such homestead.

§ 867a. Homestead for decedent's family. "On petition of executors or administrators to sell to pay debts, the lands of a decedent who has left a widow, or a minor child, unmarried, and composing part of the decedent's family at the time of his death, the appraisers shall set apart a homestead as required in section eleven thousand seven hundred and thirty-four.[24a] Except as otherwise provided in sections ten thousand seven hundred and ninety-four,[24b] ten thousand seven hundred and ninety-five[24c] and ten thousand seven hundred and ninety-six,[24d] it shall remain exempt from sale on execution, and exempt from sale under order of court so long as the widow, if she remains unmarried, or an unmarried minor child of the decedent resides thereon." [R. S. § 5437.][26]

§ 867b. Money consideration in lieu of homestead. "When a homestead is sold to pay a lien which precludes the allowance thereof, the residue of the proceeds, not exceeding five hundred dollars, shall be paid to the widow, or in case there be no widow, to the minor child, unmarried, in lieu of a homestead, on her or such child's application, in person, by agent, attorney or guardian." [R. S. § 5437.][26*]

division of said lots on Walnut Hills, prior to such re-appraisement as in his opinion will be to the advantage of the parties in interest, and he may appraise such of said lots as he thinks fit as a whole and also as subdivided." He is also authorized to lay out a street, etc. Mathers vs. Kinney, 8 Bull. 267.

[24] Hartshorn vs. Reader, 3 W. L. G. 245.

[24a] § 1598n. See § 846a, Dower and homesteads.

[24b] § 857.

[24c] § 857a.

[24d] § 857b.

[25] In a recent case the Supreme Court has held that a minor child of a woman is entitled to the year's allowance the same as a minor child of a man. The same reason might allow the minor child of a woman to claim the homestead. *In re* Hinton, 45 Bull. 423.

[26] § 11732 G. C.

This statute is to be liberally construed, and where by agreement the property is voluntarily sold to pay debts that will preclude the assignment of the same by metes and bounds, the widow will be entitled to her dower and $500 in proceeds. 16 Cir. D. 66; 26 O. C. C. (1904) 66; affirmed, 69 O. S. 574.

[26*] § 11733 G. C.

§ 868. When entitled to homestead.

A homestead is the house and land constituting the family residence, and it would seem, from the wording of sec. 10794-6, G. C.,[27] that if there is a homestead, and a widow or a minor child, the imperative duty rests upon the appraisers to set the same off to such widow and minor child; and differing somewhat from the right to homestead generally, such widow or child does not need to make an application to have it set apart to them. It has been held that the widow cannot waive such a right if there were unmarried minor children.[28]

It, therefore, becomes very important on the part of the administrator or executor to have such assignment of homestead made where the conditions exist demanding the same. If not set apart, the administrator or executor might be responsible, and the purchaser might be held to have bought the property subject to such a right, although no assignment had been mad . The value of the homestead is not to exceed one thousand dollars.[29]

If there are liens which preclude the allowance of the homestead, then five hundred dollars must be paid to the widow or to the unmarried minor child.[30] Where there is both dower and homestead to be set off, it seems that the homestead should be first set off and the dower set apart in another tract.[31] The property must be appraised subject to such a homestead right, and should be sold in that manner.[32] If the widow remarry, or moves off of said homestead, and if any unmarried minor child ceases to reside thereon, the homestead right ends.[33] If the decedent leaves no homestead, but other real estate, the widow is not entitled to an allowance in lieu of the homestead.[34]

[27] § 857.

[28] See § 326, Widow's allowance.

Jones s. Allen, 6 N. P. 518, 8 Dec. 338. See Bliss vs. Fuhrman, 6 C. C. 203; 3 C. D. 416.

[29] § 11730 G. C.

[30] § 11732 G. C. See previous section.

[31] § 950.

See Stoehr vs. Moerlein Brewing Co., 27 C. C. 330; 20 L. R. 449 (1905), where wife had signed mortgage as surety for her husband, the donee was allowed as a first lien after payment of mortgage, etc.

25 Bull. 102; Wanzer vs. Smith, 2 W. L. M. 426.

[32] §§ 10794-5-6 G. C., § 857.

In Wehrle vs. Wehrle, 39 O. S. 365, it was held that the tract upon which the homestead was located could not be sold subject to the homestead. At that time however § 10794-5-6 (§ 8857-a-b) did not contain any provisions relating to homesteads and this decision is not now controlling upon this question. Having been given in Longsdorf's Notes has caused some queries as to its effect.

[33] § 11731 G. C.

Taylor vs. Thorn, 29 O. S. 569.

[34] Wolverton vs. Paddock, 3 C. C. 488; 2 C. D. 279.

See § 846a, Dower and homestead.

A widow having separated from her husband and permanently residing elsewhere, is not entitled to al-

If a decedent own a homestead, and the widow waives dower and asks that he same be sold, she has waived her right to have set apart to her an allowance of five hundred dollars in lieu of a homestead.[35] A judgment is not such a lien as prevents a homestead from being set apart to the widow.[36] A confirmation of a sale of real estate set apart as a homestead, was formerly held not to be merely voidable, but void. But the statute now provides that it should be sold subject to such homestead rights.[37]

If the widow and minor child do not compose a part of the decedent's family at the time of his death, they are not entitled to a homestead.[38] The appraisers should set apart the family dwelling and the buildings used in connection therewith, and sufficient land which will equal according to the ordinary selling price of the same, the value of one thousand dollars. Of course the property set apart must be used as a homestead, and must be one tract or lot. It cannot be set off so as to include a part or entirety of two tracts or lots. If the buildings actually occupied a part of two lots, the rule might be different.[39]

The only instances provided by statute in which the widow or minor children can receive money in lieu of a homestead, is where the homestead must be sold to pay a lien thereon. If the homestead is of a greater value than one thousand dollars and indivisible, it is an unsettled question if anything in lieu thereof can be set apart to the widow and minor children. No provision seems to be made for such a case, like there is where an execution is issued against the homestead of a living debtor.[40]

The defeat of such a right merely because the homestead is indivisible, and of a greater value than one thousand dollars, is so contrary to the spirit of legislation which is manifested in these homestead acts, that it is almost impossible to assume that

lowance in lieu of homestead in the proceeds of her deceased husband's residence property. Nichols vs. French, 83 O. S. 162.

[35] Bliss vs Fuhrman, 6 C. C. 203; 3 C. D. 416.

The matter as to homestead rights will again be referred to when treating of assignments for the benefit of creditors.

[36] Jones vs. Allen, 6 N. P. 518; 8 Dec. 338.

[37] Wehrle vs. Wehrle, 39 O. S 365.

[38] §§ 11732-3 G. C.

[39] 9 Am. & Eng. Ency. of Law 461.

[40] §§ 11735-6 G. C.

If the real estate is so covered by liens that it must be sold, the widow is entitled to $500, in lieu of a homestead. Bank vs. Stoughton, 5 O. L. R. 613; 18 Dec. 633.

Widow entitled to dower and homestead, see Bretz vs. Moore, 4 C. C. (N.S.) 566; 26 O. C. C. 66; affirmed 69 O. S. 574.

such could have been the intention of the Legislature. And Courts will very likely endeavor to find some method to prevent such a result. The course then most likely followed would be that provided by statute in a case of dower, where the estate is indivisible.[41] And the rents and profits out of such portion of the homestead equalling one thousand dollars in value, would be allowed, by the appraisers to the widow and her infant children.[42]

§ 869. Assignment of dower.

After the homestead has been set apart — or if there be no homestead, the appraisers shall set off and assign to the widow in each or in one or more of the tracts of lands by metes and bounds one equal third part of the whole lands to which she is entitled to dower,[43] — the widow may waive her right of dower by an election under the will.[44] Or she may elect to have allowed to her in lieu of her said dower such sum of money out of the proceeds of the sale as the Court deems a just and reasonable value of her dower interest therein.[45]

In such cases the appraisers are to proceed as if no dower was to be assigned in the premises. If the property is of such character and nature that no dower can be assigned out of the same in metes and bounds,[46] then the dower shall be assigned as of a third part of the rents, issues and profits thereof to be computed and ascertained by the appraisers.[47] And in assigning dower by rents and profits, deduction should be made from the gross rents for reasonable repairs and taxes, but no deduction should be made on account of water rents or insurance.[48]

[41] § 12011 G. C.

[42] § 1623, Assignments.
§ 1598, Exempt property.
§ 1227, Election under will.
§ 1598, Exempt property.
§ 1227, Election under will.

[43] Wanzer vs. Smith, 2 W. L. M. 426.

[44] See Ch. 51, § 943 *et seq.* on dower.
§§ 10571-2 G. C., § 1221.

[45] § 12018 G. C.

[46] Such as the indivisibility of the land.

[47] § 12011 G. C. Annuity tables might be used to accomplish this result.

[48] Hillgartner vs. Gebhart, 25 O. S. 557.
See § 846a, Dower and homestead.

The widow's right to dower must always be considered, whether she claims it or not. If there are mortgage liens on the real estate in which the wife releases her dower, and there is not sufficient real estate to pay such mortgage lien and allow the widow's dower to be set apart by metes and bounds, then all such lands would have to be sold and the widow's right provided out of the proceeds. If such mortgage debt was a debt of her husband's, she would be entitled to be endowed out of the entire proceeds realized out of the sale of the lands.[49] The amount allowed her, however, could not affect the mortgage claim. The mortgage lien must be paid in full. The rule might be different if the debt was a joint one.

Growing crops do not pass to the widow on assignment of dower by metes and bounds.[50] Where property was insured and burned after the death of the husband, the widow was entitled to have her dower calculated on the proceeds of the insurance.[51] Some difficulty may be experienced by appraisers in their setting off a dower, where there is also a homestead to be set apart. In such cases the homestead should first be set apart, then the dower interest in not what is left, but in the entire tract. For illustration, supposing the decedent died owning a farm of one hundred acres worth six thousand dollars. The appraisers would proceed and set apart as homestead the land upon which the dwellings were situated and including two acres of land valued at one thousand dollars. They should then proceed to set apart out of the remaining land sufficient to equal one-third of the whole. That is, the widow would have set apart to her the homestead, one thousand dollars in value, and a dower of two thousand dollars in value; equaling a life estate in one-half of the entire property. The supreme Court has said that the widow must bear her share of the costs in the Probate Court incurred in settling her dower.[52]

[49] Kling vs. Ballentine, 40 O. S. 391; Society for Savings vs. Drake, 10 C. C. 59; 6 C. D. 31.

[50] Davis vs. Brown, 4 W. L. M. 272.

See § 947.

See § 950 as to costs, etc.

[51] Flemming vs. Jordan, 28 Bull. 332.

[52] Kling vs. Ballentine, 40 O. S. 396.

If the widow dies after filing an

§ 870. Dower especially assigned to be a charge on the land. "If the appraisers assign dower especially of the rents and profits, and the purchaser takes, by deed of the executor or administrator, the lands upon which such dower was assigned, the court shall make such orders as will secure to the widow or widower a charge thereon for the dower." [R. S. § 6164.][53]

§ 871. Report.

The appraisers having attended to the duties assigned them, that is, having set aside a homestead where the same was required, and also having set apart dower for the widow, and having appraised all the lands subject to such dower and homestead right, should make a written report of their doings. The form for such report was given in the order issued to them.[54] To this order they should attach their fees and the fees of the civil engineer. This matter should be attended to as rapidly as the same can conveniently be done.

§ 872. Compensation of appraisers. "Appraisers shall each be paid one dollar per day, for services performed by them in the county in which they reside, and two dollars per day for services performed without such county." [R. S. § 6158.][55]

It very often occurs that the compensation provided in the above section is entirely inadequate to secure the services of competent men. Where such is the case it would be proper for the administrator to consult the parties in interest as to the payment of such compensation to appraisers as would secure competent persons to perform that duty. Generally, however,

answer, but before sale, the action can be revived by her administrator and he would be entitled to whatever it was worth from the time the answer was filed. Renner vs. Bird, 2 Bull. 76.

See § 957, Assignment of dower; § 1625, Assignments; § 1600, Dower.

[53] § 10808 G. C.

The rents, issues and profits should be estimated as of the time the action is brought to have dower assigned and a lease of the property at an extravagant rent, furnishes no rule binding and controlling the commissioners as to the annual rents, issues and profits. Stoddart vs. Marshall, 1 Disney, 527.

[54] Previous § 859.

[55] § 10799 G. C.

persons are willing to sacrifice some of their time and accept such positions as a part of the discharge of their proper duties as citizens, and accept the statutory allowance.

§ 873. Executor or administrator to give bond, etc.

It will very often occur at this stage of a proceeding that the bond heretofore given by the executor or administrator is not sufficient, and therefore the statute has provided that whenever such occurs the Courts may order additional bond. The following is one section in relation thereto.

"When, in cases named in the next preceding section, the executor or administrator is ordered to sell more than is necessary to pay debts, before the sale, he must give bond with sufficient sureties payable to the state, conditioned to account for all proceeds of the sale remaining after payment of the debts and charges for which the land is sold, and to dispose of them according to law." [R. S. § 6150.][56]

The giving of the bond provided for in this section is not jurisdictional and the failure to give the same would not affect the validity of the sale.[57]

§ 874. Form of bond.

Know all men by these presents, that we, A. B., C. D. and E. F., are held and firmly bound unto the State of Ohio in the sum of..... dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.* The condition of this obligation is such that, whereas in a certain cause pending in the Probate Court of the county of.....and State of Ohio, wherein A. B., executor of the last will and testament (or administrator of the estate) of G. H., deceased, is plaintiff, and I. J. and others are defendants, the said A. B. has been ordered by said Court to sell more real estate than will be necessary for the payment of the debts of said decedent and the charges of administering his estate. Now, if the said A. B. shall account for all the proceeds of the real estate so ordered to be sold, that shall remain after the payment of the debts and charges aforesaid, and dispose of the same according to law, then this obligation to be void, otherwise to be in full force. (Signed, etc.)[58]

[56] § 10789 G. C.

[57] See chapt. 15. 16, 17 and §§ 233, 243, 260, as to bonds generally.

[58] Whittaker's Probate Code.

§ 875. And give additional bond to secure further assets if required in what Court. "Before such sale, if the court deems it necessary it may require the administrator or executor to give an additional administration bond, to secure the further assets arising therefrom. The bond mentioned in this section and the next preceding section, when so ordered, must be given in the court from which letters were issued. If the action is pending in another court, the latter shall proceed no further till there is filed therein a certificate from the former court, under its seal, that such bond has been given as ordered." [R. S. § 6151.][59]

As a matter of course all such additional bonds must be given in the Court which granted the letters of administration.[60]

§ 876. Confirmation of appraisement and order of sale.

Upon the filing of the report of the appraisers in the Probate Court, the judge should carefully examine the same to ascertain that the former orders of the Court have been complied with. He then should place an entry on his journal, confirming the appraisement, and if new bond or additional bond was necessary, approving the bond and order a sale. As a general thing it will be found beneficial to the estate to order a sale at private sale if the full appraised value can be received. If there is any controversy, however, about the matter a public sale should be ordered. The following may serve as a general form of entry:

(*Title.*)

This day this cause came on to be heard upon the return of the appraisement heretofore ordered in this cause, and the same was submitted to the Court. Whereupon after careful examination of the same, the Court finds that said appraisement has been made in all respects in accordance with law and the orders of this Court, and the same is hereby approved and confirmed; and it further appearing to the Court that the plaintiff has given additional bond in the sum of.....dollars, with approved sureties thereon, conditioned according to law, the said bond is hereby approved.[61]

[59] § 10790 G. C.

[60] As to the liability of the sureties on the various bonds, see § 258. Sureties in first and additional bonds equally liable for proceeds of sale. Kehnast vs. Daum, 4 N. P. 366; 6 Dec. 401.

[61] If sufficient bond has already

*(If it is desired to have a public sale of the property, proceed as follows.)

On motion of the plaintiff and for good cause shown, publication in a German newspaper is dispensed with and said plaintiff is authorized in his discretion to employ an auctioneer to cry said sale at an expenditure not exceeding.....dollars. He may also advertise said sale by bills or posters and expend therefor not exceeding.....dollars.

It is now ordered that A. B., as such administrator, proceed to advertise for sale on the premises (or elsewhere, if so ordered) the real estate in the petition described, as provided by law; and that he sell the same at not less than two-thirds of the appraised value thereof on the following terms, to wit:

One-third cash in hand and the balance in one and two years from day of sale, deferred payments to be secured by mortgage on the premises sold and to bear interest. And said plaintiff is ordered to make return to this Court immediately after such sale.

If it is desired to have a private sale, follow the above entry from the star as follows:

And it appearing to the Court that it would be to the interest of said estate to sell the real estate described in the petition at private sale, it is now ordered that said A. B. as such administrator, proceed and sell said real estate at private sale at not less than the appraised value thereof, on the following terms, to-wit: (here insert the terms as above stated.)

been given, say "and sufficient bond having already been given by said plaintiff, additional bond is dispensed with."

CHAPTER XLIX.

REAL ESTATE. ADVERTISEMENT AND SALE.

§ 877 The sale generally.
§ 878 Order of sale and report of sale. Dower.
§ 879 When sale to be public and when private.
§ 880 Sale of improved lands; unimproved.
§ 880a Re-advertisement.
§ 881 Private sale.
§ 882 Affidavit before private sale confirmed.
§ 883 Public sale. Notice of.
§ 884 Notice to contain street number, or name of township, etc.
§ 884a Name of township in certain cases.
§ 885 Notice of sale in German or Bohemian newspaper.
§ 886 Points to be observed.
§ 887 Form of notice of public sale.
§ 888 Conduct of sale.
§ 889 Who may become purchasers.
§ 890 Return. Confirmation, Order for deed.
§ 890a Deferred payments.
§ 890b Sale of notes.
§ 891 Return of sale.
§ 892 Confirmation.
§ 893 Sufficient confirmation.
§ 894 Errors cured by confirmation.
§ 895 Entry confirming sale, and distributing proceeds.
§ 896 Resale.
§ 897 Securing payments.
§ 898 When motion to be set aside to be filed.
§ 899 Deed evidence of validity of sale.
§ 900 Execution and kind of deed.
§ 901 Form of administrator's or executor's deed.
§ 902 Purchasers right and title.
§ 902a Remedy of purchaser if sale invalid.
§ 902b Remedy in other cases of invalid sales.
§ 903 How money arising from sale of land to be applied.
§ 904 Comments.
§ 905 Surplus of proceeds of sale to be considered as real estate.
§ 906 Appeal and error.

§ 877. The sale generally.

As a sale of real estate by an administrator or executor under the order of the Court is a judicial sale, the law applicable to judicial sales generally will be found applicable to such sales. There are many things connected with the sale of real estate that are merely directory, and are cured by confirmation of the sale.[1]

In selling the real estate of a deceased person, the executor or administrator must act within the scope of his power and

[1] See subsequent section, § 894, on errors cured by confirmation. See § 876 for entry ordering sale.

the statute, and according to the direction contained in the order of sale.[2]

He is personally liable on his bond for the consequences of any deviation therefrom. Thus, if he is directed to sell for cash, a sale on credit is in excess of his authority, and may, therefore, be void, unless confirmed in Court or by the heirs;[3] and the administrator is liable to the estate for the price at which the land was sold.[4]

So, if he report that he has complied with the order of the Court, when the fact is otherwise, he is liable for any loss arising out of the failure.[5]

A private sale by him confers no title, unless the order given by the Court under its statutory power so direct.[6] Since he has no power to sell without order or decree of Court, an agreement or bond made by him before obtaining such order to sell the land of the deceased is utterly void, incapable of being enforced at law or in equity. It is held to be against public policy to allow the administrator to place himself in a position where the exercise of his lawful authority would be influenced or controlled by previous contracts binding upon him.[7]

The statute does not require that a formal order of sale be issued to the administrator or executor. It is the practice of some Probate Courts and tends to preserve regularity in the proceeding to issue such order. This form of an order of sale together with the report of sale may be as follows:[8]

[2] See §§ 811-829.

Filmore vs. Reithman, 6 Col. 120, 130.

[3] McCully vs. Chapman, 58 Ala. 325.

[4] Richards vs. Adamson, 43 Iowa 248.

[5] Heath vs. Layne, 62 Tex. 686; Payne vs. Pippey, 49 Ala. 599; James vs. Faulk, 54 Ala. 184; Fontenet vs. DeBaillon, 8 La. An. 509.

[6] Fambro vs. Gantt, 12 Ala. 298; Schlicker vs. Hemenway, 110 Cal. 579.

[7] Stuart vs. Allen, 16 Cal. 474; Bridgewater vs. Brookfield, 3 Cow. 299; Woerner on Admin. 1055.

[8] See § 1427, Gdns.; § 1626, Assignees.

A copy of appraisement must be made, § 857.

It is not error prejudicial to order an appraisement and also fix an upset price, if the sale is made at more than two-thirds of the appraisement. Ferguson vs. Ferguson, 3 N. P. (N.S.) 549; 16 Dec. 486.

§ 878. Order of sale. Dower.

The State of Ohio, Clark County, ss.
Probate Court.

To.....Greeting:

In obedience to an order and decree of the Probate Court, within and for said county, made this day, in a certain cause, wherein you as..... .....are plaintiff, ...and et al. are defendants, you are commanded to proceed according to law, to sell at.....sale, for not less than.....the appraised value thereof.....the dower of .....widow....of.....deceased, the following described premises, to-wit: .....

Said sale to be (state where) the.....and to be upon the following terms: .....

The deferred payments to be secured by mortgage on the premises and to bear interest from the day of the sale, payable annually.

You will make return of your proceedings to this Court forthwith upon execution of this order.

Witness my signature and the seal of said Probate Court at..... Ohio, this.....day of.....A. D. 190....

.....

Probate Judge.[8a]

RETURN.

To the Probate Court of Clark County, Ohio.

In obedience to the foregoing order, I have caused the same to be duly executed, as will fully appear by the proceedings hereto attached.

Dated the.....day of....., 190....

REPORT OF SALE.

(When sold at public sale.)

In obedience to the within order, I duly advertised the real estate therein described for sale, in the.....a newspaper printed and of general circulation in.....County, Ohio, where said real estate is situate, for at least four consecutive weeks prior to the.....day of....., 190..., the day of sale therein mentioned; stating in the notice the time, place and terms of sale; and on said day, at the hour of.....o'clock .....M., I attended.....the.....and offered said real estate for sale.....the dower estate of.....therein when..... .....bid to pay for the same, the sum of.....dollars, which being the highest and best bid that was offered, and being.....two-thirds, of the appraised value of said premises, I then and there sold the same to.....for that sum.

(Signed.)

Dated.....day of....., 190....

REPORT OF SALE.

(When sold at Private Sale.)

In obedience to the within order, I sold said premises on the..... day of....., 190..., to.....for the sum of....., dollars, said sum being.....the appraised value of the same.

(Signed.)

Dated the.....day of....., 190...

The State of Ohio, Clark County, ss.

The above named.....being duly sworn, say...that the sale above reported has been made after diligent endeavor to obtain the best price

[8a] Sale may for cash in hand or deferred payments with interest for two years. § 10786 G. C., § 847.

for said property, and that said sale is for the highest price.....he..... could get for said property. (Signed.)

Sworn to before me and signed in my presence, this.....day of..... ....., 190....

.....
Probate Judge.[9]

§ 879. When sale to be public and when private.

Sales are either public or private. A sale is public, within the meaning of the statute *when it is advertised as provided* by law and sold at public out-cry to the highest bidder. It is private when it is sold without advertisement as provided by statute. It cannot be sold at private sale for less than its appraised value. At public sale it may be sold for two-thirds of the appraised value. An administrator or executor may under an order of private sale, put the property up at public auction, but no bid can be received for less than the appraised value. The statute relating to such sale is as follows:

"The sale must be made at public auction at the door of the courthouse in the county in which the order of sale was made or at such other place as the court directs, except that if it appears to be more for the interest of such estate to sell such real estate at private sale, the court may authorize the petitioner so to sell it, either in whole or in part for cash in hand or on deferred payments, not exceeding two years, with interest. In no case shall it be sold at private sale for less than its appraised value. If an order for private sale is issued under this section, upon motion and showing by a person interested in the proceeds of sale, filed after thirty days from date of such order, the court may require the petitioner to return the order if the premises have not been sold. Thereupon the court may order the lands to be sold at public sale as herein provided. If, upon showing of any person interested, the court finds that it will be to the interest of such estate it may order a reappraisement and sale thereof, in parcels." [R. S. § 6161.][10]

§ 880. Sale of improved land; unimproved. "If improved, the lands shall not be sold for less than two-thirds of the appraised value; if not improved, for less than one-half the appraised value. After being twice offered for sale, the court may direct the amount for which they can be sold, or may set aside the appraisement and order a new one."

[9] See § 882, Affidavits, etc., § 876, Entry ordering sale.

[10] § 10803 G. C.

The matter of place is directory only, and if a sale is otherwise regular the sale will not be set aside. Smiley vs. Cook, 4 L. R. 738; 52 Bull. 156; affirmed, 79 O. S. 452.

See § 898, Motion to set aside.

§ 880a. Readvertisement. "If improved, the lands shall not be sold for less than two-thirds of the appraised value; if not improved, for less than one-half the appraised value. After being twice offered for sale, the court may direct the amount for which they can be sold, or may set aside the appraisement and order a new one. If such appraisement does not exceed two hundred dollars and upon first offer at public sale there are no bids, then upon motion of any party interested, the court may order the lands to be readvertised and sold at public sale to the highest bidder." [R. S. § 6160; 101 v. 46.] [11]

It is elsewhere provided that at private sale it must bring the appraised value.* The time of payment must be either all cash or deferred payments, not exceeding two years, with interest.[12] The general practice is to make one-third cash, but this could be changed to suit the circumstances.

The administrator must strictly pursue the authority under which he acts.[13]

The order of sale is like an execution of decree of court issued to a sheriff to sell specific real estate.[14] The order does not limit the time within which the sale is to be made; and if a report of the sale is required by a certain time, a sale made after the time required for the filing of such report will be valid.[15]

If an administrator be removed, his successor may pick up the proceedings where he left them and proceed to complete the sale.[16]

[11] § 10802 G. C.

Some question has been made as to what is meant by the words "improved land" under § 880. This expression is the same as in the law of 1840. At that time a large portion of the lands of Ohio were in the same condition, practically as nature left them, undoubtedly they were not "improved lands." "Unimproved" when used "in reference to land is a term which conveys the idea of the absence of cultivation; a state of nature." 39 Cyc. 686.

The mere fact that the land had no dwellings on it would not make it unimproved, my judgment would be that any lands which have been changed by the agency of men, from their natural condition would be improved, even though they might be vacant lots in a city or lands in the country, without buildings or even fences thereon.

[12] §§ 10786, 10803 G. C., §§ 847, 879.

[13] Wiley vs. White, 3 Stew. & P. 355; Lockwood vs. Sturdevant, 6 Conn. 373; Reynolds vs. Wilson, 15 Ill. 394; Broadwater vs. Richards, 4 Mont. 80.

[14] *In re* Lawrence, 1 Redf. 310. See § 879.

[15] Bowen vs. Bond, 80 Ill. 351.

[16] Steele vs. Steele, 89 Ill. 51. See § 835.

If the order is to sell at a public sale, it may be changed by the court to a private one, or *vice versa*.[17] If the order is to sell at private sale, neither the time nor place need be specified.[18]

An instrument executed by an heir of the intestate, authorizing the administrator to sell certain land "under the direction of the court," does not dispense with the necessity for observing all the statutory requirements.[19]

Where an administrator sells land under the statute he can impose no conditions, but simply sells the right of the heirs in the real estate. His sale is equivalent to a sale by the heirs.[20]

§ 881. Private sale.

The statute leaves the matter in the discretion of the Probate Judge whether or not to order the property to be sold at private sale. In order to justify the Probate Judge in making an order of private sale he should be satisfied that it would be to the interest of the estate to make such an order. The statute contemplates that where a good reason does not exist that the sale be made at public auction, and in that manner the rights of all will be amply provided for. But there are many instances, especially where the estate is small, in order to save the costs of advertising, etc., the court should grant the application for a private sale. As a general rule, it may be said, that when property sells for the value fixed by the appraisers, it brings its full value. If there is opposition to the order, it should not be allowed, unless the administrator would put the property to the highest bidder, the upshot price, of course, being the appraisement. One matter is to be strictly observed, and that is, in the return made, the administrator or executor must comply with the following section of the General Code:[21]

[17] Meek vs. Spencer, 8 Ind. 118.

[18] Rice vs. Cleghorn, 21 Ind. 80; Maxwell vs. Campbell, 45 Ind. 360.

[19] *In re* Hartley (Minn.), 37 N. W. Rep. 449; S. C. 38 Minn. 325.

[20] Foote vs. Overman, 22 Ill. App. 181. The administrator may sell in parcels, in his discretion, a tract ordered to be sold as a whole. Stall vs. Macalester, 9 O. 19.

[21] The statute now authorizes any interested person to make applica-

§ 882. Affidavit before private sale confirmed. "Before the court confirms a sale by an executor, administrator, guardian, assignee, or trustee, made under an order allowing such officer to make private sale, it shall require such officer to file an affidavit that such private sale was made after diligent endeavor to obtain the best price for the property, and that the sale reported, is the highest price he could get for it." [R. S. § 6412.][22]

It is sometimes the practice to receive bids at private sale and report them to the court, and get the court's approval of the sale before the bid is accepted. This, however, is not necessary as no sale becomes effective until confirmed.[23]

§ 883. Public sale. Notice of. "If the sale is to be public, the executor or administrator must give notice of the time and place of sale, by advertisement at least four weeks successively, in some newspaper printed in the county where the lands are situated." [R. S. § 6159.][24]

§ 884. Notice to contain street number, or name of township, etc. "All notices and advertisements for the sale of lands and tenements located in a city or village in this state, made by virtue of proceedings in a court of record therein, in addition to a description of such lands and tenements, shall contain the street number of the building or buildings erected on the lands, or the street number of the lots offered for sale. If no such number exists, then the notice or advertisement must contain the name of the street or road upon which such lands and tenements are located, together with the names of the streets or roads immediately north and south or east and west of such lands and tenements, that cross or intersect the street or road upon which they are located." [93 v. 256, § 1.][25]

tion to have an order of private sale returned if no sale is made within 30 days. § 10803 G. C., § 879.

See § 902, Purchaser's right and title; § 888, Conduct of sale.

22 § 11213 G. C.

The form for such return and affidavit will be found attached to the order of sale given in the previous section, § 878.

23 See § 1614, Assignees.

24 § 10800 G. C.

25 § § 11678 G. C.

Omission of house number of an improved section of city, fatal. Griefenkaup vs. Cresap, 26 C. C. (N.S.) 177. But failure to state street number or adjacent intersecting streets is not, where it is otherwise properly described on vacant lots. Hopkins vs. Bradburry, 19 N. P. 286; 26 Dec. 573; Hopkins vs. Oliphand, 20 N. P. 399.

§ 884a. **Name of township in certain cases.** "All notices and advertisements for the sale of lands and tenements located in a township and not within the limits of a city or village in this state, which are made by virtue of proceedings in a court of record therein, must contain the name of the township in which the lands and tenements are located." [93 v. 256, § 1.][25*]

§ 885. **Notice of sale in German or Bohemian newspaper.** Repealed.

§ 886. Points to be observed.

From the above sections of the General Code, it will be observed that a proper notice of sale must contain, *first,* the time and place of sale.[27]

Second, a description of the property, and if the property is in a town or city the street number of the building must be given. Or if there are no buildings or no such numbers, then the name of the street or road, together with the names of the roads north and south or east and west, must be given.[28]

Unless the court otherwise provide, the place will be at the door of the court house in the county in which the order of sale is made.[29]

The names of the parties should be given, but this is not a material matter.[30]

The notice must be given in the county in which the lands are situated.[31]

[25*] 11679 G. C.

See § 886, § 1625.

Want of legal notice will not defeat purchaser's title. Stall vs. Macalester, 9 O. 19.

[27] § 10800 G. C., § 883.

Craig vs. Fox, 16 O. 563.

[28] §§ 11678-9 G. C., § 884.

Incorrect metes and bounds in the advertisement is not sufficient to set aside a sale if the lot number is correctly given, and the plat would show the dimensions and no injury is shown. Kotch vs. Sieplein, 1 Clev. 17. If not in a platted town the name of the township must be given. § 11679 G. C.

[29] § 10803 G. C., § 879.

[30] Schneider vs. Ferrin, 41 Bull. 54.

[31] § 10801 G. C., § 885.

If there is no newspaper printed therein, it must be by posters, put up in at least five public places. If there is a newspaper, it must be inserted at least four weeks successively before the date of the sale. This means that four full weeks must elapse from the time of the first insertion until the day of sale. Some attorneys by reason of extra precaution have five insertions. This is more than is required, but the time should be long enough that five insertions could be made before the day of sale. If it is made in a daily paper it should be once a week on the same day of the week.[32] The statute does not in words say that it may be advertised in a daily paper, as it does in sales on execution,[33] but I have no doubt where it is shown or known that a daily is as good a means of spreading news as the weekly, that the daily may be used.[34] Where there is only one publication to be made in a newspaper, the statute means an English newspaper.[35]

The notice should be signed by the person making the sale, and should have inserted the terms of sale. It is customary to state the appraisement. As a general rule it will be found advisable to make the advertisement by posters as well as by the legal advertisements required in a newspaper. In these matters the administrator should use his discretion. If he desires to advertise by posters it would be well to include such authority in the entry ordering the sale. As to such notice it may be said generally, a sale without notice first given is void.[36] But the failure of the record to show notice given will not avoid the sale; for it will be presumed that such notice was

[32] Lemert vs. Clark, 1 C. C. 569; 1 C. D. 318.

[33] §§ 11681-2 G. C.

[34] The notice might be made in a Sunday paper. Hastings vs. Columbus, 42 O. S. 585; State vs. Thomas, 61 O. S. 444.

[35] Cincinnati vs. Bickett, 26 O. S. 49; *In re* Ringwald, 5 N. P. 496; 5 Dec. 452.

[36] Matter of Mahoney, 34 Hun. 501.

See service by publication where newspaper is defined. The court may refuse confirmation if not published in newspaper as required. Craig vs. Fox.

given.[37] Sale on too short notice does not render the transaction void.[38]

Failure to give notice of the time, terms and place of sale has been held not to invalidate sale after confirmation.[39]

A notice published in the English language inserted in a German newspaper is not sufficient.[40] Publication in one newspaper is sufficient; and if the administrator publish the notice in more than one, he will not be allowed the cost of the extra publication.[41] If the Court direct publication to be made in two newspapers a confirmation of the sale after publication in one paper only will make it valid.[42] If the publication of the notice is made according to the statute, an order directing notice to be given in a different manner will not avoid the sale.[43] The publication must be continuous in the same newspaper for the whole time required by the statute.[44]

The report of the sale, or the affidavit of posting, should show that the places where notices were posted were public places, and not merely state where they were posted, unless such places are such as the Court will take notice are public places. The court will not presume a school-house is a public place.[45] Proof of the posting may be made by copy attached to the affidavit.[46] Failure to state the terms of the sale will probably not avoid the sale.[47] The use of the wrong street number will not

[37] Saltonstall vs. Riley, 28 Ala. 164; S. C. 65 Am. Dec. 334; Gerrard vs. Johnson, 12 Ind. 636; Schaale vs. Wasey, 70 Mich. 414; S. C. 38 N. W. Rep. 317.

[38] Bland vs. Muncaster, 24 Miss. 62; S. C. 57 Am. Dec. 162; Minor vs. Selectmen, 4 Sm. & M. 602; S. C. 43 Am. Dec. 488. Unless cured by confirmation it would be void.

[39] Richardson vs. Farwell (Minn.) 51 N. W. Rep. 915.

[40] Graham vs. King, 50 Mo. 22; Doerge vs. Heimenz, 1 Mo. App. 238; Heitkamp vs. Biedenstein, 3 Mo. App. 450.

[41] Succession of Hautau, 32 La. Ann. 54. The court might allow it if it deems it advisable.

[42] Sankey's Appeal, 55 Pa. St. 491.

[43] Lawrence's Appeal, 49 Conn. 411.

[44] Townsend vs. Tallant, 33 Cal. 45.

[45] Sowards vs. Pritchett, 37 Ill. 517; Hugo vs. Miller, 50 Minn. 105; S. C. 52 N. W. Rep. 381.

[46] Brown vs. Redwyne, 16 Ga. 67. The notice should state the time and place of sale, or it will be void (unless there is a confirmation). Blodgett vs. Hitt, 29 Wis. 169.

[47] Paine vs. Fox, 16 Mass. 129. Where the order of sale directed the sale to be held according to law, but the notice of sale showed that the sale was held on the premises (instead of at the court house), the sale was held to be valid. Smiley vs. Cook, 40 L. R. 737; 52 Bull. 156.

avoid the sale, if the description by boundaries is correct.[48] A sale will not be set aside because the description of the premises is not full, if it did not mislead the bidder,[49] and if the notice is sufficient to put an ordinary man on inquiry, and such an inquiry would disclose the true facts, a misdescription in the notice will not release the bidder.[50] But if the notice does not fairly include a tract, no title to it will pass.[51]

The date of sale must be stated, or it will be invalid.[52] A notice of a private sale need not be given.[53]

§ 887. Form of notice of public sale.

In pursuance of an order of the Probate Court of.....County, Ohio, I will offer for sale at public auction on the.....day of..... at.....o'clock at the door of the court house in the city of..... (or such other place as the Court may have ordered the sale), the following described real estate, situate in the county of.....State of Ohio, to-wit: (here describe property), (and also insert, if the property is in a town or city, the number of the building, if there is no number to the building then give the name of the street and likewise the names of the streets north and south or east and west. If the property is in the country, name the township and public road upon which it is situated, as well as its proximity to some village). Appraised at..... dollars, terms of sale (here state how payments are to be made, which may be varied in such a manner as the Court may order. But the terms must correspond with those given by the Court, which usually are as follows: one-third in hand, one-third in one year and one-third in two years from the day of sale, with interest). The payments to be secured by a mortgage upon the premises sold.[53a]

A. B., administrator of the estate (or executor of the last will and testament) of C. D., deceased.[54]

§ 888. Conduct of sale.

The advertisement having been made according to law, and the time having arrived at which the sale should be made, the next thing in order is, making the sale. In this matter the administrator or executor is not only required to exercise ordinary care and prudence, but must follow the orders of the Court.

[48] New England Hospital vs. Sohier, 115 Mass. 50.

See statute, Previous, see § 884.

[49] Succession of Wadsworth, 2 La. Ann. 966.

[50] Wylly vs. Gazan, 69 Ga. 506.

[51] Bradford vs. McConihany, 15 W. Va. 732.

[52] Wellman vs. Lawrence, 15 Mass. 326.

[53] Rice vs. Cleghorn, 21 Ind. 80; Maxwell vs. Campbell, 45 Ind. 360.

See § 1625, Assignees.

[53a] May be all cash. § 10786 G. C. §, 847.

[54] See § 1625.

The statements and representations made by the administrator at the time of the sale bind the estate only as to such matters as are prescribed in the order, or concerning which he has discretionary power,[55] hence, the estate is not, for instance, bound by his representations of the validity of the title. If he mislead purchasers by false statements which he is not authorized to make, or in respect of matters lying beyond the scope of his discretion, he may make himself personally liable thereby, but not the estate.[56]

Puffing, the employment of sham bidders, and similar contrivances to stimulate bidding at public sales, are discountenanced by Courts; the current of authorities is now, that the employment of such means taints the transaction with fraud, against which Probate or Chancery Courts will relieve a purchaser, upon his complaint, by setting aside the sale.[57]

The Court can appoint no one but the executor or administrator to make the sale,[58] but I apprehend this will not preclude the administrator to act by agent. There is no doubt but what if the estate is of considerable amount, unless the administrator or executor is particularly qualified for such a purpose he could secure an auctioneer. Yet our Supreme Court has held that it is presumed that he has such ability, and unless there is an order of the Court allowing procuration of an auctioneer, the administrator or executor would not be allowed the expense of such auctioneer.[59]

From this ruling of our Supreme Court it is never safe to employ an auctioneer without an order of the Court for that purpose. No bid can be received for less than two-thirds of the appraised value, nor should the bid of any one be received who

[55] Dunlap vs. Robinson, 12 O. S. 530; Giles vs. Moore, 4 Gray 600; Randolph's Appeal, 5 Pa. St. 242, 245; Cruikshank vs. Luttrell, 67 Ala. 318-325; Selb vs. Montague, 102 Ill. 446, 451; Foote vs. Overman, 22 Ill. App. 181; See Woerner on Guardianship, § 82.

[56] Westfall vs. Dungan, 14 O. S. 276; Arnold vs. Donaldson, 46 O. S. 73; Mellen vs. Boarman, 13 Sm. & M. 100; Riley vs. Kepler, 94 Ind. 308, 311; West vs. Wright, 98 Ind. 335; Fritz vs. McGill, 31 Minn. 536, 539; Wells vs. Harper, 81 Ga. 194.

[57] Woerner on Admin. 1055.

[58] Woerner on Admin. 1058.

[59] Ingham vs. Lindemann, 37 O. S. 218.

This holding was made in an assignment case, but the reasoning applies to administrators.

is not qualified to bid. When the property is knocked down to the successful bidder, he should be required to make a deposit of not less than double the amount that a readvertisement would require.

It is probable that the Court could enforce by proceedings in contempt the acceptance of the property and compliance of the bid on the part of a purchaser.[59*] A slight variation of the time and place of sale would not affect its validity unless it be shown that some prospective purchaser was misled thereby.[60]

§ 889. Who may become purchasers.

This matter has been discussed somewhat in the chapter on the sales of personal property,[61] and what was there said is equally applicable to purchasers of real estate. The statute forbids an appraiser from becoming a purchaser, and an officer making sale on execution,[62] and a long line of authorities establish the principle, that a person acting as a trustee of any kind, cannot either directly or indirectly purchase the property he holds in trust, and that if he becomes interested in the purchase of such property, the beneficiaries may have the purchase set aside.[63]

It has, however, been held that such a sale is not absolutely void, but only voidable, and will only be considered fraudulent and void by a party directly interested, etc. Terrill vs. Auchaner, 14 O. S. 80.

60 See § 1625, Assignees.

61 § 469, *et seq.*, § 506 *et seq.*

62 § 11696 G. C. Hurst vs. Fisher, 46 Bull. 19.

59* Section 11687 G. C. provides that the court from which any execution or order of sale issues, shall, upon notice and motion of the officer who makes sale, or an interested party, punish as for contempt any purchaser of real estate who fails to pay the purchase money therefor, and § 10500 G. C., gives the Probate Court the same power to punish for contempt as the Common Pleas has. See § 17.

63 This principle has been applied, in the following cases, to purchasers by various trustees in Ohio, such as executors, administrators, guardians, etc. Welsh vs. Perkins, 8 O. 52-56; Armstrong vs. Huston, 8 O. 552, 554; Dunlap vs. Mitchell, 10 Ohio 117; *Id.* 120; Glass vs. Greathouse, 20 Ohio 503; Sheldon vs. Newton, 3 O. S. 494; Barrington vs. Alexander, 6 O. S. 189; Riddle vs. Roll, 24 O. S. 572; Piatt vs. Longworth, 27 O. S. 159; Rammelsberg vs. Mitchell, 29 O. S. 22; Beard vs. Westerman, 32 O. S. 29. Does not apply to partition sales. Bohart vs. Atkinson, 14 O. 228.

The direct purchase by a trustee at a sale made by him, in his trust capacity, is voidable, but it can not be set aside after the land has been conveyed to a *bona fide* purchaser without notice of the indirect purchase by the trustee. Harrison vs. Heckler, 6 C. C. 443; 3 C. D. 530.

S. having inherited real estate from her deceased mother, her stepfather induced her to convey it to him for an inadequate consideration by representing that it had been

Fullness of price, absence of fraud, and fairness of purchase are not sufficient to countervail this rule of policy. To give it effect, it is necessary to recognize a right to set aside the sale in all cases, on repayment of the money in advance,[64] but where an executor, having brought property at a sale to pay debts for the estate, upon failure to sell for want of bidders, resigned, and, upon a sale by his successor in trust, bought the property as executor of his father's estate, at a price claimed to be inadequate, does not constitute ground for setting aside the sale, where it does not appear that vendee and former executor, did anything to prevent fair competition.[65]

In our State it has been held that a creditor in an execution may claim the benefit of a purchase made by his attorney. By analogy this might apply to attorneys acting for the administrator, and the purchase of the attorney might be considered in law, the purchase of an administrator or executor.[66] It seems, however, in such a case if it be shown that an attorney acted entirely for himself in the absence of fraud and a want of proper vigilance to secure the best price on the part of the administrator or executor, the Court might approve the sale.[67]

The rule, however, prohibits not only the purchase by the executor or administrator, but is applicable if he become beneficially interested in the property sold before the confirmation of the sale, although after it had been struck off, and although the confirmation was *ex parte*, and, notwithstanding the agreement by which he became interested is void under the Statute of Frauds.[68]

bought with his money and the title put in his wife's name to secure money he owed her. S. filed a petition to compel her step-father's heirs to pay her the real value of the property. *Held*, such petition is demurrable. S. must affirm or repudiate the conveyance, and can not assert a vendor's lien for the full value and repudiate the actual sale. These facts do not amount to a sale, and constituted the step-father a constructive trustee for S. Stewart vs. Marsham, 2 C. C. 471; 1 C. D. 594.

[64] Armstrong vs. Huston, 8 O. 554; Price vs. Morris, 5 McLean 4.

[65] Woodward vs. Curtis, 10 C. D. 400; 19 C. C. 15.

[66] Wade vs. Pettibone, 11 O. 57, 60.

[67] Woerner on Admin. 1083.

[68] Terwilliger vs. Brown, 44 N. Y. 237; O'Conner vs. Flynn, 57 Cal. 293; Gibson vs. Herriott, 55 Ark. 85. If an executor purchases it will be presumed fraudulent and the

An agreement, by an executor selling, with the purchaser to share in future profits and losses, is a constructive fraud, and he can obtain a voidable title only; but in the absence of anything done to prevent competition in bidding, and if the property produce all it is worth, such agreement is not an actual fraud, so as to make the sale void collaterally.[69] But where the administrator got the benefit of land sold to another who paid no purchase-money, the Court, in setting aside the sale, will refuse to allow the claims of the administrator for debts of the estate paid by him, and his own claim allowed by the Probate Court, and will hold him liable for rents and profits;[70] so it has been held that equity will not permit property sold by executors to be reconveyed to them by the purchaser for the same consideration, before the executor's duties are ended, except for the benefit of the *cestui que trustent,* or parties beneficially interested.[71] The administrator is prohibited alike from purchasing for himself through an agent,[72] and from purchasing as an agent for another.[73]

A sale to a relative for less than could have been obtained from a stranger is fraudulent; nor can the son of an executrix, having bought land with the understanding that he is to hold it for her use, hold it against creditors; and a purchaser of land from an executrix, which she had paid for out of the assets of the estate, will, if he had notice, hold in trust for the creditors.[74] This rule does not apply to one who was nominated by the decedent as executor, but who does not qualify as such.[75]

The administrator is not, subsequent to the sale, precluded from dealing with the purchaser, and may acquire from him a valid title to the property sold, if there was no understanding, express or implied, at the time of the administrator's sale, that he should have an interest in the purchase.[76]

court will set sale aside on application of a party interested. Barrington vs. Alexander, 6 O. S. 189. See Sheldon vs. Newton, 3 O. S. 494; Glass vs. Greathouse, 20 O. 503; Riddle & Parker vs. Roll, 24 O. S. 572; Pratt vs. Longworth, 27 O. S. 159; Caldwell vs. Caldwell, 45 O. S. 512.

69 Williams vs. Rhodes, 81 Ill. 571.

70 Coat vs. Coat, 63 Ill. 73.

71 Boynton vs. Barstow, 53 Me. 362.

72 Decker vs. Decker, 74 Me. 465; Kruse vs. Steffens, 47 Ill. 112.

73 Neda vs. Fontenot, 2 La. Ann. 782; State vs. Jones, 53 Mo. App. 207.

74 Woerner on Admin. 1083.

75 Bowden vs. Pierce, 73 Cal. 459-463.

76 Woerner on Admin. 1086.

A *bona fide* purchaser from an administrator, who indirectly buys at his own sale, such purchaser having no notice thereof, is, of course, protected in his purchase.[77] An executor or administrator, having purchased at his own sale, is treated in equity as a trustee for the heirs or devisees; hence, if such sale is set aside on their suit, he will be required to account, being chargeable for rents and profits received from the property, or, if converted into money, then for the money, with interest, and to be credited with payments for the purchase, if applied in the administration of the estate, for taxes, necessary repairs, and reasonable improvements, also with interest.[78]

§ 890. **Return. Confirmation. Order for deed.** "The executor or administrator shall make return of his proceedings under the order of sale; and the court, after careful examination thereof, if satisfied that the sale in all respects has been legally made, shall confirm it, and order the executor or administrator to make a deed to the purchaser." [R. S. § 6162.][79]

§ 890a. **Deferred payments.** "The order, in such case also may require that before the delivery of such deed the deferred installments of the purchase money be secured by mortgage. But if after the sale is made, the purchaser offers to pay the full amount of the purchase money in cash, the court may order that it be accepted, if for the best interest of the estate, and direct its distribution." [R. S. § 6162.][79*]

§ 890b. **Sale of notes.** "The court in such case also may direct the sale, without recourse, of all or any of the notes taken for deferred payments, if for the best interest of the estate, at not less than their face value with accrued interest, and direct distribution of the proceeds." [R. S. § 6162.][79†]

§ 891. **Return of sale.***

The property having been knocked down to the highest bidder, it is the duty of the administrator or executor to report the sale to the Probate Court for confirmation. If he refuses to do so he may be compelled to act by order of the Probate

[77] Woerner on Admin. 1088.

[78] Lagger vs. Bldg. Association, 146 Ill. 283; Miles vs. Wheeler, 43 Ill. 123; Ebelmesser vs. Ebelmesser, 99 Ill. 541; O'Conner vs. Flynn, 57 Cal. 293; Fisher vs. Bush, 133 Ind. 315.

See § 1625, Assignees.

[79] § 10804 G. C.

[79*] § 10805 G. C.

[79†] 10806 G. C.

See § 878, for form of report of sale.

* Cited, Fitzgerald vs. Welds, 50 Bull. 384.

Where an administrator has sold under order of court he may convey directly to the assignee of the purchaser. Ewing vs. Higby, 7 O. (pr. 1) 198.

Court,[80] or, as it has been held in some instances, a Court of Chancery might confirm.[81] The course in our State would be to apply to the Probate Court, and if he fail to act, the Court would remove him, and the person appointed in his place could report the sale. Before reporting the sale for confirmation, the administrator or executor should ascertain whether the purchaser desires to pay all cash or whether he desires to pay more in cash than required by the terms of sale. Such fact should be reported so that the Court may make an order in conformity to the wishes of the parties. The object of the report is to enable the Court to examine into the doings of the administrator in respect to the sale and to determine whether he has complied with all the requirements of the statute and the orders of the Court touching the same.[82]

If there is apparently no contest, the Court may proceed to confirm the sale upon the report. As a general rule, it may be said, that the sale ought not to be confirmed until the parties interested have had a reasonable time to examine the same and make contest thereto, if so desired. Usually parties interested can and ought to make objection at once. The report should be signed by the administrator or executor, but need not be sworn to.[82*] The form of such report is attached to the order of sale given in the previous section. If there are several tracts offered, each tract should be reported separately in the return with the price received for each.

A report of sale by an administrator, showing that land belonging to his decedent's estate has been sold to a designated person, is not conclusive as to who the person was, but the real purchaser may be shown by parol, though the decree of confirmation directed that conveyance be made to "the purchaser."[83]

The report of sale need not contain a precise and full description of the lands by metes and bounds.[84] Reference to the order of sale is sufficient.[85]

But he can not make to another, if the other is to convey to him. Caldwell vs. Caldwell, 45 O. S. 512.

[80] Stow vs. Kimball, 28 Ill. 83; Mason vs. Osgood, 64 N. C. 467.

[81] Rea vs. McEachron, 13 Wend. 465.

[82] Woerner on Admin. 1059.

[82*] If sale is public.

[83] Dodd vs. Templeman, 13 S. W. Rep. 187; S. C. 76 Tex. 57.

[84] Calvert vs. Alexander (Ky.), 8 S. W. Rep. 696.

[85] Sullivan vs. Berry, 83 Ky. 198.

A purchaser named Mary Hynod cannot be compelled to pay for a sale returned and confirmed to May and Inott. She is not connected therewith.[86] If the purchaser consent, the administrator may substitute some one else as purchaser in his report.[87] If the highest bidder fails to comply with the order making a deposit, or for some other good reason is unable to comply with the terms of the sale and where the difference between his bid and the next highest is very slight, the name of such next highest bidder might be substituted for the highest bidder. he consenting thereto.[88]

§ 892. Confirmation.

The confirmation or approval of the sale by the Court is the judicial ascertainment of its validity and legality, and the decree so made cannot thereafter, in any collateral proceeding, be questioned.[89] The matter of confirming the sale rests largely in the discretion of the judge, and the higher Court will not review the same on the weight of the evidence.[90]

The judge should inquire into all the circumstances connected with the transaction, examine the administrator or executor, the purchaser and other witnesses if necessary, and if he reach the conclusion that the sale was not fairly made or not in conformity with law, the sale should be vacated. It is not proper

[86] Starbuck vs. Hynod, 1 Bull. 140.

[87] Ewing vs. Higby, 7 O. (pt. 1) 198; Thompson vs. McManama, 2 Dis. 213.

[88] Woerner on Admin, 1063.

[89] Noland vs. Barrett, 122 Mo. 181; Sturdy vs. Jacoway, 19 Ark. 199; Thorn vs. Ingram, 25 Ark. 52; Osman vs. Traphagen, 23 Mich. 80; Camden vs. Plain, 91 Mo. 117; 4 S. W. Rep. 86; See also Keller vs. Amos, 31 Neb. 438.

But the approval can not by any retroactive effect impart validity to a sale which is wholly void. Cunningham vs. Anderson, 107 Mo. 371; Schlicker vs. Hemenway, 110 Cal. 579.

[90] Niles vs. Parks, 49 O. S. 370. Confirmation may be refused and the sale on execution vacated in the Court's discretion, though the proceedings are regular and though R. S. § 5398 seems to be mandatory. (Aff'd, no rep., 23 B. 253.) Bear vs. Bookmiller, 3 C. C. 484; 2 C. P. 277.

Amendment of return giving reasons for not executing order of sale. Bereman vs. Directors, 4 W. L. J. 500.

Where a sale had been made for a fair price upon competitive bidding, the court can not set it aside merely because the sale was on the premises, when the statute provides that when not otherwise directed the sale shall be held at the court house. Smiley vs. Cook, 4 O. L. R. 737; 52 Bull. 156.

for the Court to go into and investigate as to the legality of the finding made, upon which the order of sale rests. If a question is to be raised upon that question, it cannot be done in an objection to confirmation. If it was clearly shown, however, that the Court had no jurisdiction to make the order of sale, it should not be confirmed.[91] As a general rule it may be said that the Court will refuse to confirm the sale if the statute has not been literally complied with.[92] If made on an improper day and the property bring but two-thirds of a low appraisement, it should be set aside.[93] A defect in the description where not material and not objected to by the purchaser is no ground to resist confirmation.[94]

A very common objection to confirmation is the inadequate price at which the property has been sold. This is never a good reason to refuse confirmation, unless the Court be satisfied that a better price will be secured. Generally the Court of Probate being charged with the duty of seeing that the estate receive the most that can be had on such sale, will set aside a sale where a higher price is guaranteed. Such action on the part of the Court sometimes brings on it the ill feeling of the person who bid it off. But a Court mindful of the duty devolved upon it, to look after the interests of infants, widows, and creditors not directly represented, should not be afraid of offending some one who may by its action loose a fortunate chance of speculation. The general practice is in order to set aside such sale by reason of inadequate price, to require that a bond be taken or security given to insure a sale of the premises if again offered for an amount sufficient to equal the present bid and the costs of an additional sale, as well as interest which might accrue on the purchase money from the date of the first sale to the second.[95]

[91] See Buckingham vs. Grandville, 2 O. 360; Fritsch vs. Van Mittendorff, 2 C. S. C. Rep. 262.

[92] Craig vs. Fox, 16 O. 563.

[93] Banning vs. Pendery, 4 Bull. 912.

[94] Wilson vs. Scott, 29 O. S. 636.

[95] Where corporation property is bid in at foreclosure sale by a director at much less than its value, and a bond holder offers security that he will bid twenty per cent. more if a new sale is ordered, it will be ordered on condition this proposi-

No title can vest until a confirmation.[95*] But a confirmation does not of itself constitute the sale.[96] The title of the heirs is not divested until the purchase money is paid and the deed delivered by the administrator.[97] If an heir or person interested as provided by statute,[98] appear in Court and offer to give bond to the administrator to pay all the debts of the estate, the sale ought not to be confirmed, as the heirs ought to have an opportunity of preserving the estate to themselves. The object of the sale is to secure funds with which to pay the debts of the deceased and not to divest the heirs of their title for any other purpose.[99]

§ 893. Sufficient confirmation.

Where there is any evidence of confirmation, or of something from which an intention to confirm might be inferred, or something entitling the purchaser to have the sale confirmed, the purchaser will be entitled to claim title to the land.[100]

The minutes of the judge making the approval is sufficient to sustain the sale against a collateral attack.[101] An approval of a sale will be construed also as an approval of the appointment of the administrator.[102] So ordering the report to be spread of record, accepting an account of the proceeds, and approving the deed, is a confirmation of the report.[103] An acknowledgment of the execution of the deed taken by the judge of the Court, and charging the administrator with the proceeds of the sale, is a confirmation of the sale,[104] and if no formal entry can be found, an approval will be presumed in a collateral attack.[105]

tion is put into shape within a week. Secor vs. Maumee Rolling Mill, 1 N. P. 100; 1 Dec. 80.

95* See Johnson vs. Cincinnati, 11 C. C. (N.S.) 344; 30 O. C. C. 644.

96 Curtis vs. Norton, 1 O. 278.

97 Woerner on Admin. 1063.

98 § 826.

99 The title of the purchaser may not be divested by a subsequent reversal of the order of sale. Irwin vs. Jeffers, 3 O S. 339.

100 Moody vs. Butler, 63 Tex. 210.

101 Camden vs. Plain, 91 Mo. 117; S. C. 4 S. W. Rep. 86.

102 Shumard vs. Phillips, 53 Ark. 37; S. C. 13 S. W. Rep. 510.

103 Grayson vs. Weddle, 63 Mo. 523.

104 Agan vs. Shannon, 103 Mo. 661; S. C. 15 S. W. Rep. 757.
Moore vs. Davis, 85 Mo. 464.

105 Jones vs. Manly, 58 Mo. 559.

A confirmation may be made any time after the sale,[106] even after suit to set aside the same or deed.[107]

If several tracts be sold, the sale of some may be approved and the others disapproved, although there be only one report embracing them all.[108] Long possession of the purchaser under a deed will raise a presumption of confirmation.[109]

§ 894. Errors cured by confirmation.

Where jurisdiction has been acquired in such a proceedings, subsequent errors in the course of its exercise, as in the order of sale and its confirmation, however grave and glaring, will not subject the judgment to successful collateral attack.[110]

If a deed be made before confirmation, the fact of confirmation will cure the defect.[111] If an order be given to two joint administrators, a sale by one is valid after confirmation.[112] The confirmation cures all defects in the advertisement or notice of the sale,[113] or the failure of the notice to give the terms of sale,[114]

[106] *In re* Harvey, 16 Ill. 127.

[107] Morgan's Appeal, 110 Pa. St. 271.

A confirmation cannot be collaterally attacked.

Sturdy vs. Jacoway, 19 Ark. 499; Thorn vs. Ingram, 25 Ark. 52; Osman vs. Traphagen, 23 Mich. 80; Camden vs. Plain, 91 Mo. 117.

[108] Delaplaine vs. Lawrence, 3 N. Y. 301; Bacon vs. Morrison, 57 Mo. 68.

[109] Smith vs. Wert, 64 Ala. 34; Neill vs. Cody, 26 Tex. 286; Moody vs. Butler, 63 Tex. 210.

In passing on a sale, the Court can not go behind and revise the original order of sale.

Allen vs. Shepard, 87 Ill. 314.

The order of confirmation is not void because it does not show to whom each of several tracts was sold.

Perry vs. Blakey, 5 Tex. Civ. App. 331; S. C. 23 S. W. Rep. 804.

A recital that the sale had been made, and that on inspection it appeared it was made according to law, is a sufficient report and confirmation of the sale.

Day Land, etc., vs. N. Y., etc., Co. (Tex.), 25 S. W. Rep. 1089.

[110] Bohart vs. Atkinson, 14 O. 228; Spaulding vs. Baldwin, 31 Ind. 376; Hammann vs. Mink, 99 Ind. 279.

[111] Lemert vs. Clark, 1 C. C. 569; 1 C. D. 318; Hammann vs. Mink, 99 Ind. 279; *Contra*, Stillwell vs. Swarthout, 81 N. Y. 109.

[112] Osman vs. Traphagen, 23 Mich. 80.

[113] Jackson vs. Magruder, 51 Mo. 55.

[114] Braubaker vs. Jones, 23 Kan. 411.

or the place,[115] or both the time and place,[116] or any departure from the order of sale,[117] or the fact that the notice was too short.[118] A sale for less than the appraisement is cured by the confirmation,[119] or by selling at private sale when ordered to sell at public sale,[120] or selling upon different terms from the order,[121] or the omission to verify the report.[122] A void sale, however, can not be rendered valid by confirmation.[123]

§ 895. Entry confirming sale, and distributing proceeds.

No objection being made and the Court being satisfied that a proper sale has been made, an entry should be placed upon record reciting these facts. Generally the same entry includes a distribution of the proceeds, but this is not essential and an entry might be made confirming the sale and thereafter another entry distributing the proceeds. For convenience they will both be included in the following, which may be used as a general form:*

(*Title.*)

This day this cause came on to be heard upon the report of a public (or private) sale of the property described in the petition herein; and there appearing to be no objection to the sale it was submitted to the Court upon such return of sale. Whereupon the Court finds, after due and careful examination of the same that said sale has been duly and legally made in conformity to law, and the former orders of the Court. Wherefore it is ordered that the same be and is hereby approved and confirmed. And it is further ordered that said A. B. as such administrator (or executor) make to the purchaser, E. F., a good and sufficient deed for the premises so sold. (If the purchaser desires to change the terms of sale the entry may continue.) And the said E. F. desiring to pay all of said purchase money in cash, said administrator (or executor) is ordered to accept the same.[124]

[115] Blodgett vs. Hitt, 29 Wis. 169.

[116] Beidler vs. Friedell, 44 Ark. 411; Cadwallader vs. Evans, 1 Dis. 585.

[117] Hammann vs. Mink, 99 Ind. 279.

[118] Wyant vs. Tuthill, 17 Neb. 495; S. C. 23 N. W. Rep. 342.

[119] Spaulding vs. Baldwin, 31 Ind. 376.

[120] Apel vs. Kelsey, 52 Ark. 341; S. C. 12 S. W. Rep. 703; *Ex parte* Kirkman, 3 Hed 517.

[121] Jacobs' Appeal, 23 Pa. St. 477.

Where a devisee of a share dies before distribution is made, the proceeds of from a sale of the property go to his heirs as personalty, and should be paid to his administrator. Avery vs. Howard, 7 N. P. (N.S.) 97; 19 Dec. 71.

[122] Spragins vs. Taylor, 48 Ala. 520.

[123] Cunningham vs. Anderson (Mo.), 17 S. W. Rep. 972; Templeton vs. Falls, etc., Co., 77 Tex. 55; S. C. 13 S. W. Rep. 964.

See §§ 10783-4 G. C., § 814.

[124] If the administrator or executor desires to get an order to sell the notes representing the deferred payments, the entry should state and authorize such sale, and might be as follows: "And it appearing to the Court that it would be for the best interest of the estate to sell the

And the said M. N., having by her answer elected to receive, in lieu of her dower in said real estate, its value in money, the Court finds the just and reasonable value thereof to be.....dollars.[125]

And it is further ordered that upon satisfaction of the mortgage of O. P. herein set forth in the cross petition of said O. P., said mortgage being recorded in volume.....page.....Mortgage Records of..... County, Ohio, cancellation be entered on the record thereof in the office of the Recorder of said county where it is recorded.[126]

And the Court coming now to the distribution of the proceeds of said sale, amounting to.....dollars, the said E. F., purchaser, having elected to pay the same in cash (or the said administrator having sold the notes and secured the cash therefor), it is ordered that said administrator out of the moneys in his hands pay *first* to the treasurer of this county, taxes, penalties and interests thereon against said property, to-wit, the sum of.....dollars.[127]

Secondly, costs and expenses incurred in the sale of said land to the sum of.....dollars, as follows:

1. Probate Court costs, amounting to.....dollars. 2. The Morning Sun, for advertising said property.....dollars. 3. James Foley, auctioneer, the sum of.....dollars. 4. Van Bird, surveyor, the sum of.....dollars. 5. The per centum of the executor, the sum of.....dollars.[128]

Thirdly, to M. N., widow, the sum of.....dollars, which the Court finds to be the reasonable value of her dower interest in said premises.

Fourthly, to O. P. on the note and mortgage set forth in his cross-petition herein, the sum of.....dollars, which the Court finds to be due him. And it is ordered that the balance of said sum, amounting

notes taken for the deferred payment, it is ordered that said administrator sell the same without recourse for not less than their face value and accrued interest."

[125] This dower interest of the widow is calculated by use of the ordinary tables of mortality. See chapt. next to index.

[126] This entry should always contain the volume and page of the record where the lien is recorded. It sometimes becomes a difficult matter and one exceedingly dangerous to the clerk or Probate Judge where such is not done. For perchance he might cancel the wrong mortgage, and besides, it is much easier for the attorney when preparing the entry to insert the volume and page of such lien record than it is for the judge or clerk to search through a number of papers to ascertain the same and then fail to find it correctly given. §§ 10783-4 G. C., § 814; as to statute providing for distribution, see § 903.

[127] As to how money is to be distributed, see subsequent section and § 10809 G. C., § 903.

This does not include street assessments which are not on the tax duplicate. Makley vs. Whitmore, 61 O. S. 587.

Taxes, interest and penalties which by the statute are to be paid out of the proceeds means taxes standing on the duplicate; and taxes are deemed due on October first for the purpose of being paid out of the purchase money on administrators, creditors, trustees, or judicial sales though the lien of the same attaches at a prior April. Hoglen vs. Cohan, 30 O. S. 436; Ketchem vs. Fitchem, 13 O. S. 204.

[128] As to collection and compensation of the executors and administrators, see §§ 654-659.

Neither attorney fees of an administrator nor premiums due on the administrator's bond, are costs, under § 10809 G. C., § 903, prior to a first mortgage, nor can they be allowed as extraordinary expenses. Sherman vs. Millard, 6 C. C. (N.S.) 338; 27 O. C. C. 181.

The author is somewhat inclined to doubt the soundness of this opinion. It seems that such expense as the mortgage-holder would have been put to if he had foreclosed his mortgage would have at least been proper to allow the administrator. The recent case of Klimper vs. Klimper, 12 O. App. 332, would support the allowance of such costs which supports the view of the author.

For taxes, costs and expenses be-

to.....dollars, be distributed by said administrator as provided by law.[129]

§ 896. Resale.

If there are no bidders, the premises should be re-offered. If offered twice and there are no bidders the Court may then fix the amount for which they may be sold or may order a new appraisement.[130] If the purchaser fails to pay the price bid by him, there must be a resale of the property. The Court may order a resale even after a sale has been confirmed, for it does not lose its jurisdiction until the sale has been actually consummated.[131]

In all cases where there has been no sale made, either for want of bidders or by reason of a bidder refusing to comply with his bid, the matter should be reported to the Probate Court and the Court should order a resale. Such proceedings tend to preserve a regularity which will prevent errors. If a purchaser refuses to take the property and it is resold he will be liable if it brings a less amount than his bid. The Court may also enforce a purchaser's bid by proceeding against him for contempt. If the Court fixes the value once after the property has been twice offered, it cannot fix it a second time.[132] The Court might, perhaps, order a reappraisement if a great length of time had expired between a former appraisement and the time of the proposed sale, where it is shown that values have changed. The journal entry in such cases might be as follows ordering a reappraisement:

ENTRY.

(*Title.*)

It appearing to the Court that the real estate herein ordered to be sold has been twice offered for sale under the present appraisement and not sold for want of bidders, it is now on motion ordered that said appraisement be set aside and re-appraisement of the same be made by (name the

ing prior to dower, see § 950.

See § 814, Power to determine liens.

[129] After distribution has been made in payment of costs and liens on the property the remainder should be applied in payment of debts, etc. See § 646 *et seq.*

If anything remains after debts have been paid it must be distributed as real estate. See § 6171 R. S., § 905.

See § 1626, Assignees.

[130] § 10802 G. C., § 880.

[131] Greffet vs. Willman, 114 Mo. 106; Woerner on Admin. 1064.

[132] Brown vs. Conn. M. L. Ins. Co., 6 C. C. 62; 3 C. D. 350.

See § 888, Conduct of sale.

The beneficiary may apply for a resale. Caldwell vs. Caldwell, 45 O. S. 512.

persons), three judicious, disinterested men of the vicinity, who are freeholders.[133]

If the court is to fix the value the following may serve as an entry:

(*Title.*)

It appearing to the Court that the real estate herein ordered to be sold has been twice offered for sale under the present appraisement and not sold for the want of bidders, it is now on motion ordered that said real estate may be sold for the sum of.....dollars (at private sale or public auction, etc).

§ 897. Securing payments.

Before the delivery of the deed, or at the same time, the administrator or executor must secure payment for the real estate sold. Having delivered the deed he is responsible for the purchase money unless it should be a loss through deferred payments secured as provided by law. The statute provides that with the permission of the Probate Court the purchaser may pay all cash. Otherwise he must make payments as directed in the order of sale. If the administrator trusts the purchaser or takes notes in any other method than that directed by law, he is responsible. The deferred payments must be secured by mortgage on the premises, and must bear interest at six per cent. and must not exceed two years from the date of sale.[134]

Some care should be exercised in the drafting of the mortgage. The purchaser's wife or husband need not sign the same unless he or she be joint purchasers, although it will do no harm to have them to do so. Being a purchase money mortgage their dower does not attach until the purchase money is paid. The mortgage should be made to the administrator, *his heirs,* successors and assigns. If the word "heirs" is not used in the granting clause, or in habendum clause, or in the covenants, no fee simple is conveyed, but only a life estate.[135]

The only instance in which the word successors can be used instead of the word heirs, is when the mortagee is a corpora-

[133] This entry may be changed to suit where appraisement is ordered for any other reason.

It is not generally necessary to have a writ of possession, and there might be a doubt whether, in an administrator's sale under order of court, a writ of this kind could issue directed to the sheriff. But the sheriff is the executive officer of the Probate Court as well as the Court of Common Pleas and the mere fact that he does not conduct the sale would not prevent the court from granting the writ direct to him. See Bates Pl. and Pr., p. 2218; § 11654 G. C.

[134] § 10786 G. C., § 847.

[135] Stephenson vs. Sedam, 12 C. C. 408, 414; 5 C. D. 609. See case for application.

See Stambaugh vs. Fox, 16 C. C. 427; 8 C. D. 625.

tion. The administrator has no power to make a valid agreement with a partial number of the heirs to deduct a part of the purchase money for an alleged deficiency in the quantity of the land sold, nor can an heir retain the purchase money until his share to which he may be entitled out of the estate be ascertained, if the money is needed for purposes of administration. The same is equally true with a creditor.[136]

The administrator's claim for the purchase money constitutes a vendor's lien as in other cases of sale.[137]

§ 898. When motion to be set aside to be filed.

Until a sale is confirmed, the Probate Court undoubtedly has power to entertain a motion to set aside the appraisement or to refuse to confirm, and for equal reasons the Court should entertain a motion for such purposes until the deed has been delivered to the purchaser. The general rule being that all judgments are subject to vacation or modification during the term at which they are pronounced.[138]

The difficulty in the application of this rule is, as to whether or not the Probate Court has *terms* for such purpose. Whatever *terms* the Probate has are those given by sec. 11643, G. C. (see § 5), and consist of three terms of four months each, commencing on the first of January of each year.[138*] In this section it specifically applies to new trials and other relief after judgment, and the reasoning is cogent that if the Probate Court shall have *terms* for a new trial after judgment it should also have *terms* for all adversary proceedings before judgment.[139] If relief is had after the term, the practice provided for Common Pleas Courts should be followed. In some States it has been held that when a sale is confirmed by the Probate Court it has no further jurisdiction in the premises;[139*] and generally it is said the power to review or set aside the judgment or decree confirming

[136] Woerner on Admin. 1063.

[137] Woerner on Admin. 1065.

[138] 15 Ency. of Plead. and Prac. 205; 19 Ency. of Plead. and Prac. 904.

[138*] See § 5, Terms of court.

[139] Potter vs. Jenman, 4 N. P. 78; 4 Dec. 444.

[139*] State vs. Probate Court, 19 Minn. 117; State vs. Probate Court, 33 Minn. 94.

a sale after the expiration of the term at which it was rendered does not in the absence of statutory enactment to that effect, reside in Probate Courts.[140]

Sales will be set aside in equity where there has been fraud;[141] or where the purchase was made by an appraiser;[142] or for great and manifest inadequacy of price, from which fraud may be presumed;[143] or where the property was bought by the executor or administrator himself, or by one of his relatives. But in such cases application for the vacation of the sale must be made within a reasonable time,[144] and all the heirs must be made parties;[145] nor will the sale be set aside if the rights of a stranger or innocent purchaser have attached.[146]

The form of a motion to set aside an appraisement or sale may be as follows:

FORM OF MOTION.

(*Title.*)

Now comes I. J., defendant herein and as heir at law of C. D., deceased, and moves the Court to set aside the appraisement (or sale) heretofore made of the real estate described in the petition for the following reasons: First, because (here state reason). Second, because (set out reason).

Wherefore he asks that said appraisement (or sale) be set aside and such proceedings be taken as authorized by law.

.....

The hearing of such a motion is usually had upon affidavits, although the Court may hear the matter by oral testimony. The practice of the various Courts are not alike in this respect and no uniform rule can be given. If the motion is sustained, a journal entry should be made sustaining the same and granting the relief to which the party is entitled. Before a sale of land will be vacated relief will not be granted until the full

[140] Woerner on Admin. 1062.

[141] Van Horn vs. Ford, 16 Iowa, 578; Smith vs. Chew, 35 Miss. 153; Tillman vs. Thomas, 87 Ala. 321.

[142] Armstrong vs. Huston, 8 O. 552

[143] Haynes vs. Swann, 6 Heisk. 560.

[144] Haynes vs. Swann, *supra;* Murphy vs. De France, 105 Mo. 53.

[145] Hoe vs. Wilson, 9 Wall. 501.

[146] Sivley vs. Summers, 57 Miss. 712; Adams vs. Toomer, 44 Ark. 271; Jones vs. French, 92 Ind. 138; Adams vs. Thomas, 44 Ark. 267; Woerner on Adminis. 1062

See Kinkead's Pract. 574.

amount paid by the purchaser is returned to him.[147] He is entitled to recover from the heirs for taxes paid.[148]

If the purchase money has been applied to the payment of the debts, and the sale is set aside, the heirs will be liable to the extent of the property they have received, if necessary, to reimburse the purchaser.[149] If the purchase money did not go to pay the debts the heirs are not liable except for taxes.[150] He cannot recover for improvements made after notice to set aside the sale.[151]

§ 899. Deed evidence of validity of sale. "The deed of the executor or administrator, made in pursuance of the order of the court, shall be received in all courts as prima facie evidence that the executor or administrator in all respects observed the directions and complied with the requisitions of the law, and shall vest the title in the purchaser, in like manner as if conveyed by the deceased in his lifetime." [R. S. § 6163.][152]

§ 900. Execution and kind of deed.

A deed made by an administrator or executor in pursuance of an order of Court for real estate sold, conveys and vests in the purchaser the title which the deceased possessed. It is not a warranty deed. The Court has no power to authorize an administrator to make a deed of that kind,[153] and therefore in no instance could an administrator or executor make a deed of general warranty, unless a power expressly so to do was given in the will of the testator. If any effect at all can be given to

147 Longworth vs. Wolfington, 6 O. 9; Fisher vs. Bush, 133 Ind. 315; Burdett vs. Silsbee, 15 Tex. 604; Neel vs. Carson, 47 Ark. 421; S. C., 2 S. W. Rep. 107; Scott vs. Dunn, 1 Dev. & Eq. 425; Wilson vs. Holt, 83 Ala. 528; S C., 3 So. Rep. 321; Bennett vs. Caldwell, 8 Baxt. 483.

148 Schaefer vs. Causey, 6 Mo. 365.

149 Wehrle vs. Wehrle, 39 O. S. 365; Jayne vs. Boisgerard, 39 Miss. 796; Schaefer vs. Causey, 8 Mo. App. 142; Jones vs. French, 92 Ind. 138; Smith vs. Knoebel, 82 Ill. 392.

150 Nowler vs. Coit, 1 O. 519 (2d ed.).

151 Snider vs. Snider, 3 W. Va. 200.

152 § 10807 G. C.

153 Lockwood vs. Gilson, 12 O. S. 529.

a covenant of warranty in a deed it is personal, and it can only be enforced against an administrator or executor.[154]

As a general rule, it may be said that executors and administrators are the mere agents and instruments of law for conveying the title of the deceased, and therefore it may be said that covenants of warranty contained in such a deed do not bind these.[155] But the executor or administrator may bind himself by an express and voluntary covenant collateral with his official act, and if he chooses, in order to make a good sale, he may make a warranty that will bind him. But in order to bind the estate it must be shown first that he was authorized by will to give a warranty deed. Second, that it appears clearly from the instrument that he made a warranty *collateral* to his official act.[156]

The deed must be executed with the formalities of any other deed. It should show on its face the authority under which it was given, with sufficient certainty to enable the act done to be traced to the authority for that purpose. It should have the essentials given in the form hereinafter given. An administrator's deed, even if made under order of Court with but one witness, conveys no legal title.[157]

"If the deed conveys the equitable interest" of the deceased and all his "right, title and interest," it is sufficient to carry the legal title, if the decedent possessed a legal title. An administrator's sale passes no title until a deed is executed and delivered. But where the sale is otherwise complete, equity will compel the delivery of a deed and the payment of the purchase money; and the Probate Court might indirectly at least enforce the execution and delivery of a deed. It could make an order directing the executor to perform such an act, and if he failed,

[154] Lockwood vs. Gilson, 12 O. S. 526; Dunlap vs. Robinson, 12 O. S. 530.

An agreement to protect the title or indemnify the purchaser against incumbrances, orally made by the executor, does not bind the estate without authority from the will or Court. Arnold vs. Donaldson, 46 O. S. 73.

A covenant by executors in a deed made by order of the Probate Court warranting the title "as far as executors are bound by law to do," is not a personal covenant. Day vs. Brown, 2 O. 345.

[155] Woerner, Admin. 1066.

[156] Woerner, Admin. 1067.

[157] Miami Exp. Co. vs. Halley, 7 O. (1 pt.) 11.

could remove him and appoint some one who would comply with the orders of the Court. Where there are several executors or administrators, the deed should be made by all. An executor cannot make a deed by power of attorney, but if he dies or is removed his successor could make the sale.[158]

§ 901. Form of administrator's (or executor's) deed.

Know all men by these presents:

That, whereas, on the.....day of....., 19..., ...w...duly appointed and qualified as.....of the estate of..... deceased, late of.....County, Ohio, by the Probate Court of said county; and afterwards, to-wit: on the.....day of....., 19..., said.....filed his certain petition and then and there commenced an action in the Probate Court of.....County, Ohio, against..... .....and numbered on the Docket of said Court as Case No....., praying among other things, for an order of sale of certain real estate therein mentioned and hereafter described.

And, whereas, such proceedings were had in said action, on the..... day of....., 19..., said Court finding the allegations of the petition true, and that said real estate ought to be sold as prayed for in said petition.*

And the Court having found that said property had been appraised with the personal property of said estate, ordered that said..... proceed according to law to sell the real estate at public (or private) sale, as provided by law, free from the dower estate of..... therein (if said real estate has been appraised in the Real Estate Proceedings, commence at the star above, and the following should be inserted in the deed).

* And on the same day, in pursuance of said order and judgment, an order of appraisement was issued out of said Court under the seal thereof to the said.....as.....as aforesaid directed, commanding him to execute the said order, and of the same, together with his proceedings thereon, to make due return;

And, whereas, said.....having caused said premises to be appraised; and having on the.....day of.....returned said appraisement, the same was by the Court confirmed, and said Court ordered that the said.....proceed to sell said property at public (or private) sale, as provided by law; and thereafter, to wit, on the.....day of.....said.....made a report to this Court of a sale made of the premises in the petition described to.....for the sum of .....dollars.

And, whereas, on the.....day of....., 19..., the said Court having examined the proceedings of the said.....aforesaid, under said order of sale, and it appearing to the Court that said sale was in all respects legally made, ordered that the same be approved and confirmed, and that said.....should execute and deliver a proper deed to the purchaser, of the real estate so sold.

[158] Woerner, Admin. 1068.

§ 10776 G. C., § 835.

An administrator's deed may be voidable in the hands of a first purchaser and good in a subsequent purchaser.

Though an administrator's deed contain no words of perpetuity, yet if the sale was in fact made of the whole estate, chancery would so decree it. Piatt vs. Bank, 7 O. (pt. 2) 165.

The proceedings of the Probate Court will be presumed to be regular, and where the order shows that due notice was given, it will be presumed all parties had notice and the court had jurisdiction. Hamilton vs. Stewart, 5 N. P. (N.S.) 558; 18 Dec. 133.

All of which will more fully appear by the records of said Court, to which reference is here made.

Now, therefore,.....the said.....of the estate of..... .....deceased, aforesaid, by virtue of said judgment, order of sale, sale and confirmation and of the statute in such cases made and provided, and of the powers vested in..... .....and for and in consideration of the premises, and the sum of.....dollars ($.....), paid or secured to be paid to.....by said....., the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell and Convey to the said.....his heirs and assigns forever, the following real estate, situated in the County of.....in the State of.....and in the.....and bounded and described as follows: ....the dower estate aforesaid.

To have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said.....his heirs and assigns forever, as fully and completely as he, the said.....as such..... .....by virtue of said judgment, order of sale, sale and confirmation, and of the statute made and provided for such cases, might or should sell or convey the same.

In Witness Whereof, The said.....as such.....has hereunto set his hand, this.....day of.....A. D. 19....

Signed and acknowledged in
presence of.....

(Signed.) .....

The State of Ohio, Clark County, ss.

Be it remembered, That on the.....day of....., 19..., before me, the subscriber, a.....in and for said county, personally came the above named.....as.....of.....the grantor in the foregoing deed, and acknowledged the signing of the same to be his voluntary act and deed as such.....for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

.....

§ 902. Purchaser's right and title.

The sale being a judicial sale, the doctrine of *caveat emptor* applies in all its rigor.[159]

[159] If, however, there is no title and the administrator represents that there is, and the purchaser in ignorance pays the purchase price, the administrator is personally liable. Fisher vs. Fisher, 33 O. C. C. 525; affirmed, 86 O. S. 365.

The facts in this case are not reported and it seems to me that it is going a good way to hold the administrator liable if he does nothing more than make representations in his petition, that *deceased was the owner.*

Mechanics, etc., vs. O'Connor, 29 O. S. 651; Riddle vs. Bryan, 5 O. 48; Vattier vs. Lytle, 6 O. 477; McLouth vs. Rathbone, 19 O. 21; Corwin vs. Benham, 2 O. S. 36; Creps vs. Baird, 3 O. S. 277, 279; McKinzie vs. Perrill, 15 O. S. 162, 168; Dresbach vs. Stein, 41 O. S. 70; Beal vs. Price, 13 O. 368.

Caveat Emptor, "Let the purchaser take care" is a legal maxim expressive of the rule at common law that a purchaser of property buys at his own risk as to title and quality, unless the seller gives a warranty or the law implies one. Wright vs. Hart, 18 Wend. (N. Y.) 449.

Caveat venditor, "Let the seller take care" expresses the civil-law rule, which contrary to the common-law doctrine, required the seller to protect himself from future responsibility by a particular agreement with the purchaser. Wright vs. Hart, 18 Wend. (N. Y.) 452; 5 Am. & Eng. Ency. of Law, 778 (2d ed.).

The purchaser, after his bid is accepted, can not refuse to take the property because there are liens, etc., upon it. He is bound to examine the records before bidding,

A sale does not carry a sound title, but only the deceased's title, a title clear and free, but only as free and clear a title as the deceased had.[160]

It was formerly held to be the law in Ohio that a sale made by an administrator conveyed the property free from incumbrance to the purchaser.[161] But since the law of 1858, requiring mortgagees and other lien holders to be made parties in the petition for the sale of such land, a mortgagee who was not made such party retains his rights unaffected by the administrator's sale, and the purchaser is liable therefor.[162] And where a purchase was made by one who was advised by his counsel that the land was clear and unincumbered, and that the wife had no dower estate therein, and thereupon he bought the lands at their full value and paid over the money to the executor and entered into possession, and afterwards the Court of Common Pleas found that the wife was entitled to dower, it was held, that the purchaser could not recover back sufficient of the purchase money to compensate him for the loss he sustained.[163]

The rights of a purchaser at a judicial sale as to the payment of taxes out of the proceeds are fixed by date of sale, after confirmation it relates back to that date,[164] and consequently the purchaser is entitled to all the rents that accrued after that date.[165] Emblements, however, do not pass to the purchaser.[166]

Similar to a sale made on execution, the purchaser is entitled to a writ to put him into possession. The rights of a purchaser to appear in Court and ask for confirmation of the sale are not very clearly determined. By courtesy the Court generally allows him to be present and protect his own interests so far as they may be involved. But it seems he has no rights in the

or failing so to do, must bear the consequences. Mull vs. Typewriter Co., 1 N. P. (N.S.) 509; 14 Dec. (1904) 455.

This may be good law, but the policy of its enforcement may be questionable.

160 Vattier vs. Lytle's, 6 O. 477.

161 Miller vs. Greenham, 11 O. S. 486; Muskingum vs. Carpenter, 7 O. 21.

162 Holloway vs. Stuart, 19 O. S. 472.

163 Arnold vs. Donaldson, 46 O. S. 73.

164 Scheid vs. Scheid, 5 Dec. 559.

165 Boyd vs. Longworth, 11 O. 235; Oviatt vs. Brown, 14 O. 295.

166 Mason vs. Lemon, 4 Dec. 322; 3 N. P. 116.

As to what are emblements, see § 368. As to when a trade mark will pass to the purchaser, see Burkhardt vs. Burkhardt, 4 N. P. 358; 9 Dec. 84.

matter superior to whatever the Court may deem for the best interests of the estate.[167]

A statement made by the administrator at the sale that the crops are not reserved cannot prejudice the rights of the heirs in the crops sowed by them or their tenants.[167*]

The purchaser acquires no title to cordwood on the land sold, nor to growing crops sowed by the heirs or their tenants after the decedent's death.[168]

As against prior unrecorded liens and secret trusts, the purchaser acquired a free title.[169]

The administrator is not bound to reveal defects in the title.[170]

The purchaser is bound to pay his bid, although there is a defect in the title, unless the administrator has misled him.[171] His title is superior to an unrecorded deed of which he had no notice.[172]

The administrator cannot insist on rescinding the sale on the ground that the title is defective.[173] But a purchaser may insist that it be not confirmed. It seems that a purchaser ought not to be required to take a defective title, and if such appear to be the fact before confirmation, he ought to be relieved. After confirmation it is probably too late to raise the question.[174]

§ 902a. Remedy of purchaser, if sale invalid. "Upon the sale of property on execution, if the title of the purchaser is invalid by reason of a defect in the proceedings, he may be subrogated to the right of the creditor against the debtor, to the

[167] As to purchasers' rights in general, see Woerner, Admin. 1071 to 1091.

[167*] Barrett vs. Cohen, 119 Ind. 56.

[168] Barrett vs. Cohen, 119 Ind. 56; Law's Estate, 7 Pa. Co. Ct. Rep. 605.

[169] Lumpkin vs. Adams, 74 Tex. 96; S. C. 11 S. W. Rep. 1070; Banks vs. Ammon, 27 Pa. St. 172; Love vs. Berry, 22 Tex. 371.

[170] Thompson vs. Munger, 15 Tex. 523; Hawpe vs. Smith, 25 Tex. Supp. 448.

[171] Mellen vs. Boarman, 13 Sm. & M. 100; Burns vs. Hamilton, 33 Ala. 210; Bishop vs. O'Conner, 69 Ill. 431; Jones vs. Read, 1 La. Ann. 200; Corbitt vs. Daukins, 54 Ala. 282.

[172] Barto vs. Bank, 15 Hun 11; Emerson vs. Ross, 17 Fla. 122.

[173] McCulloch vs. Weaver, 14 La. Ann. 33; Peele vs. Chever, 8 Allen 89.

[174] See § 493, Warranty of title.

A purchaser who loses a title which depends on an administrator's sale, can set up no equity on the estate of the decedent by reason of appropriations of the purchase money to pay debts of decedent. Beal vs. Price, 13 O. 368.

A purchaser, however, is not divested of title by a subsequent reversal of the order of sale. Irwin vs. Jeffers, 3 O. S. 389.

extent of the money paid and applied to the debtor's benefit, and, to the same extent have a lien on the property sold, as against all persons, except bona fide purchasers without notice. This section shall not require the creditor to refund the purchase money, by reason of the invalidity of such sales." [R. S. § 5410.][174a]

§ 902b. Remedy in other cases of invalid sales. "The next preceding section shall apply also, to sales by order of court, sales by executors, administrators, guardians, and assignees, and to sales for taxes." [R. S. § 5411.] [174b]

§ 903. How money arising from sale of land to be applied. "The money arising from the sale of real estate shall be applied as follows:

"1. To discharge the costs and expenses of the sale, and the per cent and charges of the executor or administrator thereon, for his administration;

"2. To the payment of mortgages and judgments against the deceased, according to their respective priorities of lien, so far as they operated as a lien on the estate at the time of his death; which shall be apportioned and determined by the court, on reference to a master or otherwise;

"3. To the discharge of claims and debts, in the order mentioned in this title." [R. S. § 6165.][175]

§ 904. Comments.

The above section omits one very important item which is always considered a first lien on the funds of such a sale, to-wit, taxes. The rule is that at judicial sales all the taxes which stand charged against the property on the tax duplicate are to be paid out of the proceeds of the sale, and this duplicate is made up on October 1st. In such a sale street assessments payable in installments are not to be placed on the tax duplicate except those payable at the end of September of any year. And only those properly on the duplicate can be paid out of the proceeds of judicial sales. Those falling due later must be paid by the purchaser of the land.[176]

As to the costs of expenses of the sale and percentum, the same rule is applied as to personal property.[177]

174a § 11703 G. C. Subsequent reversal does not affect judgment. Smith vs. Dixon, 27 O. S. 477; Insurance Co. vs. Sampson, 38 O. S. 696.

174b § 11704 G. C. Where wrong tract included Court of Equity will protect, etc. Stites vs. Wiedner, 35 O. S. 555. See Endel vs. Leibrock, 33 O. S. 270; Timmerman vs. Hurell, 2 C. C. 27; 1 C. D. 342.

175 § 10809 G. C. A purchaser in possession after judicial sale liable for care of premises while in his possession. Christ vs. Lay, 37 O. C. C. 312.

176 Makley vs. Whitmore, 61 O. S. 587.

177 See §§ 653, 663.

See note 906.

Neither attorney fees of an administrator, general costs of an administrator, nor premiums due an insurance company are included in costs and expenses prior to a mortgage lien. Sherman vs. Millard, 6 C. C. (N.S.) 338; 27 C. C. 175.

The administrator was not disturbed in his commissions, however, in above case.

See Alms vs. Felton, 6 C. D. 415; 9 O. C. C. 255.

After taxes and costs of administration and liens are paid on the property, the remainder is to be applied in the payment of debts, as set forth in the previous chapter.[178]

§ 905. Surplus of proceeds of sale to be considered as real estate. "In all cases of a sale by an executor or administrator of part or the whole of the real estate of the deceased, under an order of court, whether such executor or administrator has been appointed in this state or elsewhere, the surplus of the proceeds of sale remaining on the final settlement of the account, must be considered as real estate, and be disposed of accordingly." [R. S. § 6171.][179]

It has been held under the above section, that although the surplus goes to the heirs in the line that real estate would go, such proceeds are personalty and are held as personalty by the heir, and as such passes from such heir.[180]

The widow is not entitled to a distributive share in such proceeds.[181] However, land directed by a will to be sold and converted into money is treated as personal property.[182]

§ 906. Appeal and error.[183]

It is specifically provided that appeal may be taken from the Probate Court to the Court of Common Pleas in proceedings for the sale of real estate for the payment of debts.[184] And it has been held that as an administrator's petition to sell real estate may properly be brought in the Court of Common Pleas, an appeal would lie to the Circuit Court from the Court of Common Pleas.[185]

See Klimper vs. Klimper, 12 O. App. 332 (Jan., 1920), where premiums on bond and auctioneer fees were allowed.

178 § 646, *et seq.*

See § 895, distribution of proceeds.

179 § 10816 G. C.

180 Tuttle vs. Northrop, 44 O. S. 178.

An action commenced in the Probate Court to sell real estate, and appealed to the Court of Common Pleas, the jurisdiction of the latter is the same as if the action had been commenced in that court. Tidd vs. Block, 4 C. C. (N.S.) 216; 26 O. C. C. 113.

If the heir had been an adult, and died leaving a wife and children, while the money so remained there, it could not be doubted that the same would, in distribution between the children and the widow of such intestate, be governed by the law regarding personal rather than real property. Pence vs. Pence, 11 O. S. 295. The wife of the heir has no dower interest therein.

181 Griswold vs. Frink, 22 O. S. 79.

182 Furguson vs. Stuart, 14 O. 140; Collier vs. Collier, 3 O. S. 369.

As to whom distribution should be made of such proceeds, see subsequent chapter on descent and distribution.

§ 927.

See § 1429, Guardian's sale.

183 See § 40.

184 § 11206 G. C., § 39.

185 Dalton vs. Davis, 18 C. C. 878; 6 C. D. 133.

I do not know whether the question has been raised under the present constitution as to the right to appeal to the Court of Appeals, but I am inclined the rule remains the same. It would probably be held a "chancery case." See Wagner vs. Armstrong, 93 O. S. 443.

As there are several different hearings and entries made in such proceedings, such as the finding of the necessity to sell, the confirmation of appraisement, and confirmation of sale, it will be important to know whether this entire proceeding is to be regarded as an entirety or whether, if appeal and error be taken, each order is to be regarded as a final order, or an interlocutory one. In some States the proceeding is regarded as an entirety, and all orders made before confirmation, as interlocutory ones.[186] But in our State it would seem that the order made upon the petition, finding it necessary to sell real estate, would be a final order as to the questions passed upon in such an order,[187] and that the finding made on confirmation of appraisement, and confirmation of sale, would also be a final order.[188] And therefore, if appeal is to be taken from any one of these orders, it must be taken within the time limited from the date of each order; and the same rule would be applied in proceedings in error. It has been questioned whether the right of appeal exists as to the order confirming the sale.[189]

If there is an order of distribution included in the order of confirmation, then it might be appealable.[190] However, in a recent case in the Supreme Court it was held that an appeal lies from the Court of Probate and the Court of Insolvency to the Court of Common Pleas, from an order, decree or judgment confirming a sale of real estate at private sale by an assignee reversing the inferior Court,[191] and the same principle would hold that an appeal might be taken from the confirmation of an administrator's sale,[192] but exception must be taken at the time of the confirmation.[193]

[186] Staley vs. Dorset, 11 Ind. 367; Love vs. Mikals, 12 Ind. 439; Simpson vs. Pearson, 31 Ind. 1.

[187] Potter vs. Jennman, 4 N. P. 78; 4 Dec. 444.

[188] See Evans vs. Dunn, 26 O. S. 439; Kelley vs. Standberry, 13 O. 422.

[189] Norwood vs. Park Co., 4 N. P. 240; 6 Dec. 341.

In condemnation proceedings the supreme court held that the final judgment is the "final order" and the time from which appeal, etc., dates, and there seems to be no particular reason why the same rule should not apply to proceedings to sell real estate. § 1721. Reversed in Brown vs. Wallace,, 69 O. S. 179.

[190] Spence vs. Basey, 34 O. S. 42.

[191] Browne vs. Wallace, 60 O. S. 177; Rev. 16 C. C. 124; 8 C. P. 764; 4 N. P. 240; 6 Dec. 341.

[192] See Kinkead's Pl. 1175.

[193] McArthur vs. Cen. Trust Co., 21 C. C. 654; Aff. 44 Bull. 287.

See § 1626, Assignee.

It is likewise very doubtful whether a court, in proceedings in error, would reverse an order of the court confirming a sale, where there was not a manifest abuse of discretion. And, in order to vacate such an order, it must appear from the record that said judgment and order was clearly and palpably against the weight of the evidence.[194]

[194] Brigel vs. Kittredge, 5 N. P. 412; 3 Dec. 512.

The Appellate Court, in reversing an order of distribution made by the Probate Court, should either make the order of distribution or, in remanding the case to the Probate Court, specifically indicate the items to which the fund for distribution should be applied. Sherman vs. Millard, 6 C. C. (N.S.) 338; 17 Cir. D. 175; 27 C. C. 175 (1905).

It would seem from analogy to the decision of the Supreme Court in condemnation proceedings, that the final order from which the time limited for appeal would be the order confirming sale and distribution. However (note 187), the text is quoted with approval in Mansfield vs. Cole, 16 N. P. 222, where a judgment is vacated, the order vacating same is not appealable. If review is had it must be by error. The successive steps in proceedings to vacate a judgment, after term, under §§ 11631-11643 G. C. are: (1) an application, styled a petition, filed in the original case, averring the ground for vacation and a statement of the defense, upon which application a summons shall issue; no pleading to such application is required; (2) pleading upon the application; (3) if ground for vacation exists and if a valid defense be found averred in the application, and the order of vacation suspended pending trial on the merits, this proceeding to the lien of the original judgment in case the defense fails; (4) a pleading to that upon which the judgment was taken, setting up the defense of the movement for vacation, and a trial upon the issues then made up as if no judgment had been rendered; (5) judgment thereon, either restoring the status of the old judgment or extinguishing it, as the facts in the trial demand. Bank vs. Mullen, 25 Bull. 28; 18 Dec. 637.

CHAPTER L.

DESCENT AND DISTRIBUTION.

§ 907 Introductory.
§ 908 Ancestor.
§ 909 Descent and devise.
§ 910 Deed of gift.
§ 911 By purchase.
§ 912 Legal representative.
§ 913 Next of kin.
§ 914 Relict of deceased husband or wife.
§ 915 Order of descent of real estate where title came by descent, devise or deed of gift.
§ 916 Comments.
§ 917 Order of descent where estate came by purchase, etc.
§ 918 When real estate to pass to husband or wife; when to next of kin of intestate.
§ 919 When real estate to pass to children of former husband or wife, etc.
§ 920 Descent of estate which came from former husband or wife.
§ 921 Distribution of personal estate.
§ 921a When personal property to escheat.
§ 922 Comments.
§ 923 When estate to descend to children of intestate and how.
§ 924 Descent when all descendants of equal degree of consanguinity.
§ 925 When there are living both children and heirs of deceased children of intestate.
§ 926 Extent of application of last section.
§ 927 Previous sections apply to real and personal property.
§ 928 Advancements by intestate to be considered as part of estate.
§ 929 Definition, etc.
§ 930 What constitutes an advancement.
§ 931 How proven.
§ 932 When advancement is greater or less than heirs' share.
§ 933 When advancement is wholly real or personal estate.
§ 934 When value of advancement expressed in deed, etc.
§ 935 Heirs of aliens may inherit; aliens may hold lands.
§ 936 Capability of bastards as to inheritance.
§ 937 When illegitimate children deemed legitimate, etc.
§ 938 Amount of personal estate to which a widow or widower is entitled upon distribution.
§ 939 Comments.
§ 940 Construction of words, "living" and "died."
§ 941 Posthumous child of intestate to inherit.
§ 942 Permanent leases to descend same as estates, in fee.[1]

[1] See § 1180, *et seq.*, Construction of wills; § 1189, Rule in Shelly's case; § 1031, Rule as to perpetuities.

§ 907. Introductory.

Descent and distribution is the method pointed out by law for the transmission of a person's property after his death,[3] when such person has failed in the manner provided by law to designate the manner and the persons to whom the same should be transmitted. Technically speaking, by *descent* we mean the transmission of real property, and by *distribution* the passing of personal property. Under our law, both kinds of property vest alike on the death of the ancestor in the heir. But personal property is not directly transmitted for reasons originating with the common law itself. Such property is to be transmitted through a legal representative, known as an administrator or executor. For the same common law reason, personal property was made primarily applicable to the payment of all debts of the decedent. As the executor or administrator must distribute the remainder as provided by law, after the payment of debts and costs of administration, it will be necessary to at least insert the statutes providing for the same in this work whatever is left must be distributed as real estate where the real estate is sold.[4]

It will likewise be necessary to insert the statutes relating to descent. In these statutory provisions there are some terms used which may be advisable to define in order to properly understand the statutes themselves. Preliminary to such matters it may, however, be repeated that these statutes only apply where a person dies intestate; that is, dies without having made a valid will disposing of his property. Where there is a will, the administrator or executor must look there and not to the statutes for his power and direction to distribute the estate. "Intestate," therefore, means the person who was seized of the property at the time of his death, and who made no valid disposition of such property. A person may die testate as to some

[3] The statute of descents embraces the whole subject, and is intended to provide for all possible cases. Penn vs. Cox, 16 O. 30; Drake vs. Rogers, 13 O. S. 21, 31; Spangenberger vs. Guiney, 2 N. P. 39.

The Legislature may change the course of descent, such laws are not retroactive nor impairing the obligation of contract. Tarvin vs. Broughton, 8 Bull. 21.

[4] § 10816 G. C., § 879.

Where a testator provided that all her property should go as the law directs, with the following modifications, all the property goes by devise and not by descent. Huber vs. Carew, 2 N. P. (N.S.) 81; 7 C. C. (N.S.) 609; 26 O. C. C. 389. Affirmed.

of his property and intestate as to other. If he makes no provision for a person who has an absolute right to some portion of his property, as to such person, he will die intestate.[5] But a child has no such right in his parent's estate that a failure to provide for him will in any manner affect the testamentary disposition of the parent's estate. But if a posthumous child is born, for whom no provision is made as to such child, the parent will be held to have died intestate.[6]

In distribution of real estate the law of the place where it is located controls.[7]

The course of descent of real property is always controlled by the legal title.[8]

§ 908. Ancestor.

A word in common use in these sections is the word "ancestor." This word, within the meaning of the statute of descent, means the person from whom the claimant has the capacity to inherit. That is, the claimant must be one, who, had there been no nearer relation, might have inherited from the person claimed to be an ancestor, had such ancestor died intestate.[9]

[5] Thus, if a man dispose by will of all his property without making any provision for his wife, as to her he would die intestate, and she would receive the distributive share provided by law. Doyle vs. Doyle, 50 O. S. 330.

[6] § 10[illegible] § 1105.

[7] Evans vs. Beaver, 50 O. S. 190.

[8] Russell vs. Bruer, 64 O. S. 1; Patterson vs. Lamson, 45 O. S. 77.

See § 755, 757, as to Distribution, etc.

[9] Springer vs. Fortune, 2 Han. 52.

The statute refers to the ancestor from whom the estate came for the purpose of limiting the inheritance to the blood of that ancestor. To be of the blood of any person, "is either to be immediately descended from him, or to be descended from the same couple of common ancestors." 2 Black. Com., 220, note 9.

Any one from whom an estate is derived by act of law and right of blood, is in a proper legal sense an ancestor. This appears from the definition of the term "descent" in authorities. "It signifieth, when lands do by right of blood fall unto any after the death of his ancestors; or a descent is a means whereby one doth derive him title to certain lands, as heir to some of his ancestors." Co. Lit., 13 b.; 2 Thomas' Coke, 156.

"This is the noblest and worthiest means whereby lands are derived from one to another, because it is wrought and vested by the act of law, the right of blood, unto the worthiest and next of the blood and kindred of the ancestor."

In another case it was said that "ancestor" meant in the statute any one from whom the estate was inherited, and that the phrase "ancestor from whom the estate came," was he from whom it was immediately inherited.[10]

"Ancestral property" is a term used to mean property that comes by inheritance, devise or deed of gift, as contradistinguished from a title by purchase. There are no limitations in our State upon the power of a person to receive or transmit property.[11] Where a person is seized of property by both a legal and equitable title, the legal title controls the descent.[12]

The statute of descent is not applied on equitable principles, but by rules of law.[13]

An ancestor need not be lineal. An uncle may be an ancestor if the devisees, being nephews, would have inherited from him had he died intestate.[14]

§ 909. Descent and devise.

These terms are used in the statute to describe the devolution of what may be considered ancestral property. By descent is meant the receiving of property by virtue of the rules of law. Devise means the receiving of property by virtue of the act of

[10] Pricket vs. Parker, 3 O. S. 395. That the word ancestor, as used in this act, is not to be understood as when used in common parlance, is well settled in Ohio. That an uncle of the intestate, from whom the latter inherited, was his ancestor in the sense of a statute like that before us, in this respect, being the amendatory act of 1835, was held in Brewster vs. Benedict, 14 O. 68. That a father, who took the estate by deed of gift from his father, was the legal ancestor of his son and heir, not the grandfather from whom the estate came through the father, was held in Curren vs. Taylor, 19 O. 36; Id. 3 O. S. 396.

[11] Deem vs. Milliken, 6 C. C. 357; 3 C. D. 491; Aff. 53 O. S. 668.

[12] Stembel vs. Martin, 50 O. S. 495.

[13] Patterson vs. Lamson, 45 O. S. 77.

[14] Brewster vs. Benedict, 14 O. 368. Land descended from father to son and from son to grandson — the grandson died, leaving only brothers of his grandfather and of his grandmother. *Held*, the ancestor from whom the estate came means the immediate ancestor, viz., the father, and such ancestors maternal and paternal uncles, are equally near to him. The civil law, and not the common law determines who are next of kin. Clayton vs. Drake, 17 O. S. 367; Prickett vs. Parker, 3 O. S. 394; Curren vs. Taylor, 19 O. 36.

the owner by provisions in his last will and testament. These statutes are intended to carry into execution the general desires of mankind as to who should enjoy their property after their death; and are construed with that end in view.[15]

§ 910. Deed of gift.

The statute places property acquired by a "deed of gift" in the same line as property acquired by descent or devise. It may be defined as the receiving title from an ancestor by virtue of a deed, without payment of a valuable consideration therefor; and it is a recognition of the distribution of a person's property in his lifetime, and the law has considered that property acquired in such a manner from the ancestor should be considered, as to its inheritable qualities, the same as if it had been transmitted by operation of law or the last will of the ancestor. The consideration mentioned in a deed of "love and affections" presume a gift, but if the consideration be one of money, then it is valuable and the title transmitted becomes one of purchase to the recipient, and the Courts have held that parol evidence is not competent to vary or contradict the considerations stated in a deed when the same will affect the transmission of the title.[16]

A deed from a parent to a daughter, in consideration of "love and affection, dutiful obedience and faithful service, and one dollar, is not a deed of gift. To constitute ancestral property, the consideration must be blood or marriage without other consideration.[17]

[15] See § 911. Title by purchase. A title as devisee is a new title as distinguished from a title by inheritance, and is not acquired until the probate of the will. Douglass vs. Miller, 3 N. P. 220; 4 Dec. 414.

[16] Nave vs. Marshall, 6 N. P. 488; 9 Dec. 415; Kerr vs. Paul, 37 Bull. 171.

[17] Brown vs. Whaley, 58 O. S. 654.

The Legislature seems to have had these distinctions in mind in framing our statute of descents as to deed of gift, and intended that a deed of gift from an ancestor should be supported alone, by a consideration of blood or marriage, and that a deed for a consideration other than blood, that is a valuable consideration, should be regarded as a purchase. 58 O. S. 668.

Where the consideration expressed in a deed is a valuable one, the title comes by purchase, and it is not competent to show by parol that the deed is in fact a deed of gift—was to change the line of descent. Ossman vs. Schnetz, 4 C. C. (N.S.) 502; 14 Cir. D. 709; 24 O. C. C. 709.

The title of a devisee relates back to the probate of the will, and takes effect as of the time of the death of the testator. Miller vs. Miller.

§ 911. By purchase.

Property acquired by purchase means property acquired in any other manner than by descent, devise or deed of gift.[18]

The law seems to favor the acquisition of an estate by purchase, and in pleading it will be presumed that the land acquired was acquired by purchase and not ancestral, unless it be averred to be ancestral.[19]

Land acquired by descent, devise or deed of gift, which is partitioned among the heirs by division of the same, does not lose its ancestral qualities.[20] But if such persons, after the division is made, trade the properties between themselves, reciting a money consideration, this destroys its ancestral character, and the title held by them is one of purchase.[21]

If an heir elects to take an estate in partition, then he holds his original share by descent and that acquired by purchase.[22]

Where land was inherited by an infant and converted into money by his guardian, it loses its ancestral qualities and descends as personalty.[23]

Likewise it has been held that the proceeds remaining, in the sale of real estate sold by an administrator or executor, while the same is to be distributed by such administrator or executor as real estate, yet in the hands of the heir, it is personalty, and

9 C. C. (N.S.) 242; 30 O. C. C. 666; affirmed, 77 O. S. 643.

[18] All intestate estates are by our law divided into two classes, and the line or order of succession is to be determined by the class to which they belong. The first section creates, defines and prescribes the course of the first class, and all estates embraced within this section have been appropriately called ancestral. All estates not included in the first class necessarily belong to the second, are nonancestral in their character, and pass under the second section. Persons claiming as heirs to an intestate can not trace their title to the same estate partly under the first and partly under the second section. Brower vs. Hunt, 18 O. S. 334.

At common law, property acquired in any other way than by descent, was acquired by purchase. Black Com., vol. 1, p. 215.

Parties in partition where the premises are sold acquire no new title. McBain vs. McBain, 15 O. S. 337; Tabler vs. Wiseman, 2 O. S. 208.

Purchasing of property at a sale in partition by a tenant in common extinguishes the title cast upon him as heir at law by the laws of descent, and rests in him a title by purchase. Lawson vs. McDougal, 22 Dec. 618.

A farm divided subject to the payment of legacies is an estate by purchase. Royer vs. Trumpler, 38 O. C. C. 190.

[19] Mathews vs. Krisher, 59 O. S. 562.

[20] Carter vs. Day, 59 O. S. 96; Smith vs. Carver, 36 B. 189.

[21] Brower vs. Hunt, 18 O. S. 311.

[22] Freeman vs. Allen, 17 O. S. 527.

[23] Armstrong vs. Miller, 6 O. 118. Now changed by statute. See § 4163 R. S., § 921.

But if the guardian invests in real estate it then becomes nonancestral. See § 921.

descends from him as personal property.[24] However, if an owner conveys away property and immediately receives it back, if he does it solely to break the descent, it will not change his title, and it will still remain as it was before such conveyance.[25]

In construing a conveyance, the last conveyance is alone looked to to determine whether the title is one by purchase or deed of gift.[26]

Where the legal title is acquired by purchase and an equity by inheritance, they at once unite, and on the death of the owner, descend as title acquired by purchase.[27]

§ 912. Legal representative.

The words "legal representative" have several meanings in the administration of estates. It is used by text book writers as a common term to include both executors and administrators. But as used in the statute of descent it has an entirely different application. It here means the lineal descendants of an intestate's children.[28] In other places it may mean the lineal descendants of the children of the ancestor.[29]

Generally, throughout these statutes of descent, the word "legal representative" is meant to include a lineal descendant of some designated person or class of persons.[30]

§ 913. Next of kin.

Next of kin of a decedent are the persons or person nearest in degree of blood surviving him.[31] In ascertaining "the next

[24] Pence vs. Pence, 11 O. S. 290. See § 905.

[25] Helfinger vs. Wolf, 30 B. 383. Where the father bought a piece of property and had it deeded directly to a daughter from the person from whom he purchased it, it was held, although the father furnished all the consideration that the daughter held a title by purchase. Patterson vs. Lamson, 45 O. S. 77. See Burnett vs. Felt, 3 Bates Dig. 457.

[26] Kihlken vs. Kihlken, 59 O. S. 106.

[27] Higgins vs. Higgins, 57 O. S. 239; Olmstead vs. Douglass, 16 C. C. 171; 8 C. D. 465. See § 1879, Partition.

[28] Thomas vs. Lett, 4 N. P. 393; 6 Dec. 429.

[29] Gosling vs. Rupp, 7 N. P. 185; 6 Dec. 345. See Hague vs. Thompson, 11 C. C. (N.S.) 407; affirmed, without report, October 5, 1909 (81 O. S. —;) 30 O. C. C. 628.

[30] See § 1196, as to Construction of the word heirs in will.

[31] § 1199, Construction in wills; § 121, Appointment administrator. 16 Am. & Eng. Ency. of Law, 703. "The words 'next of kin' are

of kin to the intestate," mentioned in the sixth clause of sec. 8517 G. C. (§ 915), the degree of consanguinity are to be computed according to the rule of civil law. The words "next of kin" in this clause are descriptive of a particular person, or of a class of persons related to the intestate, in an equal degree of consanguinity. They exclude the more remote kindred, and do not imply the principle of representation.[32]

No one is included within the term " next of kin," who does not come within the statute. As above stated, our Court adopts the rule of the civil law. In determining lineal consanguinity each step up or down from the decedent counts as one degree. Thus an intestate and his son or father are related in the first degree; an intestate and his grandson or grandfather are related in the second degree. In determining collateral consanguinity, the rule is to count up from the intestate to the common ancestor and then down to the person whose kinship with the intestate is sought to be ascertained. In this computation each step, both in the ascending and descending lines, counts as one degree. Thus an intestate and his brother are related in the second degree, an intestate and his cousin in the fourth degree.[33]

In cases of distribution, relatives of the intestate on the father's side and the mother's side stand on an equal footing. It follows from this that there may be relatives, distant from the intestate by an equal number of degrees, who are not related to each other, but who have equal rights in the distribution of the intestate's estate, and stand on an equal footing as to rights of administration.[34]

limited in legal meaning, as in common use, to blood relations, and do not include a husband or wife, unless accompanied by other words clearly manifesting a purpose to extend their signification; and the mere addition of a reference to the statutes of distribution is not sufficient." Per Gray, C. J., in Haraden vs. Larrabee, 113 Mass. 430; 16 Am. & Eng. Ency. of Law, 705.

Brothers and sisters of the deceased father are nearer of kin than the grand-parents. Ampy vs. Heish, 27 Dec. 419; 20 N. P. I.

[32] Clayton vs. Drake, 17 O. S. 368.

[33] 2 Black Com. 202; Lee vs. Sedgwick, 1 Root (Conn.) 52.

[34] Kearney vs. Turner, 28 Md. 408; 16 Ency. of Law, 703.

The distinguishing rules of the common law doctrine of descent are the converse of those in this country. They consist of the following principles of law, viz.: preference of males to females; primogeniture among the males; the inheritance shall never lineally ascend; the ex-

§ 914. Relict of deceased husband or wife.

The words "relict of deceased husband or wife," as used in the General Code of sec. 8577,[35] are used to designate the relationship to a former married pair, of the survivor of a marriage union; and such relationship is not destroyed or changed by the subsequent marriage of such survivor. And therefore it was held that where a man who had acquired property by purchase died without children, and his wife remarried and died without children, the second husband did not acquire the title of the real estate as being *the relict* of his deceased wife; but that in such a case the second husband had a mere life estate, and the fee of the property belonged to the brothers and sisters of the wife and the brothers and sisters of the first husband.[36]

Where such relict dies, the property is subject to his or her debts, and the brothers and sisters of such relict and the deceased consort take the property subject to the payment of such debts.[37] However, if the first husband had no brothers or sisters, and the relict had no brother or sister living at her death, the property then passes to her second husband.[38]

The surviving husband or wife takes under the statute only where the intestate spouse dies seized. Hence, if a daughter dies before her father, her husband inherits nothing from her father's estate as her legal representative.[39]

clusion of the half blood; the strict adherence to the doctrine of succession, per stirpes; the collateral heir of the person last seized, to be his next collateral kinsman of the whole blood; and kindred derived from the blood of the male ancestors, however remote, to be preferred to kindred from the blood of the female ancestors, however near, unless the land came from a female ancestor. 2 Bl. Comm. c. 14; Kent's Comm. 412.

[35] § 920.

[36] Spitler vs. Heeter, 42 O. S. 100.

[37] Gosling vs. Rupp. 7 N. P. 185; 6 Dec. 345.

[38] Thomas vs. Lett, 4 N. P. 393; 6 Dec. 429.

A widow who inherits her husband's property under R. S. § 4159, he dying without children, or brothers and sisters, and she dies without children, her brothers and sisters take the whole estate, to the exclusion of his uncles and cousins. § 4162 R. S. does not apply. The last words therein, "or their personal representatives," refer to brothers and sisters, and not to husband or wife. Ellis vs. Ellis, 3 C. C. 186; 2 C. D. 105.

[39] Lane vs. McKinstry, 31 O. S. 640.

The term "any former deceased husband," in sec. 8577 G. C. (§ 920), refers to any husband who has deceased leaving a widow to whom any real estate or personal property has passed by virtue of the provisions of said section, and is not confined in its application to cases where the widow has had two or more husbands who are deceased.[40]

§ 915. Order of descent of real estate where title came by descent, devise or deed of gift. "When a person dies intestate, having title or right to any real estate or inheritance in this state, which title came to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred in the following course:

"1. To the children of such intestate, or their legal representatives.

"2. If there are no children or their legal representatives living, the estate shall pass to and vest in the husband or wife, relict of such intestate, during his or her natural life.

"3. If such intestate leave no husband or wife, relict of himself or herself, or at the death of such relict, the estate shall pass to and vest in the brothers and sisters of the intestate who are of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or half blood of the intestate.

"4. If there are no brothers or sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and the estate came by deed of gift from an ancestor who is living, the estate shall ascend to such ancestor.

"5. If the ancestor from whom the estate came is deceased, the estate shall pass to and vest in the children of the ancestor from whom the estate came, or their legal representatives; if there are no children of the ancestor from whom the estate came, or their legal representatives, the estate shall pass to and vest in the husband or wife, relict of such ancestor, if a parent of the decedent, during the life of such relict. On the death of such husband or wife, or if there is no such husband or wife, the estate shall pass to and vest in the brothers and sisters of such ancestors, or their legal representatives; and for want of such brothers and sisters, or their legal representatives, to the brothers and sisters of the half blood of the intestate, or their legal representatives, though such brothers and sisters are not of the blood of the ancestor from whom the estate came.

[40] Anderson vs. Gilchrist, 44 O. S. 440. See § 920, § 8577 G. C.

"6. If there are no such half-brothers and sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestors from whom the estate came, or their legal representatives." [R. S. § 4158.][41]

§ 916. Comments.

The distinguishing features between the above section and the next subsequent section is that the above section provides for the devolution of property acquired by descent, including devise and deed of gift. The object and purpose running through the entire section is to confine the devolution of such property to persons who are of the *blood* of the person from whom the intestate received it. As to children and their representatives, the first subdivision of the above and subsequent sections are the same. The second clause differs only that where it comes by descent, the husband or wife acquires a life estate; where it comes by purchase, the entire estate. For all ordinary cases, a careful reading of the sections of the General Code will indicate to an administrator or executor the person to whom distribution is to be made. If a person receives property by purchase, as to all persons receiving an inheritance under him, he is an ancestor. If such person receives the title by descent, etc., he is not an ancestor, but the person from whom it came is the ancestor, and the policy running through all of our statutes of descent in respect to ancestor's estates is not to prefer the blood of the ancestor to the exclusion of the blood of the intestate. But to prefer those of the kindreds of the intestate who are of the blood of the ancestor.[42]

Real estate acquired by descent from a paternal ancestor of one who dies intestate, leaving neither widow, children, brothers, sisters, nor parents, passes under this section to the brothers and sisters of the father or their legal representatives, whether

[41] § 8573 G. C.

[42] Brower vs. Hunt, 18 O. S. 311. Ground rent is a freehold estate and goes by descent. McCammon vs. Cooper, affirmed 1 N. P. (N.S.) 154; 12 Dec. 677; 69 O. S. 367.

Half brothers and half sisters of the ancestor are included in the words brothers and sisters of such ancestor, etc. Stockton vs. Frazier, 81 O. S. 227.

See § 911, Title by purchase.

such brothers and sisters are of the whole or half-blood of the father.[43]

§ 917. Order of descent where estate came by purchase, etc. "If the estate came not by descent, devise, or deed of gift, it shall descend and pass as follows:

"1. To the children of the intestate and their legal representatives.

"2. If there are no children, or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate.

"3. If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives.

"4. If there are no brothers or sisters of the intestate of the whole blood, or their legal representatives, the estate shall pass to the brothers and sisters of the half-blood, and their legal representatives.

"5. If there are no brothers or sisters of the intestate of the half-blood, or their legal representatives, the estate shall ascend to the father and mother equally; if one of them be dead, then to the other.

"6. If the father and mother are dead, the estate shall pass to the next of kin, and their legal representatives, to and of the blood of the intestate." [R. S. § 4159; 108 v. 69.][44]

Real estate purchased with partnership funds and used for partnership purposes, is thereby converted into personalty, and so continues after death of one of the partners until complete settlement of partnership business.[45]

§ 918. When real estate to pass to husband or wife; when to next of kin of intestate. "When a person dies intestate, having title or right to any real estate or inheritance, as provided in section eighty-five hundred and seventy-three, and

[43] Burdwick vs. Shaw, 10 Dec. 533; 8 N. P. 22.

Where an estate comes by devise and there are no children on the death of the wife, etc., it is divided one-half equally between the wife's brothers and sisters and one-half equally between the husband's brothers and sisters.

[44] § 8574 G. C.

This section provides how personal estate shall be distributed. See §§ 8578-9 G. C., § 921.

[45] Fisher vs. Lang, 10 Dec. (Re.) 178; 19 B. 139.

See § 438, What is partnership real estate.

The next of kin of one who died leaving no issue and whose father and mother are dead and left no issue, are decedent's grandparents or great-grandparents as far back as may be necessary to go. Champlain vs. Walsh, 37 O. C. C. 534.

leaves husband or wife, relict of himself or herself and there is no person who, under the provisions of that section, would be entitled to inherit it, or an estate therein, save and except such husband or wife, relict of such intestate, then the estate shall pass to and vest in the husband or wife of the intestate as an estate of inheritance. If there is no such person, and no husband or wife relict of the intestate, then the estate shall pass to and vest in the next of kin of the intestate, though not of the blood of the ancestor from whom the estate came." [R. S. § 4160.][46]

§ 919. When real estate to pass to children of former husband or wife, etc. "When a person dies intestate, having title or right to any real estate or inheritance, whether by descent, devise, or deed of gift from an ancestor, or acquired, and there is no person entitled to inherit it under the next three preceding sections, then the estate shall pass to and vest in the children of any deceased husband or husbands, wife or wives, of the intestate, whose marriage with the intestate was not annulled prior to his, her, or their death, or their legal representatives. If there are no children, or their legal representatives, living, then the estate shall pass to the brothers and sisters of any such husband or wife, or their legal representatives; if there are no brothers and sisters, nor their legal representatives, the estate shall pass to the next of kin of such intestate; and if there are none such, then the estate shall escheat and be vested in the state of Ohio." [R. S. § 4161.][47]

§ 920. Descent of estate which came from former husband or wife. "When the relict of a deceased husband or wife dies intestate and without issue, possessed of any real estate or personal property which came to such intestate from a former deceased husband or wife by deed of gift, devise or bequest, or under the provisions of section eighty-five hundred and seventy-four, then such estate, real and personal, shall pass to and vest in the children of such deceased husband, or wife, or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend, one-half to the brothers and sisters of such intestate, or their legal representatives, and one-half to

[46] § 8575 G. C.
This section is only intended to provide for cases where there was a failure of persons capable of taking under the preceding section. Lathrop vs. Young, 25 O. S. 451.

[47] § 8576 G. C. Heirs of a deceased wife do not inherit any interest in the estate of the husband when he leaves heirs. McCune vs. Larkin, 25 C. C. (N.S.) 118; 36 C. C. 357.

the brothers and sisters of such deceased husband or wife from which such personal or real estate came, or their personal representatives." [R. S. § 4162.][48]

It will be observed that the above section makes provisions for property that was inherited or received by a wife or husband from her deceased consort by virtue of the provisions of sec. 8574, G. C. (§ 917), providing for the devolution of a title acquired by purchase. It is essential under this section that the wife or husband shall die intestate and without issue, and in possession of the property which she received from her husband. If she has parted with the property in any manner, the above section would not apply—that is, if she had converted real estate into money or *vice versa,* the above section would not apply. The identical property must remain.[49]

§ 921. Distribution of personal estate. "When a person dies intestate and leaves personal property, it shall be distributed in the manner prescribed in section eighty-five hundred and seventy-four, as to real property which came not by descent, devise or deed of gift from an ancestor; saving, however, such right as a widow or widower may have to any part of such personal property. But a fund in the hands of an administrator, guardian, assignee or other trustee, arising from the sale of real estate which came to such intestate by descent, devise or deed of gift from an ancestor, shall descend according to the course of descent prescribed by section eighty-five hundred and seventy-three, for ancestral real estate." [R. S. § 4163.][50]

§ 921a. When personal property to escheat. "If there be no person living to inherit it by the provisions of this chapter, such personal property shall pass to and be vested in the state. The prosecuting attorney of the county, in which letters of administration are granted upon such estate, shall collect and pay it over to the treasurer of such county; to be applied exclusively to the support of the common schools of the county in which collected, in such manner as is prescribed by law." [R. S. § 4163.][50*]

[48] § 8577 G. C. See previous § 914; Fay vs. Scott, 14 N. P. 241; 23 Dec. 464; Spitler vs. Heeter, 42 O. S. 100; Anderson vs. Gilchrist, 44 O. S. 440; Seney vs. Schmith, 25 C. C. (N.S.) 185; Gosling vs. Rupp, 7 N. P. 185.

[49] See Bruer vs. Johnson, 64 O. S. 7. This section points out the course of descent and distribution of personal property. Lingler vs. Wesco, 79 O. S. 225.

[50] § 8578 G. C. See § 755, *et seq.*

[50*] § 8579 G. C.

See Marshall vs. Bash, 17 N. P. 428, where the section was applied in case where wife and husband were both deceased each owning both real and personal property.

It has recently been held that if a guardian sells real estate and then reinvests the funds in real estate, the real estate so held would descend as

§ 922. Comments.

The above section is one brought into question most frequently in the administration of estates. According to its provisions, personal property may always be considered as coming to the decedent by purchase and is never ancestral. It provides that such personal property shall be distributed in the same manner as real estate acquired by purchase, excepting only the right that the widow may have therein.[51]

While personal property does not immediately pass to the distributee, yet the right vests at the death of the decedent.[52]

The provisions in the above section in reference to a fund that may be in the hands of an administrator, and which has arisen from the sale of real estate, shall in certain cases be distributed as real estate, are no doubt inserted into the statute because the Supreme Court had decided that in such cases the property had lost its ancestral character and was to be distributed as personalty.[53]

The latter part of the section merely provides when such property escheats.[54]

§ 923. When estate to descend to children of intestate and how. "When a person dies intestate leaving children, and none of the children of such intestate have died leaving children or their legal representatives, such estate shall descend to the children of such intestate, living at the time of his or her death, in equal proportions." [R. S. § 4164.][55]

§ 924. Descent when all descendants of equal degree of consanguinity. "When all the descendants of an intestate, in a direct line of descent, are of an equal degree of consanguinity to the intestate, whether children, grandchildren, or great-grand-

land acquired by purchase and not by descent. McCammon vs. Cooper, 12 Dec. 677; affirmed 1 N. P. (N.S.) 154; 12 D. 677; 69 O. S. 367.

This decision seems to the author to be questionable.

[51] See § 8592 G. C., § 938.

[52] Armstrong vs. Grandin, 39 O. S. 368.

[53] Pence vs. Pence, 11 O. S. 290; Armstrong vs. Miller, 6 O. 118.

[54] Personal property is always distributed according to the law of the domicile of the decedent. Swearingen vs. Morris, 14 O. S. 424; 2 Kent's Com. 571.

See § 758, Law of domicile.

[55] § 8580 G. C.

The purpose and object of the above section is not easily perceived. In the absence of statute, where property descends to a class, it would go to them in equal portions.

children, or of a more remote degree of consanguinity to such intestate, the estate shall pass to such persons of equal degree of consanguinity to such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be." [R. S. § 4165.][56]

§ 925. When there are living both children and heirs of deceased children of intestate. "If some of the children of such intestate are living, and others are dead, the estate shall descend to the children who are living, and to the legal representatives of such as are dead, so that each child of the intestate who is living will inherit the share to which he or she would have been entitled if all the children of the intestate were living, and the legal representatives of the deceased child or children of the intestate inherit equal parts of that portion of the estate to which such deceased child or children would be entitled if such deceased child or children were living." [R. S. § 4166.][57]

§ 926. Extent of application of last section. "The provisions of the next preceding section shall apply in all cases in which the descendants of the intestate, entitled to share in the estate, are of unequal degree of consanguinity to the intestate, so that those who are of the nearest degree of consanguinity, will take the share to which he or she would have been entitled, had all the descendants in the same degree of consanguinity with him or her, who died leaving issue, been living." [R. S. § 4167.][58]

§ 927. Previous sections apply to real and personal property. "The provisions of the next four preceding sections shall apply, both to personal and real estate. [R. S. § 4168.][59]

[56] § 8581 G. C.

This section disturbs the general rule that property descends *per stirpes* and not *per capita*. Under this statute, when all the descendants are of an equal degree of consanguinity, they should share equal. That is, supposing a brother died before his father, leaving three children, and another brother died leaving nine children, the estate then would be divided into twelve equal parts, the children of one brother, receiving one-fourth and the other three-fourths. If one brother would have been living at the death of his parent, the estate would then have been divided into two equal parts, the living brother receiving one part and the children of the dead brother the other. See next section. Ewers vs. Follin, 9 O. S. 326.

[57] § 8582 G. C.

This and the preceding section would apply to personal property as well as real estate. D— died leaving six children—two other children having previously died, one leaving a family of three children and the other five; these eight grandchildren are not entitled to participate equally, but the three of one family are each entitled to 1-24, and the five of the other each 1-40. Dutoit vs. Doyle, 16 O. S. 400.

[58] § 8583 G. C.

[59] § 8584 G. C.

Applies to nonancestral property and to collateral as well as lineal descendants. Goff vs. Dispeunlt, 33 O. C. C. 234; 23 Dec. 666; 20 N. P. 666, where an ancestor dies seized of nonancestral real estate leaving as next of kin, nephews and nieces, the inheritance descends *per capita* to nephews and nieces, the issue of one deceased takes a share by representation. Treat vs. Bessey, 35 O. C. C. 366.

§ 928. Advancements by intestate to be considered as part of estate. "If any estate, real or personal, has been given by an intestate in his lifetime as an advancement to any child or children of his, or their descendants, it must be considered a part of the estate of the intestate, so far as it regards the division and distribution thereof among his children or their descendants, and be taken by such child or children or their descendants toward his or her share of the estate." [R. S. § 4169.][60]

§ 929. Definition, etc.*

An advancement is a gift by a person to a presumptive heir of certain property with the intention that the value of such property shall be deducted from the portion that such presumptive heir would otherwise be entitled to receive out of such person's estate after such person was deceased. The statute applies to both real and personal property and limits its application to the case of an intestate. The reason for this is that a person dying testate and having provided for the disposition of his estate after his death, is presumed to have had in mind the claims upon his bounty of those to whom he leaves legacies, as well as of those whom he excludes;[61] and all advancements made by a testator prior to the making of the will, and not re-

*Cited and quoted from Fisher vs. Fisher, 11 C. C. (N.S.) 375; affirmed, without report (80 O. S.), 30 O. C. C. 607.

[60] § 8585 G. C.

The law presumes in the absence of an expressed intention to the contrary, that a person's children are alike in his affection and are entitled to receive an equal portion of his estate. With this object in view, the above section was enacted into law, and in order to accomplish this purpose should be so construed.

In partition of lands of a deceased's farm among his children, a child receiving an advancement should be charged with the same. Parsons vs. Parsons, 52 O. S. 470.

See § 1065, Absent child—wills. § 760, Set-off against heirs.

[61] Woerner on Admin. 1215.

The doctrine of advancements does not apply to collateral relatives. Waldron vs. Taylor, 45 S. E. 336 (1913).

See interesting article in 58 Cen. L. J. 42, on "The conversion of the debt of a child into an advancement by the parent."

Defined in Dow vs. Dow, 3 N. P. (N.S.) 125; 15 Dec. 576 (1905), In this case it is held that creditors can not acquire a prior lien on a child's share until his advancement has been deducted from such share. As between parent and child, a deed of gift from the former is presumed to be an advancement. Cowden vs. Cowden, 7 C. C. (N.S.) 277; 18 Cir. D. 71, and 28 O. C. C. 71.

A debtor heir who claims a share of the estate must account to it for advancements by him received, although some are evidenced by notes that are barred by the statute of limitations. No interest is calculated after the death of the ancestor. Tobias vs. Richardson, 5 C. C. (N.S.) 74; 26 O. C. C. 81; affirmed 72 O. S. 626.

The law of advancements can only apply where decedent died intestate. *In re* Bullock, 15 Dec. 783; reversed 3 N. P. (N.S.) 190; 50 B. 160.

Advancements made by a father to his daughter are gifts *inter vivos*, and when actually delivered can not be recovered back, and parol evidence is admissible to show that it was an advancement. Martin vs. Scudder, 14 Dec. 283.

ferred to therein, cannot be reckoned against the donee, although they would have been deducted if there had been no will; nor can parol evidence be received to show that the contrary was intended.[62]

A testator may, however, provide that his estate shall descend as if he had died intestate, in which case advancements are to be reckoned as if there were no will. The gift, in order to constitute an advancement, must be irrevocable,[63] divesting entirely all of the ancestor's interest,[64] and forming no part of the property to be administered;[65] hence, the donee can in no case be compelled to refund what he has received.[66]

The statute does not apply to unintentional intestacy.[67] But the fact that there is a partial disposition of the estate will not prevent the statute applying to the property of which the person died intestate.[68]

An oral advancement of real estate is ineffectual notwithstanding the grantor's intent, by reason of the statute of frauds.[69]

§ 930. What constitutes an advancement.

Whether a gift or conveyance is to be regarded as an advancement is to be determined by the donor at the time the gift is made. A person may convey property to a presumptive heir which may result, as to the rights of such heir, in three different ways. First, he may make an outright gift to the heir,

[62] *In re* Lyon, 70 Iowa, 375.

Recitals in a will of certain advancements to certain children, which are to be deducted from their shares, can not be disproved by the children either as to the fact of any advancement or their amount. Farmer vs. Cope, 37 Bull. 132 (Supr. Ct., not rep.).

[63] Herkimer vs. McGregor, 126 Ind. 247; Harly vs. Harly, 57 Md. 340; Dugan vs. Gittings, 3 Gill. 138; Miller's Appeal, 31 Pa. St. 337; Fellows vs. Little, 46 N. H. 27; Darne vs. Lloyd, 82 Va. 859.

[64] Joyce vs. Hamilton, 111 Ind. 163; Manning vs. Manning, 12 Rich. Eq. 410.

[65] Miller's Will, 73 Iowa, 118, per Bradley, J., in Ritch vs. Hawhurst, 114 N. Y. 512; Black vs. Whitall, 9 N. J. Eq. 572; Barrett vs. Morriss, 33 Gratt. 273; Metcalfe vs. Colles, 43 N. J. Eq. 148.

[66] Marston vs. Lord, 65 N. H. 4; Woerner on Admin. 1214.

Dow vs. Dow, 3 N. P. (N.S.) 125; 15 Dec. 576. A child may sell property received as an advancement.

[67] Needles vs. Needles, 7 O. S. 432.

[68] Dittoe vs. Cluney, 22 O. S. 436.

[69] Williams vs. Nears, 2 Dis. 604. See ademption of legacies, § 685.

in which case the heir is to be held to no accountability whatever for the same, except to creditors of the intestate where the estate is insolvent. Secondly, property may be loaned to the heir, in which case the heir is held bound to repay the same in full, no matter what his portion of the estate may be, and our Court has held that sums voluntarily paid by an ancestor for the heir, " as where he was surety for the latter," are not advancements, but debts, and as such are entitled to be off-set against any claim that the heir may have against the estate.[70] And the third way in which an ancestor may convey property to an heir is by the method under discussion, to-wit, by advancement. In such a case the heir is not bound to return to the estate any portion he has received, but he is not entitled to receive any from the estate until his portion exceeds the amount he has already received. Such advancement is not to be considered as an asset of the estate, but in order to determine the portion coming to each heir, it is to be added to the amount to be distributed. Thus if a person die intestate, leaving four children, and an estate amounting to three thousand dollars, having made an advancement of one thousand to one of his children. For the purpose of calculating the portion coming to each child, his estate would be considered as of the value of four thousand dollars, one-fourth of which, to-wit, one thousand dollars, would be the portion of each child. The administrator or executor is not entitled to charge commission on an advancement.[71]

A purchase in a child's name is presumably an advancement.[72] But such presumption can always be rebutted.[73]

On the question of whether a deed from father to son was an

[70] Keever vs. Hunter, 62 O. S. 616.

[71] Woerner on Admin. 1168.

[72] Myers vs. Warner, 18 O. 519; Creed vs. Bank, 1 O. S. 1; Vanzant vs. Davies, 6 O. S. 52.

[73] Intention must determine whether a transfer is a gift, debt, or advancement. If in a partition case a deduction from an heir's share is demanded by reason of advancements, and the only proof is decedent's account book, charging payments for the heir and credits of payments by him, this is *prima facie* a debt only, and can not in such proceeding be deducted. Fels vs. Fels, 1 C. C. 420; 1 C. D. 235.

In the case of a gift from a child to a parent, undue influence may be inferred from the relation of the parties, but never when the gift is from the parent to the child. McAdams vs. McAdams, 8 O. S. 244.

advancement, or for a consideration still due, the relation of the parties and the circumstances of the father are relevant.[74]

A gift to a son-in-law, intended as an advancement to the daughter, would be charged against her if she, knowing the intention of the gift, acquiesced therein.[75] But a conveyance to a son-in-law to advance him in life, in consideration of love and affection for the daughter, creates no trust in favor of the daughter.[76]

Delivering money to a daughter to build a home, she to pay interest during her parent's life, and to own the principal at his death, is not an advancement.[77]

§ 931. How proven.

There is no statutory provision in our State providing specifically how an advancement shall be shown, and therefore the general rules of evidence as to such matters would be applicable, and the declaration of the grantor at the time of making the advancement as a part of the *res gesta* would be admissible; and as a declaration against interest, the admission of the person receiving the advancement would be competent. Book entries made, or caused to be made, by the father, although the child

[74] Harrison vs. Castner, 11 O. S. 339, 346.

A father conveyed land to his son, and for part of the price took a receipt, thus: Received of the father $1.000 for the use without interest received by me, signed by the son. *Held*, not an advancement, but payable to the father when required. Overholser vs. Wright, 17 O. S. 157.

[75] Dittoe vs. Cluney, 22 O. S. 436.

[76] Thompson vs. Thompson, 18 O. S. 73.

If the husband of an heir receives from her father property as an advancement, she may compel the father's administrator to pay her share in full or may collect from her husband. If she elects to take the former remedy, the administrator is subrogated to her claim against the husband. Stayner vs. Bower, 42 O. S. 314.

[77] Medill vs. Fitzgerald, 15 C. C. 415; 8 C. D. 129. Where a decedent, at his death, holds promissory notes and a mortgage executed to him by his daughter and her husband, in order to establish a claim that the money for which such instruments were given was a gift to the daughter by way of advancement or otherwise, the evidence must be clear and convincing. Medill vs. Fitzgerald, 15 C. C. 415; 8 C. D. 129.

See Tobias vs. Richardson, 5 C. C. (N.S.) 74; 26 C. C. (1904), as to when a note may be treated as an advancement.

Parol evidence is not competent to show that an advancement charged in a book of advancements, was not made. Younees vs. Flory. 77 O. S. 71.

charged had no knowledge thereof, and contemporaneous memorandum and book accounts are admissable.[78]

The relation of the parties may be shown, and whatever tends to show the true purpose of the act, and the grantor's family relation, property relation, and other matters, may be given in evidence where the same will tend to throw light on the nature of the transaction. It will be competent for the child to show that the charges made for claims have been by him repaid. But a declaration made by a parent in the absence of the child, and not agreed to by the latter or communicated to him, must be excluded. But if made in the presence of the child and not controverted, they are competent.[79]

Where in a will a certain gift is stated to be an advancement, no evidence is competent to disprove such a fact.[80]

In the absence of evidence showing testator's intention, property conveyed by him as a permanent provision for donee, is regarded as an advancement. But gifts of small sums to donor's children, to be used for actual support and maintenance, will not be regarded as an advancement in the absence of evidence of testator's intention.[81]

§ 932. When advancement is greater or less than heir's share. "If the amount of such advancement equals or exceeds the share of the heir to whom it was made, he shall be excluded

[78] Woerner on Admin. 1222. See Construction of wills.

[79] Woerner, Admin. 1223.

Gifts of property by a parent to his children in such proportions as they, considering their states of health and the circumstances of each seemed to need, if not designed by him as advancements, will not be so treated, although his entire object fails by the refusal of one to accept. Burbeck vs. Spollen, 10 Rec. 491.

Where a father having an equitable right to land causes the deed to be made to his son, the father's executors, claiming the land, may in order to rebut the presumption of an advancement or gift, put the deed in evidence wherein the son is called trustee, and may show the father's prior declarations and instructions that it was to be made to the son in trust for the father. Paddock vs. Adams, 56 O. S. 242.

[80] Farmer vs. Cope, 37 Bull. 132.

An allegation that deceased advanced to H. B., husband of M. B., his daugter, is not an allegation of an advancement to his daughter and heir-at-law. Boyer vs. Boyer, 7 Dec. 525; 7 N. P. 153.

[81] Carmichael vs. Lathrop, 112 Mich. 301; Page on Wills, 935, § 788.

See § 934, When stated in deed, etc.

from any further part in the division or distribution of the estate, but not be required to refund any of such advancement. If the amount so advanced is less than his full share, he will be entitled to as much more as will give him his full share of the estate." [R. S. § 4170.][82]

§ 933. When advancement is wholly real or personal estate. "If such advancement is made in real estate, the value thereof must be considered and taken as a part of the real estate to be divided; if in money or other personal estate as a part of the personal estate to be distributed. In either case, if it exceeds the share of the real or personal estate that would have come to the heir to whom the advancement was made, he need not refund any part of it, but shall receive so much less out of the other part of the estate as will make his whole share equal, as near as can be estimated, to that of either of the other heirs who are in the same degree of consanguinity with him." [R. S. § 4171.][83]

§ 934. When value of advancement expressed in deed, etc. "If the value of the estate, real or personal, so advanced, is expressed in the deed of conveyance, or in the charge thereof, made by the intestate, or in the receipt in writing, given by the person receiving the advancement, it must be considered of that value, in the division and distribution of the estate, otherwise, at its estimated value when advanced." [R. S. § 4172.][84]

The latter part of the above section places in statutory form the rule which prevails in the absence of statute.[85] Of course, as the gift is irrevocable, the donee is not chargeable with any interest, or for any increase in the advancement, unless expressly given on such terms; and if the advancements are made

[82] § 8586 G. C.

See Moore vs. Freeman, 50 O. S. 592, A debtor heir, who makes claim for distribution, is required to account to the estate for the debt he owes. Lockwood vs. Witlesly, 23 C. C. (N.S.) 241.

[83] § 8587 G. C.

By virtue of § 4171 R. S., an advancement is first to be taken out of the same kind of property in which it was given. But in all cases the full amount of the advancement is to be charged to the heir. Reeves vs. Hunter, 62 O. S. 619.

[84] § 8588 G. C.

[85] Woerner Administration 1222.

If the heir transfers his interest, the grantee will take the interest the heir would have taken had the same not been transferred, and the same rule would apply if the interest of the heir was attached. Dow vs, Dow, 3 N. P. (N.S.) 125; 15 Dec. 576.

by will, and the will states that they are of a certain sum, such sum as fixed by the will must be taken to be the value of the advancement.[86]

§ 935. **Heirs of aliens may inherit; aliens may hold lands.** "No person who is capable of inheriting shall be deprived of the inheritance by reason of any of his ancestors having been aliens. Aliens may hold, possess and enjoy lands, tenements, and hereditaments, within this state, either by descent, devise, gift, or purchase, as fully and completely as any citizen of the United States or this state can do." [R. S. § 4173.][87]

§ 936. **Capability of bastards as to inheritance.** "Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance, in like manner as if born in lawful wedlock." [R. S. § 4174.][88]

§ 937. **When illegitimate children deemed legitimate, etc.** "When, by a woman a man has one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, will be legitimate. The issue of parents whose marriage is null in law, shall nevertheless be legitimate." [R. S. § 4175.][89]

[86] Farmer vs. Cope, 37 Bull. 132. See Page on Wills, 935.

[87] §8589 G. C.

This section removes all disabilities of aliens as to inheritance. Ry. vs. Naylor, 73 O. S. 115.

[88] § 8590 G. C.

Under previous laws it was held, that bastard's estate did not pass maternal line and gave no right to inherit from mother's relatives. But under the above provision it would seem that so far as through the mother, the bastard would be in the same position as a legitimate child. The following are cases construing the former acts: Little vs. Lake, 8 O. 289; Lewis vs. Eutsler, 4 O. S. 354; Gibson vs. McNeely, 11 O. S. 131; Hawkins vs. Jones, 19 O. S. 22; Bruner vs. Briggs, 39 O. S. 478.

[89] § 8591 G. C.

Again the language of the statute is too clear to require construction: "When a man has by a woman one or more children, and afterwards intermarries with her," etc. A "man" means any man, and a "woman" means any woman. There are no exceptions. If he is a man and she is a woman, no matter what their previous lives may have been, they come within the language of the statute, and when legally married and the former issue acknowledged by him as his child, such issue becomes thereby legitimated, even though it is an adulterine bastard. (Ives vs. McNicoll, 59 O. S. 402.) This case is also reported in the Circuit Court (12 C. C. 297; 5 C. D. 555), and in the Court of Common Pleas (3 N. P. 6; 4 Dec. 75). And a person legitimized in the manner provided by statute is the lawful issue of his parent and entitled to take under a devise "to the heirs of his father's body." Kniffin vs. Schaffer, 12 C. C. 753; 4 C. D. 62.

See Miller vs. Anderson, 43 O. S. 473; Wright vs. Love, 12 O. 619; LaRoche vs. LaRoche, 29 O. C. A. 113.

§ 938. Amount of personal estate to which a widow or widower is entitled upon distribution. "When a person dies intestate and leaves no children or their legal representatives, the widow or widower, as next of kin, will be entitled to all the personal property which is subject to distribution upon settlement of the estate. If the intestate leaves any children or their legal representatives, the widow or widower will be entitled to one-half of the first four hundred dollars and to one-third of the remainder of the personal property subject to distribution." [R. S. § 4176.][90]

§ 939. Comments.

It will be observed that the above section provides for that portion which is to be *distributed* to the surviving consort. It does not therefore include any part of the assets of the deceased which are set apart to the widow by the appraisers of the personal estate of the husband.[91] This right to a share of the estate on distribution, I have no doubt, could be relinquished by the widow or widower by either an ante-nuptial or post-nuptial contract,[91a] provided that it was shown clearly to have been the intention of the parties when the contract was made.[92]

And it may be stated as a general rule that the right to a distributive share in personal property may be barred in the same manner as the right to dower in the real estate, except that as to personal property a man or woman might defeat the right of his wife or her husband to share in his personal property by disposal of the same during his lifetime either by sale or valid

See § 1887, Adoption, etc.

[90] § 8592 G. C. See § 921.

Where a husband sold land and on demand of his wife he gave her one-third the purchase money, this did not keep her from receiving her distributive share of his personal property, although such personal property was the remainder of the purchase price of said land. Barber vs. Hite, 39 O. S. 185.

The right to such distributive share accrues at the time of the death of the husband or wife. Conger vs. Barker, 11 O. S. 1.

See § 319, *et seq.*, Widow's allowance.

[91] See § 319, *et seq.*

[91a] Recently the Supreme Court has held that a contract could not be made between husband and wife when they were living to bar themselves of their dower rights or distributive share. DuBois vs. Coven, 100 O. S. 17.

Whether they could do so in a contract of separation is not decided. There is a dissenting opinion by C. J. Nichols, and it is not improbable there will be some legislation in the future on the subject.

[92] Miller vs. Miller, 16 O. S. 527; Smith vs. Smith, 57 O. S. 27; Ward vs. Ward, 63 O. S. 125.

See Election of widow, § 1227 G. C., as to right to share in proceeds of real estate, when the same is directed to be sold, etc.

A widow is entitled to dower in the real estate and a share of his personal property subject to distribution when he dies intestate without making provision for her by his will, and when provision is made for her she may elect to retain her dower and not to take under the will; and when she retains her dower and distributive share, such share is to be ascertained by regarding the husband's estate as if he had died intestate, leaving children. Geiger vs. Bitzer, 80 O. S. 65; overruling Hutchings vs. Davis, 68 O. S. 160.

gift.[93] But a husband or wife could not, by disposing of all of his or her personal property *by will,* deprive the surviving consort of his or her distributive share of the estate. As to such surviving consort, the deceased would have died intestate.[94]

In such a case the surviving consort is not required to elect, as the will makes no provision for such consort,[95] as a person may die both testate and intestate. In such a case the widow would be entitled to her share of the intestate property, although she may have elected to take under the will.[96]

Where some of the children have received advancements, such advancements are not to be taken into consideration in determining the amount to be distributed to the widow. She is only entitled to one-third of the estate exclusive of the advancement.[97]

A widow's right to distribution, for whom no provision is made in her husband's will, is just what it would have been had her husband died intestate, and the amount to be paid to her is ascertained by charging to the executor whatever amount he is chargeable with under the law, deducting therefrom whatever he is entitled to be credited with under the law, and giving to her out of what remains one-half of the first four hundred dollars and one-third of the balance. She is not entitled to interest on her distributive portion of the personal property of the estate, until one year after the appointment of the executor, and then until the distribution is made.[98]

[93] A wife may by gift *causa mortis* dispose of her entire personal property, to the exclusion of her surviving husband who had abandoned her. South vs. Fair, 41 Bull. 343.

A husband may by gift *inter vivos* of all his property deprive his wife of any share therein at his death, although done for the purpose of excluding her from inheriting anything from him for his dominion over his personalty is absolute and she is not a *quasi* creditor. Brodt vs. Rannells, 9 Dec. 503; 7 N. P. 79.

[94] Doyle vs. Doyle, 50 O. S. 330.

[95] Doyle vs. Doyle, 50 O. S. 345. It is intimated that a person could not give away his property if done in fraud of the consort's rights.

See Smith vs. Smith, 57 O. S. 37. See § 1214 *et seq.*, Election of widow. See § 1249, Gifts etc.

[96] Gardner vs. Gardner, 13 O. S. 426.

[97] Young vs. Roberts, 7 C. C. 105; 3 C. D. 685.

[98] *In re* Mary Hutchins' Estate, 21 C. C. 721; 12 C. D. 29.

§ 940. Construction of words, "living" and "died." "When in this chapter a person is described as living, it means that he was living at the time of the death of the intestate from whom the estate came, and when a person is described as having died, it means that he died before such intestate." [R. S. § 4178.][99]

§ 941. Posthumous child of intestate to inherit. "Descendants of the intestate begotten before his or her death, but born thereafter, in all cases will inherit in the same manner as if born in the lifetime of the intestate, and surviving him; but in no other case can a person inherit, unless living at the time of the death of the intestate." [R. S. § 4179.][100]

§ 942. Permanent lease-hold to descend same as estates in fee. "Permanent lease-hold estates, renewable forever, shall be subject to the same law of descent as estates in fee are subject to by the provisions of this chapter." [R. S. § 4181.][101]

Where a widow's right to dower was dependent upon the proposition that the lands left by her husband were, as to her, to be treated as real estate, notwithstanding the fact that as to all others interested in said estate they were to be treated as converted into personalty, her claim to distribution out of the avails of the sale of the real estate based upon the proposition that such lands are to be treated as to her, as well as to the residuary legatees, as converted into personalty, is consistent with the former, and she must elect which to pursue. Id.

[99] § 8594 G. C.

[100] § 8595 G. C.

See § 10561 G. C., as to rights of posthumous child under will. § 1062, as to how an heir may be designated; see chapter on adoption, § 1887, *et seq.*

[101] § 8597 G. C.

There may be several distinct tenements in the same building under the same roof, as well where one is over the other, as where one is beside the other. Cin. College vs. Yeatman, 30 O. S. 276.

See § 949, Dower.

At the law school in Columbus I am informed Prof. Kinkeed has given an interpretation to sec. 4076 R. S. (938) which is not in accord with the general practice, nor my own idea. After taking one half of the first $400.00, he considers the *remainder* to mean the entire fund less $200, instead of less $400. That is, suppose there is $1,000.00 for distribution. The widow would get ½ of $400 + ⅓ of $800 = $466.66. According to the general practice the widow would get ½ of $400 + ⅓ of $600 = $400.00.

CHAPTER LI.

DOWER.

§ 943 Nature. Definition, etc.
§ 944 Of what estate a widow or widower endowed.
§ 944a Mansion house, etc.
§ 945 Widow or widower.
§ 946 Relinquished.
§ 947 How barred.
§ 948 Death of a consort.
§ 949 To what property the right attaches.
§ 950 Value and rights when lands are sold.
§ 951 Conveyance in lieu of dower.
§ 952 Effect of defective conveyance in lieu of dower.
§ 953 Effect of eviction from premises conveyed in lieu of dower.
§ 954 When person dwelling in adultery is barred of dower.
§ 955 Where lands are given up by fraud.
§ 956 Dower is forfeited by waste.
§ 957 Assignment of.
§ 958 Application for Court's approval.[1]

§ 943. Nature. Definition, etc.[a]

The settlement of estates of deceased persons, as well as the assignment of property for the benefit of creditors, often necessarily requires a knowledge of the law relating to dower. In addition to the method provided by law in the settlement of estates and assignments for creditors for the setting apart of the dower right, the statute provides that an action may be brought in the Court of Common Pleas for the assignment of the dower right.[2] The provisions relating to the assignment of a dower right in the Court of Common Plesa would not strictly come within the limits of work on Probate Law and Practice, and is therefore omitted.[3]

Dower may be defined to be the right which the law gives to a

[1] § 1214, *et seq.*, Election, etc., under will. For tables calculating dower interest, see chapter next to index.

[a] Cited Lape vs. Lape, 31 Dec. 192.

[2] § 12005 G. C.

[3] For practice and form for such matter see Kinkead's Pleading, 484; Bates Pl. and Prac., pp. 1508-1521; Whittaker's Forms, 224.

See § 846a, Dower and homestead; § 869, Assignment of dower; § 1523, Assignment of insane person's dower.

husband or wife in the real estate of a living or deceased consort. It is said that its origin can not be traced. At common law, the rights of a husband in such property was known as an estate by curtesy, and the right of the wife a dower right. In our State the estate by curtesy has been abolished, and a husband and wife now stand alike in reference to their respective rights in the real estate of the other,[4] and the name of "dower" has been designated as the common name for such a right. With us it is a statutory right and does not rest upon any right of contract between the parties, and is entirely subject to legislative control.[5]

It is therefore within the province of the legislature to abolish this right at any time. As a rule, however, whenever the legislature makes changes, it reserves the rights of persons whose dower has become vested and fixed. A liberal construction is to be applied to the dower statutes, and it is said that assignments by metes and bounds is favored.[6]

It is generally held that until the dower becomes fixed — that is, until the wife or husband has died — that it is not such a right that can be sold or levied on, but it may be released to a party having the greater estate. It has been a mooted question whether dower after the death of the consort and before it has been assigned or set off by metes and bounds can be sold or transferred. The more recent decisions sustain the view that it can be sold, but not on execution.[7]

Of course, if the wife or husband dies before an action is brought or proceedings had to set apart the dower right, such right would fail and the purchaser would receive nothing.[8]

Until the death of a consort, the dower right is spoken of as inchoate or contingent dower.[8*] After the death of the consort it is called vested or consummated dower. After the death of

See §§ 12004 to 12025 G. C., as to statute for assignment of dower.

[4] MacLaren vs. Stone, 18 C. C. 854; 9 C. D. 794.

[5] Weaver vs. Gregg, 6 O. S. 547. A dowress takes by purchase and not by testament or inheritance. Kling vs. Ballentine, 40 O. S. 396.

[6] Dunseth vs. Bank of U. S., 6 O. 76.

[7] Bausch vs. McCunnell, 7 N. P. 387; 5 Dec. 132; Weyer vs. Sager, 21 C. C. 710.

[8] Roth's Estate, 6 N. P. 498; 9 Dec. 429.

[8*] It does not pass to a trustee in bankruptcy. *In re* Russell, 14 Fed. Dec. 364 (1905).

the consort, when the dower has been assigned, it may be levied on and sold under execution. But until it is assigned it is not subject to a lien of judgment or levy, but may be reached by a bill in equity.[9] Inchoate dower is not an estate within the ordinary meaning of the term, but merely a right which may develop into an estate by the death of the consort.[10] While it is not an estate, it is a right capable of being barred by estoppel.[11]

It has a value which must be recognized on distribution, hence foreclosure in the mortgagor's lifetime, dower must be allowed.[12] Likewise in setting aside a fraudulent conveyance by a husband in an alimony suit the present value of the contingent dower will be awarded to her.[13]

[9] Maclaren vs. Stone, 18 C. C. 854; 9 Dec. 794; Moore vs. Moore, 7 N. P. 320; 6 Dec. 154.

[10] In this connection it is proper to remark that, although dower inchoate is not an estate, nevertheless, it is a right or interest in the land, created by the law for the wife's benefit, and vested in her. It is a legal right, contingent, it is true, upon her husband's death, as to whether it will ripen into a right, in her, to have it assigned, and to enter upon its enjoyment, but not otherwise uncertain. It is a right valuable to the wife, and valuable in respect to the estate. Its existence diminishes, while its extinguishment enhances the value of the inheritance. Having once attached by the concurrence of seizin of the inheritance in the husband and coverture, its continued existence does not depend upon the continuance of the husband's seizin. His alienation does not impair the right. It is inseparable from the inheritance, and attends it to whomsoever it may pass until discharged by her own deed, or in some other statutory mode. And while admitting that dower inchoate is not an estate, yet it may also be said that, strictly speaking, neither is dower, the title to which has become consummate, until after it is assigned in the land.

White, J., in McArthur vs. Franklin, 16 O. S. 193.

A widow's unassigned right may be made subject to the payment of her debts, created after her husband's death, Boltz vs. Stotz, 41 O. S. 540.

In re Russell, 14 Fed. Dec. 364 (1905).

The inchoate dower of the wife is not a lien upon the land; it is an interest in the land of the husband. And she is not barred, if made a party defendant in a foreclosure, unless her rights are protected. Jewett vs. Feldheiser, 68 O. S. 523.

[11] Rosenthal vs. Mayhugh, 33 O. S. 155.

[12] Sprague vs. Law, 7 N. P. 554; 5 Dec. 484; Aff. 17 C. C. 735; 8 C. D. 428.

See German Bank vs. Guthrie, 3 N. P. 311; 3 Dec. 686.

[13] Tate vs. Tate, 19 C. C. 532; 10 C. D. 321.

As to the calculation of contingent dower, see chapter next to index.

See §§ 846, 834, 1601.

If the wife join a mortgage, and the husband, without the wife joining, afterwards conveys his equity

Where a dower interest has been allowed in proceeds of a sale of lands, and the same is held by the administrator, together with the remaining proceeds, such dower interest is entitled to its own earnings in the way of interest, etc.[14]

§ 944. Of what estates a widow or widower endowed. "A widow or widower who has not relinquished or been barred of it, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage, in one-third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, and in one-third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond, or other evidence of claim." [R. S. § 4188.][15]

§ 944a. Mansion house, etc. "The widow or widower may remain in the mansion house of the deceased consort, free of charge, for one year, if dower is not sooner assigned. Dower shall not be assigned to a widow or widower in real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, until the termination of the prior estate." [R. S. § 4188.][15*]

§ 945. Widow or widower.

The first requisite in the above section as to the right of dower is that the person claiming the same must be a widow or widower. This implies that at some time there was a valid marriage relation. The first essential, then, in ascertaining the existence of a dower right would be to determine the fact that the claimant had been legally married to the deceased. It would not necessarily mean a marriage according to the forms of law,

of redemption to the mortgagee, the wife is not entitled to dower. Dural vs. Febiger, 1 C. S. C. R. 269.

But a widow is not barred of her equity of redemption, unless made a party to a suit of foreclosure, etc. McArthur vs. Franklin, 15 O. S. 485.

When land is mortgaged by the husband and the condition is broken before marriage, and the equity of redemption is released during coverture, the widow is not entitled to dower. Rands vs. Kendall, 15 O. 671.

A contract in reference to dower and the capacity of the wife to release is governed by the law of the place where the contract is made. Sell vs. Miller, 11 O. S. 331.

[14] *In re* Geo. W. Arnold Est., 47 Bull. 616.

See § 1288, Income and principals.

[15] § 8606 G. C.

There can be neither dower or curtesy unless the deceased consort had, at his death, the right of possession. Landis vs. Marsh, 32 O. C. C. 399.

[15*] § 8607 G. C.

As to widow's quarantine, see § 319 *et seq.*, and widow's allowance.

See Rent of mansion house, 372.

but a common law marriage might answer as well.[16] But if the marriage was void, for instance, if the husband had another wife at the time of the marriage, the second wife, though innocent, would acquire no right to dower.[17]

There may be instances in which a husband or wife might die, leaving two or more persons who would be entitled to dower in the real estate. Thus, if a wife secured a divorce from the husband by reason of his aggression, she would be entitled to dower, unless provided in the decree otherwise, in all the real estate on which her husband was seized at any time during the coverture.[18]

If such party remarry, the second wife would be entitled to dower in all the real estate which her husband acquired or held during her coverture.[19]

An interesting case in assignment of dower is that of King vs. King.[20] In this case King received by inheritance from his father fifty-four acres. Out of this fifty-four acres, twenty-nine acres was assigned as dower to his mother, leaving twenty-five acres in which no dower was assigned. King married and afterwards a divorce was secured from him by reason of his aggression. He then remarried and died, thus making a case where three widows were entitled to dower in one tract of land. The mother's dower had already been assigned. The Court held that the first wife was entitled to dower in the twenty-five acres, but not in the twenty-nine acres which had been set apart as the dower of his mother.[21] The second wife was held to be en-

[16] Adultery, however long continued, does not constitute marriage. Swartz vs. State, 13 C. C. 62; 7 C. D. 43.

Reputation for cohabitation is not sufficient. Robberts vs. Robberts, 8 W. L. J. 372; Carmichael vs. State, 12 O. S. 553.

Mutual promise to marry in future, followed by cohabitation, is not sufficient. Ducan vs. Ducan, 10 O. S. 181.

As to what will constitute a common-law marriage on a very interesting state of facts, see Johnson vs. Dudley, 4 Dec. 243; 3 N. P. 196. Also Fulton vs. Spear, 28 Dec. 394.

[17] Kennelly vs. Cowle, 4 N. P. 105; 6 Dec. 170.

See Brown vs. Kerns, 6 N. P. 68; 9 Dec. 112.

[18] §§ 11921 G. C. See Julier vs. Julier, 62 O. S. 90.

§ 5700 R. S. makes substantially the same provisions for the husband.

[19] See Arnold vs. Donaldson, 46 O. S. 80.

[20] 9 C. C. 191; 4 C. D. 1.

[21] Court citing § 5799 R. S., § 11921 G. C.

Scribner on Dower, 311; Lamkin vs. Knapp, 20 O. S. 454; Harvey vs. Gardner, 41 O. S. 642; Foote vs. Worthington, 4 Bull. 645.

titled to dower in said twenty-five acres subject to the dower right of the first wife, and if she survived the mother, she would also be entitled to dower in the twenty-nine acres; and that the assignment of dower to the second wife should be so made as not to include any part assigned to the first wife; and that, in order to ascertain how much land should be allotted to the second wife, in respect to that part of the land to be assigned to the first wife, the commissioners should make valuations of the land and have recourse to tables showing the value of the chance of survivorship between two lives similar to those of appellant.[22]

In no instance can a husband's lands be used for dower purposes in excess of the one-third thereof as provided by statute.

§ 946. Relinquished.

The second requisite as provided in sec. 8606-7, G. C., is that the person who is entitled to the dower right has not relinquished or been barred of the same. In a subsequent section [23] it is provided how such dower may be defeated by a conveyance in lieu of dower. There are a number of other ways in which dower may be relinquished or barred. The dower right may be relinquished by contract.[23a] The common and ordinary way in which such dower is relinquished is by a husband or wife joining in a deed in which the property is conveyed to a third party. It is said, however, that a contingent dower cannot be released to any one except an owner of the fee, or one taking the fee by the same conveyance.[24]

If a release is obtained by fraudulent representation it can be avoided, provided the rights of *bona fide* purchasers did not intervene.[25]

The dower right might also be relinquished by either a post-nuptial or ante-nuptial contract, where the same was entered into fairly and with a just perception of the respective rights of the parties.[26] But the Courts will carefully scrutinize such

[22] See § 949, What dower attaches. 2 Scribner on Dower, 468.

[23] § 8608 G. C., § 951. See § 687, Legacy in lieu of dower.

[23a] The Supreme Court has recently held that husband and wife *living together* can not contract to release the rights they have in each others property. Dubois vs. Coen, 100 O. S. 17.

[24] Smith vs. Flickinger, 22 Bull. 254.

In setting up estoppel by an ante-nuptial contract it should be averred that the terms and provisions of the contract were fair and just to the wife. Binkley vs. Binkley, 50 Bull. 58.

A contract giving $200 a year in lieu of dower, etc., out of an estate of $4,500, is on its face unreasonable. *Id.*

[25] Pumphrey vs. Pumphrey, 4 W. L. M. 40.

[26] A reasonable antenuptial contract in bar of dower, if between

contracts, and where disproportionate to the rights relinquished, will set them aside.[27]

An equitable jointure, reasonable and fully executed, bars dower as where a couple owning about equal properties, by ante-nuptial contract, agreed to enjoy the whole during coverture, and at the death of either, the survivor and the estate should resume their respective realty and divide the personalty, and neither have any claim on the other's share, this bars dower.[28]

A woman's ante-nuptial covenant not to claim dower will not bar dower unless it is either a legal or equitable bar.[29]

A contract to relinquish dower must be made in writing in order to be valid, and in the manner the statute provides.[30]

If a wife be a minor when she joined in the deed she does not relinquish her dower right.[31] It might be relinquished by accepting the amount awarded in a decree in a divorce.[32]

parties of mature age, without imposition and in good faith, given full effect during life by the husband, will be enforced. Mintier vs. Mintier, 28 O. S. 307.

If both parties are of full age, and have a reasonable knowledge of each other's circumstances, and there is no fraud, the adequacy of the provisions for the wife does not depend on its proportion to the husband's estate to bar dower. Ross vs. Ross, 2 W. L. M. 17.

[27] A woman about to marry a man 77 years old, in feeble health, and with nine children, and owning 366 acres of land of no great value agreed to receive $700 in case she survived him, in lieu of dower, *held*, not to bar dower. Johnson vs. Johnson, 1 C. C. 521; 1 C. D. 291.

Unless the ante-nuptial contract relinquishing all share in the husband's estate has been fairly performed in favor of the wife, it will not bar her. Phillips vs. Phillips, 14 O. S. 308.

Such contracts are to be tested by the rules which determine the validity of contracts between persons standing in a confidential relation to each other. Where a man had $20,000 of real estate and $35,000 of personal property, an ante-nuptial agreement of $2,500 was set aside, where it was shown that the wife had no knowledge of the husband's wealth. Duttenhoffer vs. Duttenhoffer, 12 Dec. 736.

[28] Murphy vs. Murphy, 12 O. S. 407.

[29] Grogan vs. Garrison, 27 O. S. 50; Ross vs. Ross, 2 W. L. M. 17; Stilley vs. Folger, 14 O. 610.

[30] Finch vs. Finch, 10 O. S. 501; Conover vs. Porter, 14 O. S. 450.

[31] Hughes vs. Watson, 10 O. 127; Woerner on Admin. 250.

Not barred of distributive share when receiving the ⅓ of proceeds of sale from husband, etc. Barber vs. Hite, 39 O. S. 185, § 938.

[32] Julier vs. Julier, 62 O. S. 109.

A sale of consummated dower in defraud of the rights of creditors may be set aside. McLaren vs. Stone, 18 C. C. 854; 9 C. D. 794.

Where a wife joined in a deed made by her husband to defraud, etc., and the same is set aside, she is not barred of her dower.[33]

Dower may be relinquished by an answer and election to take in money out of proceeds, etc.[34]

§ 947. How barred.

A subsequent section [34*] provides that a husband or wife living in adultery shall be barred of the right, and the fact that the other party is also living in adultery does not relieve the bar.[35]

It is also provided that dower may be forfeited by waste.[36]

A tax sale bars all dower rights, be the same inchoate or perfect.[37] The right may also be barred by an estoppel. Thus, where a woman who, believing herself divorced, lives with another man, and sees her real husband marry another woman, and acquire and convey property in which the second woman releases dower, she is estopped to claim dower against innocent grantees, as well as the second wife.[38] But where a wife joined in the deed executed by her husband to defraud his creditors, she would not be estopped to claim dower against the grantee or any purchaser from him with notice.[39]

Dower may also be barred by the statute of limitations if twenty-one years has been allowed to elapse after the right has accrued.[40] And where a widow who is entitled to dower is present at the sale of the lands under an order of Court and assents, that the sale may be made free from her dower, and in consequence of which the purchaser pays a higher price, she is thereby barred from her dower, notwithstanding the purchaser had notice of her claim.[41]

[33] Redgeway vs. Mastning, 23 O. S. 294.

[34] § 12019 G. C.

A guardian may elect for an insane widow, § 12020 G. C.

[34*] § 8611 G. C., § 954.

[35] Brown vs. Kerns, 6 N. P. 68; 9 Dec. 112.

[36] § 8613 G. C.

[37] Jones vs. Devore, 8 O. S. 430; § 2852 R. S.

[38] Brown vs. Kerns, 6 N. P. 68; 9 Dec. 112.

[39] Woodworth vs. Page, 5 O. S. 70.

Only privies under her deed could plead his act in estoppel. Kitzmiller vs. Van Ransaeler, 10 O. S. 63.

[40] Tuttle vs. Wilson, 10 O. 24.

[41] Smiley vs. Wright, 2 O. 506; McFarland vs. Febiger, 7 O. (pt. 1) 194.

Where the parties in a divorce proceeding agree that the husband shall pay his wife a certain sum during her lifetime, his estate is liable for same after his death. Hassaurek vs. Markbreit, 68 O. S. 554.

The statute of limitation does not commence to run against the claim of dower until the death of the husband. 48 Bull. 896.

Deed by infant wife does not bar. Hughes vs. Watson, 10 O. 127.

Dower may also be relinquished or barred by accepting the provisions of a will.[42]

As a matter of course, a decree of divorce bars all right to dower in property afterward acquired,[43] except where caused by the aggression of the husband.[44]

The law has provided that a widow might, by no act of her own, be barred of her right to dower in lands of her deceased husband, where the same has been sold in partition proceedings.[45] But where property is held in common, which is sold, the widow is entitled to her dower interest out of the proceeds.[46]

A dower right may also be barred by judicial proceedings where the widow files her answer and agrees to accept part of the proceeds.[47]

In assignments where she has joined in a mortgage on property, her dower may be extinguished in the entire tract, even though she filed no answer. But she is entitled to a reasonable value of the same in the proceeds after the mortgage is satisfied.[48] So in partition proceedings.[48*] Likewise as an heir takes real estate subject to the right to have his title divested by a sale of the same to pay debts of the ancestor, therefore a widow or widower of an heir would be divested of their dower right in the same manner; and in proceedings by an administrator or executor to sell real estate to pay debts, a consort of an heir is not a necessary party.[49]

[42] See § 1214 *et seq.* on election of widow. Lingart vs. Ripley, 19 O. S. 24.

[43] Rice vs. Lumley, 10 O. S. 596.

[44] McGill vs. Deming, 44 O. S. 645

[45] Weaver vs. Gregg, 6 O. S. 547. See Elliott vs. Platter, 43 O. S. 197, where there was an exchange, etc., and wife was held not to have dower.

[46] Gillett vs. Miller, 12 C. C. 209; 5 C. D. 588.

[47] See § 846, § 12018 G. C.

But a divorce granted in Kentucky has been held not to bar dower in lands in Ohio. Mansfield vs. McIntire, 10 O. 27. And where a wife was divorced in California by reason of the aggression of her husband, that being the place of her domicile, she was not barred of her dower. McGill vs. Deming, 44 O. S. 645.

[48] § 11124 G. C., § 1601.

[48*] Thus if the husband sells his interest in the property and she does not join in the deed, and partition proceedings are afterwards had, the wife is entitled to her dower. Smith's Trustee vs. Rothchild, 4 C. C. 544.

[49] § 12020 G. C., *et seq.*, provides how the dower of an insane person may be released. See § 954, § 1396.

§ 948. Death of a consort.

Before the dower can vest, the person owning the land must have died, for as long as he is living, the right does not attach or vest; and for the purpose of fixing the right of dower, when a man leaves his home or usual place of residence and goes to parts unknown, and is not heard of or known to be living for the period of seven years, the legal presumption that he is dead applies, and the widow may claim her dower.[50]

§ 949. To what property the right attaches.

The statute is broad in reference to the property which may be subject to such dower right. First, in any real property of which the deceased consort was seized as an estate of inheritance during the marriage; and second, all real property of which the deceased consort had held a fee simple in reversion or remainder, and third, where the title or interest in real property was held by article, bond, or other evidence or claim. Any property held in reversion and remainder, however, the dower right does not attach until the termination of the prior estate. These provisions are broad enough to include all ordinary kinds of real property. It would include a perpetual leasehold.[51] But it is

Guardian may act for. § 10997 G. C., § 1523.

A wife is not barred of her dower unless a party to the suit, etc. Dingmen vs. Dingmen, 39 O. S. 172; Parmenter vs. Binkley, 28 O. S. 32.

[50] Rice vs. Lumley, 10 O. S. 596.

2 Scribner on Dower, 222, 229.

Such presumption of death, however, does not authorize an administration of the estate. § 109, Death of party; § 1106, Probate of will.

[51] Whether or not the right attaches to leasehold interest is a matter not adjudicated by our Supreme Court. Inferior Courts have held that they are not subject to such dower right. Oliver vs. Jones, 3 N. P. 129; 6 Dec. 194.

But it seems to the writer that the legislature intended when making a leasehold interest, pass by descent (§ 8597 G. C., § 942), that it should be subject to dower right the same as any other real estate or estate of inheritance. See Woerner on Admin. 231 N. 7.

Dower does not attach to vested remainder, where at the time of the husband's death the previous estate had not terminated. Wood vs. Phillips, 2 C. C. 136; 1 C. D. 406.

Where a wife had adopted a child before her marriage, it was held that her surviving husband was entitled to curtesy the same as if the child was of natural birth. Clark vs. Harlan, 17 Bull. 320.

See King vs. King, § 945.

said there is no dower in an equitable estate, if the husband had parted with it before his death.[52] Neither are partnership lands subject to dower to the prejudice of creditors of the firm.[53]

Neither would dower attach to property held in trust. The estate of a deceased consort is all that can be reached by dower;[54] it cannot rise higher than such estate, and hence is subject to all equities therein.[55]

But where a consort has during coverture made an exchange of lands, the widow or widower is entitled to dower in both properties, that which was conveyed by, as well as that which was conveyed to the consort, because the consort was seized of both during coverture. Unless, perhaps, where the exchange is a mutual grant of equal interests, the one in consideration of the other, in which case the surviving consort might have an election in either parcel, but could not take both.[56]

No exceptions are made in our State as to wild or timber lands — the statute includes all lands.[57]

Real estate owned by a husband in fee, but subject to a devise over to another, if he dies before such other, is not subject to dower.[58]

Mines and quarries which have been opened in the lifetime of the husband are subject to the widow's dower.[59]

[52] Abbott vs. Bosworth, 36 O. S. 605; Rands vs. Kendall, 15 O. 671; Miller vs. Wilson, 15 O. 108.

[53] Green vs. Green, 1 Ohio 535; Ludlow vs. Cooper, 4 O. S. 1; Sumner vs. Hampson, 8 O. S. 328; Fisher vs. Lang, 19 Bull. 139.

See further discussion, § 438.

See Partnership assets, § 438, note 38.

[54] When a woman was divorced and the husband's lands were decreed to her as alimony, after his death, she can not also claim dower therein. McKean vs. Furgeson, 51 O. S. 207.

Where land is sold on vendor's lien the widow is not entitled to dower. McArthur vs. Porter, 1 O. S. 99.

Woerner on Admin. 235.

[55] If the husband had the legal title, but before marriage had agreed to sell to his son, who paid the consideration and took possession, the conveyance after marriage related to the title as of the date of the contract, and no dower attaches as against the son's equity. Firestone vs. Firestone, 2 O. S. 415.

[56] Woerner on Admin. 234; Brown vs. Kerns, 6 N. P. 68; 9 Dec. 112.

[57] Allen vs. McCoy, 8 O. 418.

[58] Myers vs. Moore, 12 Bull. 90.

[59] Woerner on Admin. 229.

Growing crops do not pass to the consort in an assignment of dower.[60] Burial grounds are not subject to dower.[61]

It is also held that dower does not exist in lands acquired by the public,[62] or any land taken by condemnation proceedings.[63]

§ 950. Value and rights when lands are sold.

Where a widow or widower has joined in a mortgage on lands, or where the mortgage was given before the marriage relation was entered into, the premises may be sold under foreclosure free from such dower right. In such a case the consort is entitled to dower in the surplus as against liens not binding on the dower.[64] The same rule applies to a purchase money mortgage.[65]

If a wife join in her husband's mortgage of property already incumbered by liens, in which dower is not released, she can not claim, after his death, any dower out of the proceeds on foreclosure until the mortgage is paid in full.[66]

Where on a foreclosure of a mortgage not signed by a wife, but she and the second mortgagee, in whose mortgage she had released dower, were both made parties, and were both in default, a decree was taken on first mortgage, and a sale had thereunder, realized only enough to pay the first mortgage, it was

[60] Davis vs. Brown, 4 W. L. M. 272.

[61] § 10105 G. C.

[62] Gwynne vs. Cincinnati, 3 O. 24. School property conveyed to the board of education is not subject to dower of the grantor's widow. Steele vs. B'd of Educ., 31 Bull. 84.

[63] Little Miami Ry. vs. Jones, 3 Dec. 219; 2 N. P. 71; Woerner on Admin. 1240; Long vs. Long, 99 O. S. 330.

[64] Smith vs. Handy, 16 O. 191; State Bank vs. Hinton, 21 O. S. 509.

[65] Culver vs. Harper, 27 O. S. 464; Fox vs. Pratt, 27 O. S. 512.

As against a mortgage made by a man before marriage his widow's dower is secondary, but as against executions levied after marriage she is dowable in the entire proceeds. Winkler vs. Winkler, 1 Dayton, Term Reps. 124.

A mortgage antedating the marriage deprives the wife of dower only as to those claiming under the mortgage. As against a judgment obtained since the marriage she is entitled to dower in the whole premises after paying the mortgage. (Aff. 5 Dec. 384; 7 N. P. 554); Sprague vs. Law, 8 C. D. 428; 17 C. C. 735.

[66] Baker vs. Fetters, 16 O. S. 596.

Where real estate is sold subject to a purchase money mortgage assumed by the decedent, her dower is calculated on the full amount. Hickey vs. Conine, 6 C. C (N.S.) 321; affirming 3 N. P. (N.S.) 209; 15 Dec. 709; affirming 71 O. S. 548.

A widow is dowable only on the surplus arising from a sale of real estate held by her husband, in which he only held an equity of redemption at the time of his marriage to her, having mortgaged the land before marriage and not during marriage. King vs. Alt, 22 Dec. 183.

held, that after the second mortgage is barred by limitation, her right of dower against the buyers at the foreclosure sale could be enforced, for they only obtained what the first mortgage had to sell.[67]

As a general rule it may be said that a release of dower in a mortgage does not inure to others than the holder of the mortgage, and only to him if she is made a party.[68]

A vendor's lien stands upon the same footing as a purchase money mortgage or ante-nuptial mortgage lien; and where such lien is foreclosed, the wife or husband need not be made a party.[69] The existence of a purchase money mortgage does not prevent petition for dower, but the wife's dower is subject to the purchase money mortgage.[70]

Where a husband asks assignment of his dower in his deceased wife's lands, and the heirs claim that a mortgage thereon was his debt, and that he is insolvent, and that dower should be subject thereto, it is proper for the Court to assign dower and to dismiss the issue as to who should pay the mortgage, without prejudice to another suit for this purpose.[71]

If the property is sold on foreclosure of a mechanic's lien which did not exist at the time of marriage, the dower right therein is not defeated. The purchaser takes subject to such right.[72]

Where the executor sells lands to pay debts, which is incumbered by a mortgage in which dower is released, the widow is, as against devisees, general creditors and heirs, dowable, in the entire proceeds, but payable out of the surplus after satisfying the mortgage.[73] And the same applies to property sold on execution.[74]

[67] Cole vs. Mathews, 38 Bull. 223; Taylor vs. Fowler, 18 O. 567.

[68] Ketchum vs. Shaw, 28 O. S. 503; Moerlien Brewing Co. vs. Westmeier, 4 C. C. 296; 2 C. D. 668.

[69] Ruffner vs. Evans, 2 C. C. 70; 1 C. D. 368; Phillips vs. Keels, 4 C. C. 316; 2 C. D. 568.

[70] Carter vs. Goodin, 3 O. S. 75; Folsom vs. Rhodes, 22 O. S. 435.

[71] Kinney vs. Kinney, 33 Bull. 4.

[72] Rockel & White's Mechanic's Lien Law, 43.

[73] Kling vs. Ballentine, 40 O. S. 391.

The part of the fund in the hands of an executor which represents the value of a widow's dower is entitled to share the interest earned *pro rata* with the rest of decedent's estate. *In re* Est. of Arnold, 48 Bull. 929.

[74] Mandell vs. McClave, 46 O. S. 407; McArthur vs. Franklin, 16 O. S. 193.

And where property burned after the decedent's death, the widow was entitled to have her dower calculated on the amount received for the lands, together with the proceeds of insurance.[75] But in a sale by an assignee, the widow is only entitled to have her contingent right of dower estimated on the proceeds remaining after mortgage debts have been paid.[76]

A. received a mortgage from M. and his wife in 1880, B. recovered judgment against M. in 1888, C. received a mortgage from M. and wife in 1891, M. assigned for benefit of creditors. On distribution, held A.'s mortgage must be paid in full, then M.'s wife must have dower, though her husband is alive, as against the judgment computed on the entire proceeds of the land, and this amount must be paid, if necessary, to C. on his mortgage.[77]

The widow of a bankrupt is entitled to her inchoate right of dower in his real estate, and if she consents to the sale of the same free from her dower, she is entitled to the right of dower as the law fixes it, by the State of the bankrupt's residence, and where the laws of the State of the bankrupt's residence provide a manner of determining the value of dower in land sold in assignment and insolvency proceedings, that rule will be applied in bankruptcy proceedings. Taxes, costs and expenses of administering the trust have priority over the dower.[78]

When the widow dies pending an action in partition, in which she has filed her answer, etc., the action can be revived in the name of her administrator, and he would be entitled to whatever the dower would be worth from the time of filing her answer until his death. Penner vs. Bird, 2 Bull. 76.

When a widow is entitled to dower and homestead both, her dower is one third of all the realty, not merely one third after the assignment of the homestead. Wanzer vs. Smith, 2 W. L. M. 426.

See § 868.

[75] Fleming vs. Jordan, 28 Bull. 332.

[76] § 6350*g* R. S., § 1601.

[77] Finley vs. First Nat., 32 Bull. 382.

[78] *In re* George Forbes, 46 Bull. 268; *In re* Frick, 41 Bull. 267.

See § 869.

The value of a future contingent dower is ascertained by the tables of mortality, aided by evidence respecting the state of health of the husband and wife. Moerlein Brewing Co. vs. Westmeier, 4 C. C. 296; 2 C. D. 555.

Mandal vs. McClave, 40 O. S. 407.

For table, see chapter next index.

§ 951. Conveyance in lieu of dower. "The conveyance of an estate or interest in real property, to a person in lieu of dower, to take effect on the death of the grantor, if accepted by the grantee, will bar the grantee's right of dower in the real property of the grantor. But if the conveyance was made when the grantee was within the age of minority, or during the marriage, the grantee may waive title to such real property and demand dower." [R. S. § 4189.][79]

This section is construed by the Supreme Court in Grogan vs. Garrison,[80] in which it was held, under sec. 2 of the dower act, an estate conveyed as jointure, to be a good legal or statutory bar to dower, must be such an estate, as to certainty and kind, that the wife, on the death of her husband, may take possession of, and hold in severalty, and not in common with others. If the estate so conveyed must be such as that at common law, dower could be assigned by metes and bounds, then in such case the jointure, to be a legal bar to dower, should be an estate in severalty, so that the widow may enter and hold in severalty, without being compelled to resort to an action to have her jointure assigned to her by metes and bounds.

An ante-nuptial contract which conveys an undivided one-third part, or any other interest in common with others, in lieu of dower, is not a good statutory bar. Whether such an estate will constitute a good equitable jointure depends on the facts and circumstances of the case, and when such contract is pleaded by way of equitable defense to an action for dower, the facts upon which it depends, and not the pleader's conclusions from the facts, must be stated. The conveyance of an estate as jointure, of an undivided one-third of a lot of land for the life of the wife, when such lot is less than one-third of the husband's lands, is *prima facie* not a good equitable jointure, in the absence of facts showing that the same is fair and reasonable, or of such acts of the widow as amount to an estoppel. The ante-nuptial covenants of a woman, that in case she survive her husband she will not claim dower in his estate, can not, in an action by her for dower, operate to bar such action, either by way of

[79] § 8608 G. C. [80] 27 O. S. 50.

release or estoppel, where such ante-nuptial contract does not constitute either a legal or equitable bar.

Where, by ante-nuptial settlement, a sum of money is secured to the wife, to be paid after the husband's death, and, by a subsequent will, the husband directs all his just debts of every kind to be first paid, and makes provision for the support of his wife during widowhood, with a declaration that the intent and meaning of the testator was to give to his wife the provision made for her in his will, she may claim the provision in the will, and also that made for her in the settlement.[81]

In an action brought to have dower assigned, the defense set up a contract in which it was alleged that the deceased agreed to pay or secure to be paid out of his estate by his executors after his demise the sum of $700 in two years. It was held not to be a defense and that she was entitled to dower.[82]

It will be observed that if the conveyance is made when the grantee is within the age of minority or during marriage, the grantee may waive the title to the property and demand dower; and where she makes her election before she is fully advised, she is not estopped, provided she restore to the estate the amount she has received.[83]

§ 952. Effect of defective conveyance in lieu of dower. "When a conveyance which is intended to be in lieu of dower, fails through any defect to be a legal bar thereto, and the widow or widower availing of such defect demands dower, the estate or interest conveyed to such widow or widower, with the intention to bar dower, thereupon shall cease." [R. S. § 4190.][84]

§ 953. Effect of eviction from premises conveyed in lieu of dower. "A widow or widower lawfully evicted from real property conveyed in lieu of dower, or any part thereof, shall be endowed of so much of the residue of the real property of the deceased consort as will equal that from which such widow or widower is evicted." [R. S. § 4191.][85]

[81] Bowen vs. Bowen, 34 O. S. 164.

[82] Johnson vs. Johnson, 1 C. C. 521; 1 C. D. 291.

[83] Spangler vs. Dukes, 39 O. S. 642.

As to relinquishment of dower by antenuptial contract, see § 946.

Marriage is not now a disability.

[84] § 8609 G. C.

There must be the utmost good faith and full disclosure of property in an antenuptial agreement to make it valid. Duttendorfer vs. Duttendorfer, 12 Dec. 736.

[85] § 8610 G. C.

§ 954. When person dwelling in adultery is barred of dower. "A husband or wife who leaves the other and dwells in adultery, will thereby be barred of the right of dower in the real property of the other, unless the offense is condoned by the injured consort." [R. S. § 4192.][86]

§ 955. Where lands are given up by fraud, etc. "If a husband or wife gives up real property by collusion or fraud, or loses it by default, the widow or widower may recover dower therein." [R. S. § 4193.][87]

In reference to the provisions of this section, Woerner says: "But her dower rights are nevertheless protected against the husband's fraudulent attempts to deprive her thereof by voluntary conveyance or collusive charges upon his lands during coverture. 'The notion,' says the Court in Thayer vs. Thayer,[88] 'that the right of the wife to dower in the husband's lifetime is a nonentity, and not susceptible of fraud being perpetrated of it, is unsatisfactory, and, we think, unsound, and at war with the principles of justice. Though the right may be inchoate, it should be protected against the *mala fide* acts of the husband." A conveyance without valuable consideration, with the intent to defeat the wife of her dower, is void, and will be set aside; and so a deed to a stranger, although he paid full consideration, if he knew that the intention was to defeat the wife's dower." [89]

And recently our Supreme Court has held, "A conveyance by a man who has entered into a contract of marriage, which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein." [90]

[86] § 8611 G. C.
See previous section, how dower is barred, § 947.
[87] § 8612 G. C.
[88] 14 Vt. 107, 120.
[89] Woerner on Admin. 247.
[90] Ward vs. Ward, 63 O. S. 125. See Tate vs. Tate, 19 C. C. 532; 10 C. D. 321.

§ 956. Dower is forfeited by waste. "A tenant in dower in real property who commits or suffers waste thereto, will forfeit that part of the property to which such waste is committed or suffered, to the person having the immediate estate in reversion or remainder. Such tenant in dower also will be liable in damages to the person having the immediate estate in reversion or remainder, for the waste committed or suffered thereto." [R. S. § 4194.][91]

§ 957. Assignment of.

The widow is entitled to remain in the mansion house for one year unless dower be sooner assigned. This is called the widow's quarantine of dower. The assignment of dower only comes within the province of this work when such assignment is necessary in the settlement of estates, or assignment for benefit of creditors, and reference will be made to those chapters for matters concerning assignment in such cases.[92]

In addition to assignments set apart by law or action, the statute provides that " when the lands of a deceased person are not incumbered by mortgage or by judgment obtained against such decedent during life, the heir, or guardian of any heir, or other person having the next immediate estate of inheritance, may assign to the widow or widower dower therein, by writing, under his hand, particularly describing the same, which, if approved in writing on the deed of assignment by the Probate Judge of the county, and also by the Probate Judge of the county appointing such guardian, and accepted by the widow or widower, in writing thereon, shall be a good assignment in law." [93]

This section has been construed as follows: " The approval of the Probate Judge, as contemplated in sec. 12004, G. C., is evidently for the protection of the widow that she may not be imposed upon; to see that the heirs are dealt with fairly, and

[91] § 8613 G. C.

May cut timber to pay taxes. Crocket vs. Crocket, 2 O. S. 181.

Strict common-law rule does not prevail. Carpenter vs. Denoon, 29 O. S. 37.

§ 8593 G. C., contains a similar provision as to tenants for life and § 5688 G. C. requires them to pay the taxes.

Waste is any unlawful act or omission of duty which results in permanent injury to the inheritance. It may consist in either diminishing its value or increasing its burdens. Teideman Real Prop., § 72, the tenant must keep the buildings in repair. *Id.* § 77. If they burn down by his negligence he is responsible but not otherwise. He is not bound to keep them insured but may insure his interest and collect the insurance. 19 Cyc. 844. See § 1292, Taxes, insurance, etc.; Act 79 Cen. L. J., p. 59.

See § 10997 G. C., § 1523, Assignment of dower of insane or imbecile person.

[92] § 869.

[93] § 12104 G. C.

that the minors who are bound in a proceeding of this sort by the act of their guardian, are not overreached. Creditors of a deceased person might have rights that could be jeopardized by an unfair assignment of dower. Nothing but this interposition of the judge could prevent the heirs from giving all the property of an estate to a widow under such an assignment if they were so disposed. And that no injustice to any of the interested parties be the consequence, a proceeding of this sort is kept under the supervision of the Probate Court." [94]

Under this provision of the law, it is the duty of the Probate Judge to ascertain whether or not the assignment made by the heirs to the widow is a fair and just one. The judge acts in a judicial capacity to determine the fact whether or not the assignment is just. The fact that the same is not submitted to the Probate Judge for his approval will not permit either the heir or the widow who has accepted under the deed or contract to avoid it, if it was fair and reasonable.[95]

As the action of the Probate Judge under this section may become important, it seems that there ought to be some record of the judge's action, and there ought to be an application filed with the Probate Court setting out the facts, and the Court having all the parties and facts before it, should make the finding in accordance with the statute; and the judge must give his approval on the deed of assignments. The application might be somewhat as follows: [96]

§ 958. Application.

In the Matter of the Estate of
G. H., deceased.

Probate Court,
Clark County, Ohio.
Application.

Now come A. B., C. D. and E. F., heirs-at-law of G. H., deceased, and represent to the Court that said G. H. died seized of the following described real estate. (Here describe real state.)

Leaving said I. J. as his widow. and the said A. B., C. D. and E. F., as his only heirs-at-law. That the said real estate belonging to the said deceased was not incumbered by mortgage or judgment obtained against said deceased during his lifetime, and that the valid debts of said deceased have all been paid.

Said A. B., C. D. and E. F. further represent that they and the said I. J., widow of deceased, have agreed as to the portion of said real estate,

[94] Smith vs. Whistler, 16 C. C. 130; 8 C. D. 768.

[95] Smith vs. Whistler, 16 C. C. 137; 8 C. D. 768.

[96] See § 1524, Assignments.

A minor is not bound by a collusive assignment of dower if the same is to his prejudice. § 12016 G. C.

which should be assigned to said I. J. as her dower interest therein the same being described as follows.

They further represent to the Court that in accordance with said agreement they have executed and delivered to said I. J. a proper deed therefor which the said I. J. has accepted in writing thereon.

They therefore pray that the Court will approve of the said assignment of dower to said I. J. and will in writing approve the same on the said deed of assignments.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

If any of the parties to said assignment are subject to a legal guardian the approval must also be made by the Probate Judge who appointed the guardian. From this it is inferred that an heir under guardianship may enter into such an arrangement; and the approval must also be made by the judge of the Court of the county in which the land is situate. If the lands were situated in two or more counties, it would probably be necessary to have it approved by the judge of the Probate Court of the county in which the deceased had his domicile, and in which some portion of the land was located. The entry entered thereon may be as follows:

ENTRY.

(*Title.*)

This day this matter came on to be heard upon the application of A. B., C. D. and E. F., heirs-at-law of G. H., deceased, praying for the Court's approval of a deed of assignment made by them to I. J., widow of G. H., deceased, assigning to her certain portion of the land of said deceased as her dower interest; and the same was submitted to the Court.

Whereupon the Court finds that said assignment of dower is just and reasonable, and the deed therefor conveyed to said I. J. a proper portion of said premises for her said dower interest in the land of said deceased.

Wherefore it is by the Court ordered that the said assignment of dower is approved, and it is further ordered that the Court enter its approval in writing on the said deed of assignment.

CHAPTER LII.

INSOLVENT ESTATES WHEN SETTLED BY ADMINISTRATOR, ETC.

§ 959 When estate need not be declared insolvent.
§ 960 When an estate should be declared insolvent.
§ 961 Application for insolvency.
§ 962 Form of application.
§ 963 When commissioners not appointed, executor or administrator to act as such.
§ 964 Entry and order declaring the estate insolvent.
§ 965 Executor or administrator shall give notice of insolvency of estate to creditors.
§ 966 Form of notice.
§ 967 Time allowed in such case for creditors to present claims. List of claims to be filed.
§ 968 Comments.
§ 969 Claim disallowed may be submitted to referees.
§ 970 Presentation and proof of claims.
§ 971 If not referred, creditors to commence suit. Limitation.
§ 972 Court or referee to award costs.
§ 973 How judgment to be rendered on disallowed claim.
§ 974 Preparation of report.
§ 975 Report of claims presented in insolvency.
§ 976 When Court to make order of distribution on return of list of debts.
§ 977 Hearing and order of distribution.
§ 978 Report of payment of dividends.
§ 979 Confirmation of distribution.
§ 980 When Court to make further order of distribution.
§ 981 Exceptions.
§ 982 Provisions for contingent debts.
§ 983 When contingent debt becomes absolute.
§ 984 Dividends thereon. Disposition of residue.
§ 985 Action against executor or administrator of insolvent estates.
§ 985a Estate declared insolvent while action against it pending.
§ 986 Comments.
§ 987 Claims not presented as required, barred unless, etc.
§ 988 If surplus remain after paying debts allowed other creditors may claim it.
§ 989 How divided between two or more such creditors.
§ 990 Executor or administrator liable only for assets in his hands.
§ 991 Creditors may sue after three years in case, etc.
§ 992 When and how executor or administrator may be compelled to render his account to Court.

§ 959. When estate need not be declared insolvent.

An estate is insolvent when its assets do not equal its liabilities, but not every estate which is in this condition is by the law required to be declared insolvent. If the administrator or executor has only assets sufficient in his hands to pay the debts that are entitled by the statute to preference and no more, he would not be required to ask the Court to declare the estate solvent.[1]

For the statute provides that if it shall appear upon settlement of an estate that the whole effects which have come into the hands of the administrator or executor have been exhausted in paying the charges of administration, the allowance to the widow and children of the deceased, and the charges of last sickness, and funeral expenses or debts or claims entitled by law to a preference, such a settlement would be a sufficient bar to any action brought against the executor or administrator by any creditor who is not entitled to a preference, and the executor or administrator may plead and give the same in evidence, although the estate may not have been represented insolvent.[2]

There might be cases even in the payment of preferred claims, where it would be well to have the estate declared insolvent, for instance if there were a large number of claims in a certain class and the estate was not sufficient to pay all in full in that class. An estate need not be declared insolvent if a period of six months has elapsed since the appointment of the executor or administrator and all those creditors who have presented their claims agree to accept a certain portion and relieve the executor or administrator from all liability thereon. The executor or administrator should never pay claims before the expiration of six months from the date of his qualification unless the assets in his hands are ample to meet all demands that may be made in the class to which any debt may belong. However, after the expiration of six months when all the assets are collected, it will be an expeditious as well as an advantageous way of settling the estate to see the creditors and have them agree to accept a certain por-

[1] For order in which debts are to be paid. See § 646 *et seq.*

[2] § 10745 G. C., § 670.

tion as their proportionate share of the same. Such a course of proceedings will allow a speedy settlement to be made as well as the saving of a considerable expense. When a distribution is made by consent of creditors, the administrator or executor should be careful that the creditor receipts to him in full of all demands he may have against *him* as administrator or executor.

§ 960. When an estate should be declared insolvent.

The statute makes it the duty of the administrator or executor to apply to the Court to have the estate declared insolvent whenever it would be probable that the real or personal estate of the deceased would be insufficient for the payment of debts.[3] When such fact of insolvency plainly appears to the administrator or executor, he ought at once to proceed and make application to have the estate declared insolvent. It should not be forgotten that this and the subsequent chapter in relation to insolvent estates only apply to the *distribution* of the estate. As to collection of assets, the administrator or executor must proceed in the same manner as if the estate was solvent. It is only when he comes to the payment of claims that it is material to have the estate declared insolvent. Our statute in reference to settlement of insolvent estates is copied very closely from the Massachusetts law upon the subject, and the following from a work specially dealing with the Massachusetts statutes as to the duty of an administrator or executor in making an application for insolvency is peculiarly applicable to our law.[4]

"If the estate is insolvent it is the duty of the executor or administrator to represent the fact to the Probate Court. His neglect to do so may make him personally liable to creditors of the deceased. He is allowed ample time to satisfy himself as to the condition of the estate. He is not held liable to answer to the suit of any creditor commenced within one year after he gives bond for the faithful discharge of his trust, unless the demand is one that would not be affected by the insolvency of the

[3] § 10884 G. C., § 993. [4] Smith Probate Law 191.

estate, or is brought after the estate has been represented insolvent for the purpose of ascertaining a contested claim.[5]

If within six months after giving notice of his appointment he does not have notice of demands which will authorize him to represent the estate insolvent, he may proceed to pay the debts due from the estate; and he will not be personally liable to any creditor in consequence of payments made before notice of his demand. If he so pays away the whole of the estate before notice of the demand of any other creditor, he is not required in consequence of such notice to represent the estate insolvent, but may plead that he has fully administered, and be discharged on proving such payments.[6]

Or if any effects remain, and such remainder is insufficient to satisfy a demand of which he afterwards has notice, he is liable to pay only so much as may then remain; if there are two or more such demands, which together exceed the amount of assets remaining, he may then represent the estate insolvent, and pay over the amount in his hands to such persons as the Court shall order; but creditors who have been previously paid cannot be required to refund any part of the amount received by them.[7]

[5] § 10906 G. C., § 985; Greenleaf vs. Allen, 127 Mass. 248; Converse vs. Johnson, 146 Mass. 20; Browne vs. Doolittle, 151 Mass. 595.

But he is accountable for money paid on debts within the year, though without the knowledge that the estate was insolvent. Cobb vs. Muzzey, 13 Gray, 57.

In case the estate has been represented insolvent, the whole amount of the judgment against the administrator, including costs as well as debts, is to be certified to the judge of Probate, and added to the list of claims reported by the commissioners of insolvency. Healy vs. Root, 11 Pick. 389.

[6] § 10741 G. C., § 667; § 10742 G. C., § 669; Cushing vs. Field, 9 Met. 180; Fuller vs. Connelly, 142 Mass. 227; Browne vs. Doolittle, *supra.*

It is no bar to an action against an administrator on a debt of his intestate, that he gave due notice of his appointment, and had no notice within a year thereafter of demands against the estate which would authorize him to represent it insolvent; and applied in payment of the debts of the deceased all the personal and a sufficient portion of the real estate to pay the debts then ascertained; and that the heirs at the same time sold all the residue of the real estate; and the administrator rendered his final account which was allowed. The statute applies only when the whole of the estate has been exhausted. Hildreth vs. Marshall, 7 Gray, 167; Bassett vs. Granger, 136 Mass. 174.

[7] Colegrove vs. Robinson, 11 Met. 238; Heard vs. Drake, 4 Gray, 514.

§ 961. Application for insolvency.

The representation of insolvency must be addressed to the Probate Court in the county in which the executor or administrator was appointed, and should set forth the amount of the indebtedness of the estate, so far as it can be ascertained (including the funeral expenses, charges of administration, and the allowance, if any, made to the widow or minor children), and the amount of the assets in the hands of the executor or administrator. There should also be filed a list of the claims against the estate, showing the name of each creditor and the sum claimed by each. If the evidence of the fact of insolvency is satisfactory, the Court may appoint two or more fit persons to be commissioners to receive and examine the claims of creditors.[8]

This provision of the statute applies to payments made after the expiration of six months. If the executor, within a year after giving notice of his appointment, pays a debt of his intestate, he may, if the estate afterwards proves insolvent, recover of the creditors the excess of the sum so paid over the amount awarded to the creditor by commissioners of insolvency. Walker vs. Hill, 17 Mass. 380; Bliss vs. Lee, 17 Pick. 83; Heard vs. Drake, 4 Gray, 514; Richards vs. Nightingale, 9 Allen, 149.

The administrator cannot recover unless he proves the insolvency of the estate by a commission of insolvency regularly issued, executed and returned, and a dividend declared by the Court. Bascom vs. Butterfield, 1 Met. 536; Flint vs. Valpey, 130 Mass. 385.

The general statute of limitations will begin to run against the claim of the administrator from the date when the dividend is ordered. Richards vs. Nightingale, 9 Allen, 149.

A decree of the Probate Court allowing distribution of all the personal estate of a deceased person before the end of the two years of administration, is void as to creditors prosecuting their claims within that period, whether they have notice of it or not; and the administrator has no defense to actions by such creditors. Browne vs. Doolittle, 151 Mass. 595; Newell vs. Peaslee, 151 Mass. 601.

[8] Newell vs. West, 149 Mass. 520.

Where a judge of Probate has rejected a representation of insolvency made by an administrator, and upon a second application, which the administrator offered to support by legal evidence, again refused to receive it, giving his former decision as a reason for the second denial, and an appeal was taken, he was directed to receive the evidence, and thereupon to decree according to law and the justice of the case. Bucknam vs. Phelps, 6 Mass. 448.

No appeal lies from a decree of the Probate Court appointing such commissioners. Putney vs. Fletcher, 140 Mass. 596; Smith Pro. Law 194.

Or the Court may refuse to appoint commissioners and allow the administrator or executor to act as commissioner to receive and examine the claims.[9] As a general rule the administrator or executor should be appointed or allowed to act as commissioner, as he is familiar with all the affairs of the estate and is the one to whom claims against the estate are presented; and therefore as a matter of convenience the course pursued in this chapter will be the consideration first of the subject when the administrator or executor acts as commissioner. The method to be pursued when commissioners are appointed will be the subject of the next chapter.

§ 962. Form of application.

Probate Court,.....County, Ohio.

In the Matter of
the Estate of
....., deceased.
No.....

Representation of Insolvency.

To the Probate Judge of said County:

The undersigned.....of the estate of..... ....., deceased, respectfully represents that the total value of the real and personal estate of said decedent is about.....dollars; that the cost of administration and other preferred claims against said estate amount to.....dollars; and that the balance of the assets applicable to the payment of ordinary claims, will not exceed..... .....dollars; that claims against said estate have been presented to the undersigned, or have come to his knowledge, amounting to..... .....dollars, as will appear by the following schedule:

Names of Creditors.....
Nature of Claim.....
Original Amount..... $.....
Interest ..... $.....
Amount now due..... $.....
.....

Wherefore the undersigned asks that said estate may be declared probably insolvent, and that such proceedings may be had in the premises as are authorized by law.

.....
.....of....., deceased.
.....190...

The State of Ohio,.....County, ss.

.....of the estate of....., deceased, being duly sworn says that the statements in the foregoing representation are true as he verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

.....Probate Judge.[10]

[9] § 10896 G. C., § 963.

[10] See § 994.

§ 963. When commissioners not appointed, executor or administrator to act as such. "If the court does not appoint commissioners, when satisfied that the estate will probably be insolvent, the executor or administrator shall proceed, in the place of such commissioners, to receive and allow, if valid, the claims of creditors against the estate, and return to the court a list of all claims laid before him, with the sum allowed by him on each claim." [R. S. § 6236.][11]

§ 964. Entry and order declaring the estate insolvent.

If the Court is satisfied that the assets of the estate will probably be insufficient for the payment of all the debts of the decedent it may in its discretion appoint commissioners.[12] Or if it does not think fit to appoint commissioners, the executor shall proceed and perform the duties of a commissioner. The Court usually acts upon the facts set out in the application and the entry thereon may be in the following form:

(*Title.*)

This day this cause came on to be heard upon the application of A. B., administrator of the estate of C. D., herein filed, and representing to the Court that the estate of said C. D. is probably insolvent and the same was submitted to the Court upon the said application and testimony.

Whereupon, after due consideration, the Court finds that the allegations of said application are true and that the said estate of C. D., deceased, is probably insolvent; and the Court is further of the opinion that the interest of all concerned in said estate will be best subserved by the said A. B. acting as a commissioner to receive and allow the valid claims of creditors against the estate.

Wherefore it is ordered that said estate be and the same is hereby declared insolvent and the said A. B. is directed to receive and allow the claims presented in the same manner that commissioners should do as provided by statute.

It is further ordered that said A. B. shall give notice as provided in § 10898 G. C., to the creditors of said estate, that the same has been declared insolvent by publication in the ..... newspaper for three weeks, one insertion each week.[13]

§ 965. Executor or administrator shall give notice of insolvency of estate to creditors. "In such case, immediately after the court declares the estate probably insolvent, the ad-

[11] § 10896 G. C.

[12] § 11050 G. C., § 993.

[13] Or whatever the Court may order in reference to such notice, the entry should make provision therefor. For by § 10897 G. C., § 965, unless the Court makes some order, the notice may be given by posting. But in all cases whether by posting or by publication, the Court should define how the notice should be given.

ministrator or executor shall give notice to creditors of its insolvency and to present their claims to him within three months for allowance, by causing notification to be posted in public places in the township in which the deceased last dwelt, or in such other manner as having regard to the situation of the creditors of the estate, the court orders." [R. S. § 6237; 102 v. 205.][14]

§ 966. Form of notice.

The notice mentioned in the next preceding section in substance may be as follows:

On the ..... day of ....., in the year ....., the Probate Court of ..... county declared the estate of ..... deceased, to be probably insolvent: Creditors, therefore, are required to present their claims against the estate to the undersigned, for allowance, within three months from the time above mentioned, or they will not be entitled to payment.

(Signed.)

Date .....

.....

Executors or administrators, etc.

[R. S. § 6238; 102 v. 205.][15]

§ 967. Time allowed in such cases for creditors to present claims. List of claims to be filed. "After the court declares the estate probably insolvent, three months must be allowed the creditors, to present their claims to the executors or administrators. Further time may be granted therefor, in like manner as when commissioners are appointed to receive and audit claims. After the expiration of such period, the executor or administrator shall file the list of the claims hereinbefore mentioned." [R. S. § 6239; 102 v. 205.][16]

§ 968. Comments.

If for any reason, the Court may think it necessary, it may allow additional time not exceeding twelve months from the date of the appointment of the administrator. It seems that this application for an extension of time may be applied for by

[14] § 10897 G. C.

[15] § 10898 G. C.

Copy and proof of this notice should be filed with report of valid claims.

See § 997.

[16] § 10899 G. C.

See § 998.

A claim once presented to the administrator and accepted need not be again presented. Haley vs. King, 1 C. C. 44; 1 C. D. 27.

any creditor who has failed after using due diligence to present his claim for approval.[17]

The application should fully set forth the facts of the case and may be in the following form:

FORM OF APPLICATION.

(*Title.*)

Now comes E. F. and represents to the Court that he is a creditor of the estate of C. D., deceased. That he has been absent from the State during the period of three months time allowed to A. B., administrator of said estate for presentation to him of claims against said estate and that he had no notice of said proceedings of insolvency in time to make a presentation of his claim.

Wherefore he asks that further time may be allowed to the creditors to present their claims against said estate.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

.....

The following may serve as an entry:

(*Title.*)

This day this cause came on to be heard upon the application of E. F., creditor of the estate of C. D., deceased, for an extension of time to present claims against the estate of said C. D.; and the same was submitted to the Court.

Whereupon Court finds that the allegations of said application are true, and it is the opinion of the Court that it is proper and necessary that the time of presentation of claims be extended for a further period of..... months, and it is ordered that said time be extended.....months.[18]

§ 969. Claim disallowed may be submitted to referees. "If a claim, so presented to the executor or administrator for allowance, be disallowed, in whole or part, it may be referred to referees, by the agreement of the parties, in the manner heretofore prescribed in this chapter." [R. S. § 6240.][19]

§ 970. Presentation and proof of claims.

The claims must be presented with three months, unless further time be allowed and the administrator has no right to

[17] Walker vs. Lyman's Administrators, 6 Pick. 458; Towle vs. Bannister, 16 Pick. 255.

[18] Extension of time does not extend the time in which suit must be brought on rejected claims.

[19] § 10900 G. C.

The reference to arbitration referred to in this section probably means the arbitration provided for in ordinary claims against the estate, in cases where the estate is solvent. See § 594 *et seq.*

receive a claim beyond such a length of time.[19*] The statute is not clear as to the method the administrator or executor shall adopt to satisfy himself as to the validity of the claim. As he is to act in the place of a commissioner it is fair to presume that the rule laid down for the method in which claims are to be established before the commissioners would apply to the administrator or executor when acting as commissioner, and it may therefore be said that he may fix the time for the hearing of claims and administer oaths to witnesses and proceed in the hearing of the matter in the same way that a judge or referee would hear it. He may, and perhaps in the absence of controversy it is the rule that should be usually followed, require the claimant to make an affidavit to his claims in the same method as is prescribed by law for the presentation of a claim to an executor or administrator.[20]

Where a claim against an estate is allowed by an administrator thereof, and the verified account is left with him, and the estate is afterwards declared probably insolvent, and no commissioners of insolvency appointed, the claim should be reported to the Court as a valid one, without a new presentation and allowance thereof, unless the holder of such claim is duly notified by the administrator that it is disputed or rejected by him.[21]

Whatever the proof may be it must be such that satisfies the administrator or executor that the claim is valid. The party has a right by excepting to the report to have the question passed upon by the Probate Court,[22] or may bring action on the claim.[22*] The administrator or executor is to liquidate and balance all mutual demands subsisting between the deceased insolvent and his creditor. If the balance is found in favor of the creditor, it should be allowed by the commissioner, and included in his report; but if the balance is found to be against the creditor, it is not a subject of their report, which is to include claims against the estate only.[23] A claim

19* 10901 G. C., § 971; § 10908 G. C., § 987.

20 See § 552 *et seq.*

21 Haley vs. Krug, 1 C. C. 44; 1 C. D. 27.

22 Cromwell vs. Herron, 11 C. C. 448; 5 C. D. 196.

22* § 10901 G. C., § 971.

23 When the defendant in a suit brought by the administrator of an

payable absolutely may be proved before its maturity; and contingent liabilities which become absolute debts at any time before being presented to the commissioners may be allowed.[24]

§ 971. If not referred, creditors to commence suit. Limitation. "If such claim is not so referred, the creditor shall commence a suit thereon, within three months after its disallowance, or within three months after it or any part thereof, becomes due, for its recovery. If no suit is begun within such time, the claim shall be forever barred." [R. S. § 6241.][25]

insolvent estate files in set-off a claim larger than that on which he is sued, he is entitled to judgment for the balance, and need not present his claim to the commissioners. The judgment is to be presented to the judge of Probate and by him added to the claims allowed by the commissioners. Bigelow vs. Folger, 2 Met. 255.

In such suit the defendant may set off a note which falls due pending the suit, though not due when the action was commenced. Ibid.; Boyden vs. Mass. Life Ins. Co., 153 Mass. 544.

[24] See § 10887 G. C., § 982.

A stipulation in partnership articles that in case of the decease of either partner the business may be carried on for one year by the survivor for the mutual benefit of both parties, does not, in case of the death of one partner, justify the allowance against his insolvent estate of a debt contracted by the survivor within the year, with one who had notice of the death. Stanwood vs. Owen, 14 Gray, 195; Bacon vs. Pomeroy, 104 Mass. 576.

Payments made by the surviving partner while carrying on the partnership business pursuant to such stipulation, upon an account, some items of which were contracted before, and some after, the death of the other partner, must be applied to the discharge of the first items. Ibid. A surviving partner may prove a claim against the estate of his deceased partner. Sparhawk vs. Russell, 10 Met. 305; Haverhill Loan and Fund Assoc. vs. Cronin, 4 Allen, 141.

A lessor is entitled to prove his claim for rent becoming payable by the terms of the lease before or after the death of the lessee, up to the time the claim is presented to the commissioners, but not for rent payable in the future. Deane vs. Caldwell, 127 Mass. 242; Bowditch vs. Raymond, 146 Mass. 109.

And see Wilby vs. Phinney, 15 Mass. 116; Harding vs. Smith, 11 Pick. 478; Savage vs. Winchester, 15 Gray, 453.

A ward after coming of age is not entitled to prove against the estate in insolvency of his guardian, a claim for the property which came into the hands of the guardian, until the latter has settled his account in the Probate Court, or until a judgment has been obtained on his bond. Murray vs. Wood, 144 Mass. 195. See Thorndike vs. Hinckley, 155 Mass. 263; Smith Pro. Law 198.

See § 982, Contingent debts.

[25] § 10901 G. C.

§ 972. Court or referee to award costs. "In a suit or proceeding upon a claim mentioned in the next preceding section, the referees or court, before whom it is tried, may direct such costs to be awarded against the creditor, or the executor or administrator, personally, or to be paid out of the assets of the estate, as a part of the costs of administration, as shall be just, having reference to the facts that appeared on the trial." [R. S. § 6242.][26]

§ 973. How judgment to be rendered on disallowed claim. "The judgment on the award or in the suit upon the claim mentioned in the next preceding section, shall be rendered in the manner, and with the effect, provided in the case of an appeal from the award of commissioners." R. S. § 6243.][27]

§ 974. Preparation of report.

The administrator or executor must after the expiration of the period allowed for the filing of claims, file a list of the claims presented. This report should set out the names of the creditors, kind of a claim, amount of claim, rate of interest and total amount due; and it would be advisable to make separate lists of the claims allowed and those rejected. When a claim is rejected the reason ought briefly to be stated. A question of some difficulty often presents itself as to the calculation of interest on the claims. If the estate is hopelessly insolvent, it makes little difference to what period the interest is calculated, be it at the death of the deceased or the date of the filing of the report. The better plan would be, and one to which there could be no objection, to calculate the interest of each claim up to the date of the time when the report is to be filed. Interest should be

The above section seems to be an absolute bar if suit is not brought within three months from the time the claim has been rejected and the same rule would be applied to constitute a rejection as if the estate had not been declared insolvent.

See § 552 *et seq.*, as to rejection of claims.

[26] § 10902 G. C.

[27] § 10903 G. C.

calculated at the rate stipulated in the instrument evidencing the indebtedness, or if no rate is stipulated the legal rate of six per cent. will prevail. If claims are not due a rebate might be made. Another question which sometimes presents itself is, where a creditor has his claim secured, whether he is entitled to receive a dividend on the full amount of his claim or only so much thereof as remains after the security has been exhausted and applied on the claim. There is a difference of opinion on this question. The Circuit Court in Cromwell v. Herron,[28] held that the claim is entitled to a dividend on the full amount. And United States Courts have held to the same effect.[29] Other Courts have held that all a preferred creditor is entitled to, is a dividend on his claim after it has been reduced by application of the security.[30] And Woerner says[30*] "This view seems to be gaining ground in the United States, as being consonant with principles of justice, and putting the specialty creditors and general creditors on same footing." [31]

§ 975. Report of claims presented in insolvency.

In Probate Court.
In the Matter of the Estate of....., deceased.

To the Probate Court of.....County, Ohio.
The undersigned.....of the.....of.....
....., deceased, makes report—That he gave notice in due form of

[28] 11 C. C. 448; 5 C. D. 196.

See annuity table for calculation of debt not due.

[29] Merrill vs. Natl. Bank, 19 Sup. Ct. Rep. 360; McNeill vs. Hagerty, 31 Bull. 356; 51 D. S. 255; See Jelke vs. Stallo, 1 N. P. 29; 1 Dec. 43.

[30] Spence vs. Kiefer, 4 N. P. 439; 7 Dec. 386; 7 N. P. 624.

In the case of Cromwell vs. Herron, 11 C. C. 451 5 C. D. 196; Judge Smith says in his decision of that case, "So far as I am concerned I come to this conclusion with reluctance, for I feel that it is not the most equitable rule."

This matter will be further discussed in Assignments for benefit of creditors. § 1631.

The Supreme Court in State National Bank vs. Esterly, 48 Bull. 909; 69 O. S. 39, has finally settled this matter, in assignment matters, that the claimant is only entitled to dividend on the remainder after the collateral has been applied.

[30*] Woerner on Admin. 859.

[31] He gives Earle vs. Lane, 22 Col. 273-278; LaPlante vs. Convey, 98 Ind. 499; Wintz vs. Hart, 13 Iowa 515, 518; Masonic Bank vs. Bangs, 84 Ky. 135, 144; Union Bank vs. Mariguy, 11 Rob. (La.) 209; Haverhill vs. Cronin, 4 Allen, 141; Hill vs. Tounley, 45 Minn. 167; Drew vs. Daniel, 60 N. H. 482; Bell vs. Fleming, 12 N. J. Eq. 13-25; Hanselt vs. Patterson, 124 N. Y. 349; Moore vs. Dunn, 92 N. C. 63; Wheat vs. Dingley, 32 S. C. 473, as supporting the view taken in Spence vs. Kiefer.

law, of the probable insolvency of the estate of said decedent, a copy of which notice, with proof of publication, is filed herewith, marked "A," and made part of this report; — and that after carefully examining the claims against said estate presented to him for allowance, he has made disposition of the same as follows: — interest computed from..... ....., 190...to....., 190....

CLAIMS ALLOWED.

NAMES OF CREDITORS.	Kind of Claim.	Amount of Claim.	Rate of Interest.	Interest Accrued.	Amount Total Now Due.
.....	.....	.....	.....	.....	.....

....., 190...

CLAIMS NOT ALLOWED.

NAMES OF CREDITORS.	Kind of Claim.	Amount of Claim.	With Interest From	At %	Amount Claimed as Now Due.
.....	.....	.....	.....	.....	.....

Respectfully submitted,

.....

Administrator — Executor — of the.....of....., deceased.

§ 976. When court to make order of distribution on return of list of debts. "After the expiration of thirty days from the return by the executors or administrators of the list of debts, the court shall make an order of distribution, as provided in the case of the return of the commissioners, except that the court may first hear and determine any exceptions filed, by a person interested, against the allowance of debts allowed by the executor or administrator, and also make an order in relation to any suit pending against an executor or administrator, as when an appeal is had, or pending, before or at the time an order of distribution is required, upon the report of commissioners." [R. S. § 6244.][32]

§ 977. Hearing and order of distribution.

This report is to be on file in the office of the Probate Judge for a period of thirty days, and it should have attached to it a proof of service of notice required by sec. 6236 R. S.[33] This is

[32] § 10904 G. C.

[33] § 963.

for the purpose of permitting any interested person to file exceptions to such report and then the questions raised by the exception are to be heard and determined by the Probate Court. And in such cases the Probate Court has the power to adjudge whether a part of the fund in the hands of the administrator shall be used to pay a particular claim.[34]

In this case [35] the question was made that a certain person had a lien or a priority of right to a certain portion of the funds in the hands of the administrator, and it was held that the same rule applied that applies in the distribution of the estate in assignment for the benefit of creditors, that necessarily in determining how the assets should be distributed, the Court must pass upon the question whether any part of the effects to be distributed shall be used for the payment of a particular debt and until such question is determined, the Court could not determine what distribution "the case shall require."

If no exceptions are filed at the end of thirty days, the Court should make an order in conformity to the report filed. The entry for the order may be as follows:

FORM OF ENTRY.

(*Title.*)

This day this cause came on to be heard upon the report of claims allowed and disallowed by A. B., administrator (or executor) of the estate of C. D. Said estate having been declared insolvent and the same was submitted to the Court, whereupon the Court finds that thirty days have expired since said report was filed in Court, and that no exceptions have been filed thereto, and that the same has been examined by the Court and is now and here proved.

The Court further finds that the said A. B. has given notice as required by section 10898 G. C.,[35*] and that said three months' time from the giving of said notice had expired when said report was filed in this Court; and the Court finds that the notice given was correct and according to law. It is ordered that said administrator (or executor) of the estate of said A. B., after deducting from the assets in his hands the amount necessary to pay the costs of administration that may yet accrue, pay over to the creditors whose claims have been allowed under the proceedings had in insolvency in this Court an equal portion according to their respective claims, the balance of the assets there remaining, the sum being a dividend of.....per cent. and that he make a report to this Court of such distribution.[36]

[34] Brown vs. Trottner, 11 C. C. 498; 5 C. D. 222.

[35] Id. 503, citing Clapp vs. Banking Co., 50 O. S. 524.

[35*] § 966.

[36] The Court may add in this entry the manner in which the creditors shall be notified.

In making the distribution, the preferred creditors, if the assets are sufficient, are paid in full, in the or-

§ 978. Report of payment of dividends.

The administrator or executor should at the very earliest possible time make payment of the amount to which each creditor is entitled. If he fails to do so, he may be sued as provided in the previous section.[37]

The following may be used as a form:

REPORT OF PAYMENT OF DIVIDENDS IN INSOLVENCY.

In the Matter of the Estate of....., deceased.

In the Probate Court of.....County, Ohio.

The undersigned,.....of the.....of..... ....., deceased makes report: That in obedience to a former order of this Court, made....., 190.., ..he..ha...made distribution from the assets of said estate in his hands, to the persons entitled thereto, on account of their several claims heretofore presented and allowed (and for which payments, vouchers are herewith filed), as follows, to-wit:

Total Balance, due estate, as per account filed.....190.. $.....

Less amounts paid — Costs of this proceeding and preferred claims, viz:

Probate Judge, voucher $

Total, - - - - - - - - $.....

Balance for distribution to general creditors, - - - $.....

DISTRIBUTION TO GENERAL CREDITORS. — RATE.....PER CENT.

Interest computed from....., 190.., to....., 190..

Names of creditors.....

.....

Kind of claim.....

der required by statute. If there is not enough to pay all the debts on any one class, the creditors of that class are paid ratably upon their respective debts. The balance remaining after the payment of the preferred claims is distributed ratably among the other creditors. If the deceased had been a member of a co-partnership, and died in possession of both separate and partnership estate, and was indebted as a partner as well as on private account, his partnership debts are payable from the partnership estate, and his separate debts from his separate estate. If there is a balance of the separate estate after the payment of his separate debts, it is added to the joint stock for the payment of the joint creditors. If there is a balance of the joint stock after the payment of the joint debts, it is divided among the separate estates of the partners according to their respective interests therein, as it would have been if the partnership had been dissolved without insolvency; and the sum so appropriated to the separate estate of each partner is applied to the payment of his separate debts. Howe vs. Lawrence, 9 Cush. 553; Fall River Whaling Co. vs. Borden, 10 Cush. 458; Jewett vs. Phillips, 5 Allen, 150; Smith Pro. Law. 209.

See § 1011, Distribution after commissioner's return.

[37] § 10869 G. C., § 262.

Amount claimed..... $.....
Interest due..... $.....
Total due..... $.....
Amount paid..... $.....
Voucher .....
.....

Respectfully submitted,

.....
Administrator — Executor — of.....of....., deceased.

The State of Ohio,.....County, ss.
....., ...above named, being sworn, says that the foregoing account and statement are in all respects correct.

.....
Sworn to before me and subscribed in my presence this.....day of.....190...

.....Probate Judge.

§ 979. Confirmation of distribution.

The executor or administrator having filed his report of distribution the Court should carefully examine the same with the same prudence and care that would be exercised in an ordinary account of an executor or administrator. The footings should be verified and the vouchers compared, and if it is ascertained to be correct, an entry should be made, of which the following may serve as a general form:

(*Title.*)
This day this matter came on to be heard upon the report of distribution made by A. B., as administrator of C. D., whose estate has heretofore been declared to be insolvent; and said report having been duly and carefully examined by the Court, is found to be correct and according to law, and the same is hereby proved and it is ordered that said report and proceedings hereunder be recorded and that the said administrator (or executor) be discharged from his trust.

§ 980. When court to make further order of distribution. "If all the assets were not distributed on the first order of distribution, or if further assets afterward come to the hands of the executor or administrator, the court shall make such order or orders for their distribution as the case requires." [R. S. § 6245.][38]

§ 981. Exceptions.

When the Court makes its order of distribution, it may hear exceptions that may be filed by any person against the allowance

[38] § 10905 G. C.

of any debts which have been allowed by the administrator or executor.[39] It will be observed that exceptions can only be taken where the claim has been allowed. If it has been rejected, the creditor must bring suit within three months,[40] or submit it to arbitration; and it has also been held by filing an exception a question may be raised as to a priority of liens on some part of the fund.[41]

On his report of distribution, the questions that could be raised in exceptions to an ordinary account could be raised against such report of distribution, except those claims which had been reported as valid in the report of the list of valid debts, could not be attacked and the right of the administrator to pay the same as reported to the Court in such report of valid debts, could not be questioned. The order of the Court confirming the report of valid debts against the estate is an adjudication, and unless appealed from would stand as a charge against the administrator or executor, for which suit might be brought against him on his bond.[41*] The statute seems to make no provision for opening up a report of distribution, and the order of the Court thereon would seem to be a finality, unless it was appealed from as provided by law.[42]

If on the trial of exceptions the Court sustain the same, an entry to that effect should be made, and the report of valid claims should be made to conform thereto. If any one is aggrieved thereby, he could appeal from the decision of the Probate Court or Common Pleas Court.[43]

§ 982. **Provisions for contingent debts.** "At the return of the list of claims against the estate so made out by the commissioners, or by the executor or administrator as hereinafter provided, if a person be liable as a surety for the deceased, or has any other contingent claim against his estate which could not be proved as a debt under the commission, upon the presentation and proof of it, before the court, in ordering a dividend it shall leave in the hands of the executor or administrator,

[39] § 10904 G. C., § 976.

[40] § 10901 G. C., § 971.

[41] Cromwell vs. Herron, 11 C. C. 448; 5 C. D. 196.

[41*] § 265.

[42] See §§ 735-741, as to form of exception, trial, etc.

[43] § 11206 G. C., § 39.

a sum sufficient to pay to such contingent creditor, a proportion equal to what then is paid to the other creditors." [R. S. § 6227.][44]

§ 983. **When contingent debt becomes absolute.** "If, within four years after the date of the administration bond, such contingent debt becomes absolute, it may be allowed by the court, if not disputed by the executor or administrator. If disputed it may be proved before the commissioners already appointed, or others to be appointed by the court, in like manner as if presented before the first return of the list of claims against the estate." [R. S. § 6228.][45]

§ 984. **Dividend thereon. Disposition of residue.** "Upon the allowance of such claim, the creditor shall be entitled to a dividend thereon, equal to what was paid to other creditors so far as it can be paid without disturbing the former dividend. If his claim is not finally established, or if the dividend due to him does not exhaust the assets in the hands of the executor or administrator, the residue shall be divided among all the creditors who have proved their debts." [R. S. § 6229.][46]

§ 985. **Action against executor or administrator of insolvent estate.** "No action shall be maintained against an executor or administrator after the estate is represented insolvent, unless it be for a demand that is entitled to a preference, and would not be affected by the insolvency of the estate, or the assets prove more than sufficient to pay all the debts allowed by the commissioners, or a claim is presented and rejected, or disputed by the executor or administrator, before the estate is represented as insolvent, or the suit is brought against the executor or administrator, while acting in the place of commissioners, upon an estate represented to be insolvent, and upon a claim disallowed by such executor or administrator." [R. S. § 6246.][47]

§ 985a. **Estate declared insolvent while action against it pending.** "If an estate is represented insolvent, while an action is pending against an executor or administrator, for a

[44] § 10887 G. C.

It will be observed that the object of this section is to protect claims that could not be presented against the estate to the administrator. But it seems that it only applies when the contingency may be terminated within four years. If it does not terminate within four years, the fund must be distributed to the other creditor. See § 970 of this chapter.

See § 569 *et seq.*

[45] § 10888 G. C.

[46] § 10889 G. C.

[47] § 10906 G. C.

demand that is not entitled to preference, it may be discontinued without the payment of costs; or, if the demand is disputed, the action may be tried and determined, and judgment be rendered thereon, in the manner and with the effect provided in the case of an appeal from the award of commissioners; or, the case may be continued until it appears whether the estate is insolvent. If it proves not to be so, the plaintiff may prosecute the action as if no such representation had been made." [R. S. § 6246.][47*]

§ 986. Comments.

It will be observed that the above section protects the administrator or executor against suit, while the estate is in progress of being settled by the methods provided by this section. Specifically, no action can be brought unless *first* it is for a demand that is entitled to preference, and therefore it would not be affected by the solvency or insolvency of the estate. But I apprehend that it could not be brought even if it were such a demand, unless it was first presented to the administrator and by him rejected. The *second,* exception given above is, that no action shall be brought unless the assets are more than sufficient to pay all the debts. Or giving a *third* reason, if the claim has been disputed by the executor or administrator before the estate is represented insolvent. Or *fourthly* unless suit is brought against the executor or administrator upon a claim which was disallowed by such executor or administrator. These cover all cases in which the suit may be brought against an administrator or executor after the estate has been declared insolvent.

§ 987. Claims not presented as required, barred unless, etc. "Every creditor of an estate that proves to be insolvent, who has not presented his claim for allowance, in the manner prescribed herein, shall be forever barred from recovering it, unless assets of the deceased come to the hands of the executor or administrator, after the order of distribution, in which case his claim may be proved, allowed, and paid, in the manner and with the limitations provided for the case of contingent debts." [R. S. § 6247.][48]

47* § 10907 G. C. See § 607 *et seq.*, as to Limitation of actions against administrator, etc.
See State vs. Schott, 22 Dec. 320.
48§ 10908 G. C.

§ 988. **If surplus remain after paying debts allowed, other creditors may claim it.** "After the report of the commissioners of insolvency, or of the executor or administrator acting in their place, if the assets prove to be sufficient to pay all debts allowed under the commission, or under the report of the executor or administrator, as the case may be, the executor or administrator must pay them in full. After such order is made, if other debts be recovered against him, he shall be liable therefor only to the extent of assets then in his hands." [R. S. § 6248.][49]

§ 989. **How divided between two or more such creditors.** "If there be two or more such creditors, the assets, if not sufficient to pay their demands in full, shall be divided among them, in proportion to the amount of their respective debts." [R. S. § 6249.][50]

§ 990. **Executor or administrator liable only for assets in his hands.** "In such case, the executor or administrator may prove the amount of the assets in his hands, whereupon judgment must be rendered in the usual form. Execution shall not issue for more than the amount of such assets; and if there is more than one judgment, the court shall apportion the amount between them." [R. S. § 6250.]

§ 991. **Creditor may sue after two years in case, etc.** "At the end of two years after granting letters testamentary, or of administration, if it is not ascertained whether an estate represented insolvent, is or is not so in fact, any creditor whose claim was not presented before the commissioners, or to the executor or administrator acting in their place, may commence an action for it against the executor or administrator, which may be continued for the defendant until it appears whether the estate is insolvent. If it should not prove to be so the plaintiff may prosecute his action as if no such representation had been made." [R. S. § 6251; 102 v. 205.][52]

§ 992. **When and how executor or administrator may be compelled to render his account to court.** "If an executor or administrator neglects to render and settle his accounts in court, within three months after the return is made by the commissioners, or by the executor or administrator, in their place, or after the final liquidation of the demands of the creditors, or

[49] § 10909 G. C.
[50] § 10910 G. C.
[51] § 10911 G. C.
[52] § 10912 G. C.

within such further time as the court allows in which to collect the debts and assets, so as to delay an order of distribution, he may be compelled to render such account, in the manner hereinbefore directed, to compel the return of an inventory. The same proceedings may be had to attach and to discharge him, and the like revocation of the letters to him be made as in case of a party absconding or concealing himself, so that no order can be personally served, or of his neglecting to render an account within thirty days after being committed. New letters shall be granted with the like effect, and remedies on the administration bond, as in those cases." [R. S. § 6252; 102 v. 205.][53]

[53] § 10913 G. C.

CHAPTER LIII.

SETTLEMENT OF INSOLVENT ESTATES BY COMMISSIONER, ETC.

§ 993 When estate insolvent, Court to appoint commissioners to audit claims.
§ 994 Comments.
§ 995 Duties of administrator, etc., when commissioners appointed.
§ 996 Commissioners to give notice of their appointment, etc.
§ 997 Form of notice, etc.
§ 998 Time allowed creditors to present and prove claims. Commissioners to report to Court.
§ 999 Presentation of claims.
§ 1000 Commissioners examine claimants on oath.
§ 1001 Any one of commissioners to administer oath.
§ 1002 Hearing and action on claim.
§ 1003 Report of the commissioners.
§ 1004 Appeal from decision of commissioner, how perfected. Hearing and costs.
§ 1005 Procedure and appeal.
§ 1006 Form of bond, and notice of appeal.
§ 1007 Duty of commssioners when bond or notice is filed.
§ 1008 How persons should proceed who have omitted to appeal.
§ 1009 Comments.
§ 1010 Allowance of appeal not to disturb distribution previously made.
§ 1011 Distribution among creditors after commissioners return.
§ 1012 Compensation of commissioners.

§ 993. When estate insolvent, court to appoint commissioners to audit claims. "When, from the representation of an executor or administrator, it appears to the court that the real and personal estate of the deceased will probably be insufficient for the payment of his debts, it may appoint two or more fit persons to be commissioners to receive and examine all claims of creditors against the estate, including claims presented and allowed by the administrator or executor, and other claims duly verified and presented to them, and return to the court a list of the claims thus laid before them, with the sum they allowed on each claim. Before entering on the duties of their office, the commissioners must be sworn to the faithful discharge thereof." [R. S. § 6224.][1]

[1] §§ 10884 to 10914 G. C., deal wholly with creditors and not for the heirs, for the reason that the heirs have no beneficial interest in an insolvent estate. Insurance vs. Bank, 172 Fed. 390.

§ 994. Comments.

By the above section of the General Code, the Probate Court is permitted in the case of insolvent estates to appoint a board of quasi judicial character to determine the validity of claims against the estate.[2] There seems to be very little use for the appointment of such board, and except in very large and complicated estates it would be far better to allow the administrator or executor to serve as a commissioner. The right to appoint commissioners vests solely in the Probate Court and no appeal would lie from action of the Court thereon.[3]

Upon receiving their appointment and before entering upon their duties, they must be sworn to the faithful discharge of the same. The form of the oath to be administered may be as follows:

State of Ohio, Clark County, ss.

E. F. and G. H., being duly sworn, say that they will faithfully and impartially discharge all of the duties devolving upon them by law, as commissioners to receive and examine all claims of creditors against the estate of A. B., deceased, and report the same to Court as provided by law, and according to their best understanding and ability.

.....

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

.....

There is no statutory requirement as to the ineligibility of a person to act as commissioner, but the Court should select only such as are competent by knowledge and experience, to properly perform their duties, and free from influences by relation or otherwise, which would affect their judgment in the discharge of the trust devolving upon them. It is presumed that the commissioners will as soon as they are informed of their appoint-

[2] As to form of application to be filed, see § 962.

An entry thereon can easily be adopted to suit an appointment of commissioners.

[3] Putney vs. Fletcher, 140 Mass. 596.

The commissioners shall act and have the power of a *quasi* judicial tribunal. Cromwell vs. Herron, 11 C. C. 452; 5 C. D. 196.

ment, enter upon the discharge of their duties. No formal method is prescribed as to the manner in which they should be notified. It is presumed that the Court or parties interested will convey to them this information.

§ 995. Duties of administrator, etc., when commissioners appointed.

The only power that the commissioners have is to receive and audit the claims against the estate and report the same to the Probate Court. It only interferes with the ordinary duties of the administrator or executor, that it takes away from him the allowance or rejection of claims against the estate. Otherwise he acts as if no commissioners had been appointed. He will proceed to collect all the assets and convert the real estate into money, and after the report of the commissioners has been passed upon by the Court, it will be the duty of the administrator or executor to make distribution of the funds in his hands in conformity with the order of the Court. It would be the duty of the administrator to turn over to the commissioners all evidences of indebtedness against the estate which are in his possession. It would likewise be his duty to attend the sessions of the commissioners, and if a claim was allowed which in his judgment should not have been allowed, to appeal the same to the Probate Court. If he is guilty of corrupt conduct in not opposing the allowance of illegal claims, he will be liable to an action on his bond.[4]

It is held under the Massachusetts law, that the individual claim of the administrator or executor is not to be presented to the commissioners, but to the Court for allowance.[5]

§ 996. Commissioners to give notice of their appointment, etc.

As soon as the commissioners have received notice of their appointment, they must fix a time and place, where they will

[4] Parson vs. Mills, 2 Mass. 80.

[5] Green vs. Russell, 132 Mass. 520; Newell vs. West, 149 Mass. 536.

hold their session for the purpose of examining claims and creditors. The statute relating thereto is as follows:

"The commissioners of insolvency shall appoint convenient times and places for their meetings, to receive and examine all claims of creditors as provided for in the next preceding section, and give notice thereof, in writing, to each of such creditors by mailing it to his postoffice address; and further, by causing notification to be posted up in some public places where the deceased last dwelt, or in such other manner as the court having regard to the situation of the creditors of the estate, may order." [R. S. § 6225.][6]

§ 997. Form of notice, etc.

No particular form of notice is required. The notice provided in sec. 10898, G. C., would be sufficient with the matter added, fixing the time and place where the commissioners will meet for the purpose of receiving and auditing the claims. In addition to sending a notice in writing to each of the creditors, it further provides that the notice shall be put up in some public place in the vicinity where the deceased last dwelt, or in such other manner as the Court may provide. Generally the Court will provide that notice shall be given in a newspaper of general circulation for such a length of time as it may think fit. A copy of the notice sent to the creditors and the date of its mailing as well as a copy of the notice published with proof of its publication should be filed with the report of the commissioners. The commissioners ought perhaps to fix, especially where the estate is large, two or three different days on which they will be in session.[7]

§ 998. Time allowed for creditors to present and prove their claims; commissioners to report to court. "After the appointment of the commissioners, three months shall be allowed to creditors to present and prove their claims. The court may allow such further time for this purpose, not to exceed one year from the date of the commission, as it thinks necessary.

[6] § 10885 G. C. [7] § 966.

At the expiration of the time for proof of debts, the commissioners must make their written report to the court." [R. S. § 6226; 102 v. 205.][8]

§ 999. Presentation of claims.

All kinds of claims against the estate ought to be presented to the commissioners; even claims reduced to judgment. Also all claims that have been previously presented to the administrator or executor; likewise claims which have a preference ought to be presented, for it is the intention of the statute that this board of commissioners should audit and receive *all* the claims against the estate and if creditors fail to present their claims they shall be forever barred from recovering the same.[9]

If a person hold a claim against the estate which was secured and he did not present it, the estate would be relieved and the creditor would be obliged to look to the security alone for its payment. Contingent claims as well as those fixed must be presented.[10]

The commissioners cannot allow claims after the expiration of the time limited by statute or fixed by the Court.[11] For a good reason the Court may extend the time.[12] But such extension of time does not relieve a creditor from the obligation to commence the prosecution of his claims.[13] It is provided by a subsequent section,[14] that a person who by accident or otherwise fails to appeal his claim may prosecute an appeal to the Probate Court. But this does not apply to cases where claims have not been presented at all. As was said in a previous chapter,[15] the creditor in order to protect his rights must strictly pursue the line marked out by the statute. Any other course is dangerous and may defeat his right. Necessarily in cases where

[8] § 10886 G. C.
This section is very much similar to § 10899 G. C., § 967.

[9] § 10908 G. C., § 987.

[10] § 10887 G. C., 982.

[11] Bascon vs. Butterfield, 1 Metc. 536.

[12] § 10886 G. C., § 11899 G. C., § 967.

[13] Walker vs. Lamins Admr., 6 Pick. 458; Towle vs. Banister, 16 Pick. 255.

[14] § 10891 G. C., § 1008.

[15] § 552 *et seq.*

an estate is insolvent, there must be a reasonably short limit upon the presentation of claims so that the same can be expeditiously distributed.

§ 1000. Commissioners examine claimants on oath. "When they think it proper, the commissioners may require an oath to be administered to a claimant, and thereupon examine him on all matters relating to his claim. If he refuses to take such oath, or to answer fully all questions lawfully put to him, the commissioners may disallow his claim. On an appeal from the award of the commissioners, the court shall examine the claimant on oath, and disallow his claim, if he refuses to take the oath, or to answer fully upon his examination thereon." [R. S. § 6233.][16]

§ 1001. Any one of commissioners to administer oath. "Any of the commissioners may administer the oath to the claimant, and also the oath to all witnesses produced and examined before them." [R. S. § 6234.][17]

§ 1002. Hearing and action on claim.

At the time set for hearing, or at such other time as the board of commissioners may adjourn to from time to time they shall proceed to hear in an orderly manner the witnesses to the claims presented. They shall have power to administer oaths to the claimant himself and question him concerning his claims.[18] And if he refuses to answer, the penalty attached is a rejection of his claim. They may also administer oaths to all witnesses produced. The statute does not give them the authority to subpœna witnesses. This examination should be carried on under the same rules of evidence applicable to any Court of justice. The commissioners shall liquidate and balance all mutual demands subsisting between the deceased insolvent and his creditors. If the balance is found in favor of the creditors, it should be allowed by the commissioners, and included in their reports;

[16] § 10893 G. C.
[17] § 10894 G. C.
[18] § 10883 G. C., § 593.

but if the balance is found to be against the creditors, it is not a subject of their report, which is to include claims against the estate only.[19]

§ 1003. Report of the commissioners.

At the end of three months after their appointment they must make their written report to the Court. This report should be very much similar to that made by the administrator or executor when he is acting as such commissioner. It should have filed with it, a proof of the notice given to creditors, when given by mail, or publication or posting up, for if no such notice be given, the creditors will not be barred of their right to present claims. The form provided in sec. 975 of the previous chapter can easily be adopted for report by commissioners. Likewise the entry of distribution would be very much similar,[20] and the commissioners may be compelled on motion of an interested party to make a return.[21]

§ 1004. Appeal from decision of commissioners, how perfected. Hearing and costs. "A person whose claim is disallowed in whole or part, by the commissioners, and an executor or administrator who is dissatisfied with the allowance of any claim, may appeal from the decision of the commissioners to the probate court. If the creditor appeals, within ten days after the decision, he must file with the commissioners a bond to the executor or administrator, with surety to be approved by the commissioners in the sum of one hundred dollars, conditioned to pay all costs adjudged against him on such appeal.

[19] When the defendant in a suit brought by the administrator of an insolvent estate files in set-off a claim larger than that on which he is sued, he is entitled to judgment for the balance, and need not present his claim to the commissioners. The judgment is to be presented to the judge of Probate, and by him added to the claims allowed by the commissioners. Bigelow vs. Fowler, 2 Met. 255. In such suit the defendant may set off a note which falls due pending the suit, though not due when the action was commenced. Ibid; Boyden vs. Mass. Life Ins. Co., 153 Mass. 548; Smith Pro. Law 198.

[20] Equitable liabilities shall be deemed to be debts provable against insolvent estates of deceased persons.

[21] Blanchard vs. Allen, 116 Mass. 447.

See § 1568, Form citation.

The executor or administrator may appeal by giving notice to the commissioners within ten days. In case of an appeal, as soon as practicable the court shall hear and determine the allowance or disallowance of the claim, and adjudge the costs against the party failing on such hearing." [R. S. § 6230.][22]

§ 1005. Procedure on appeal.

The statute furnishing relief to creditors makes a distinction between where there is a board of commissioners, and where the administrator or executor is acting in that capacity. Where there is a board of commissioners, the creditor whose claim is not allowed must seek his remedy by appeal to the probate Court. If it is not allowed where the administrator is acting as commissioner, he must bring suit within three months. If no one appeals as provided in the statute, the report of the commissioners is conclusive.[23]

The right of appeal is given to both the creditor and the administrator. If the creditor appeals, he must within ten days after the board of commissioners have rendered their decision, file a bond as provided in the previous section. If the executor or administrator wishes to appeal, he must give notice within ten days and the Probate Court must try the case at as early a date as the same can practicably be done, and the costs must be charged against the party who fails on appeal.[24]

§ 1006. Form of bond, and notice of appeal.

If the administrator or executor intends to appeal, he should file a notice with the commissioners, which must be done within ten days. The following may serve as a notice:

[22] § 10890 G. C.

The Supreme Court cannot take jurisdiction in an appeal from the decision of the commissioner. McCurdy vs. Legally, 14 O. 391.

[23] Boardman vs. Smith, 4 Pick. 211; See Wright vs. Dunham, 9 Pick. 37.

[24] Pierce vs. Saxton, 14 Pick. 274; Perkins vs. Fellows, 136 Mass. 294.

If the creditor, on appeal, does not receive a sum greater than that allowed by the commissioners, the executor shall recover his costs of suit against such creditor. Dodge vs. Breed, 13 Mass. 537.

(*Title.*)
To E. F. and G. H., commissioners of the estate of A. B., deceased:
You are hereby notified that I, as administrator (or executor) of the estate of A. B., deceased, intend to appeal to the Probate Court from your decision rendered on the.....day of.....,allowing as a valid claim against said estate, the clam of J. K. for.....dollars.
.....[25]

When such notice is filed or when a bond is filed, the commissioners should endorse the fact and date of filing thereon. If a creditor wishes to appeal, instead of the notice he must file a bond which may be in the following form:

FORM OF BOND.

Know all Men by the Presents.
That we, L. S. and P. Q., are bound unto C. D., executor of the last will (or administrator of the estate) of A. B., deceased, in the sum of..... .....dollars; to the payment of which we do hereby jointly and severally bond ourselves, if default be made in the conditions following:
Whereas L. R. and C. H., commissioners appointed by the Probate Court of.....county, in the State of Ohio, to receive and examine claims against the estate of the said A. B., deceased, have refused to allow a claim of.....dollars against the same, presented by the said L. S., from which decision the said L. S. has appealed to the Probate Court in and for said county of..... Now, if the said L. S. shall prosecute his said appeal to effect, and shall pay the costs that may have accrued thereon, and that may accrue thereon in the Court of Common Pleas, in case the claim shall be disallowed by the said Court, then this obligation shall be void; otherwise, it shall be and remain in full force and effect.
Signed by us this.....day of.....A. D. 190...
.....
.....[26]

§ 1007. Duty of commissioners when bond or notice is filed.

There seems to be no provision in the statute as to how the Probate Court is to have notice or get jurisdiction of a claim when an appeal has been taken. It is probably the duty in such cases of the commissioners to notify the Court of such action and transmit with such report the claim presented and all matters connected therewith, which might be something in the following form:

(*Title.*)
To the Probate Court of.....County, Ohio:
The undersigned commissioners, appointed by your honor, beg leave to report that in pursuance of the duties devolving upon them, on the.....

[25] No reasons of appeal are required to be filed. Jacobs vs. Jacobs, 110 Mass. 229.

[26] Giauque's Settlement of Estates.

lay of.....they did allow (or reject) the claim of.....
.....in the sum of.....dollars. That thereafter said
.....filed with them a bond to appeal the same, which bond was approved by us. (If the administrator or executor is the appealing party, say the administrator gave written notice of his intention to appeal in said matter.)

We therefore report the fact of such appeal to your honor and transmit herewith the papers filed with us in reference to said claims.

.....
.....

Commissioners.[27]

§ 1008. How persons should proceed who have omitted to appeal. "A person whose claim is disallowed by the commissioners, and who by accident, mistake, or otherwise, and not by his own neglect, omits to claim or prosecute his appeal, as before provided, upon his petition and notice thereof to the executor or administrator, may be allowed by the court to prosecute his appeal in manner aforesaid, upon such terms as it imposes, if it appears by affidavit that justice requires a further examination of his claim. No such petition shall be sustained, unless it be presented within two years after the return of the commissioners, and within four years after the date of the administration bond, and before final distribution." [R. S. § 6231.][28]

§ 1009. Comments.

The above section is one which saves to a person the right to perfect an appeal when by reason of accident or mistake or some other good reason he has neglected to perfect his appeal within the time permitted by law. Such a right will rest largely in the discretion of the Court. In the application for such an appeal the reason why the same was not perfected should be set out in detail and the Court should be satisfied by affidavit that such want of appeal was not by neglect. There should be strong and urgent reason in behalf of justice and right before such a claim should be allowed. This section does not permit the Court to pass upon a claim that was not presented to the commissioners, it is confined to claims that were disallowed, etc.[29]

[27] Upon receipt of such notice from the commissioners the Probate judge should docket the claim and set it down for hearing, and notify the creditor and the administrator of the time when it will be heard and proceed thereafter as in any other case.

[28] § 10891 G. C.

[29] See § 1003.

§ 1010. Allowance of appeal not to disturb distribution previously made. "The allowance of such appeal, and the judgment that follows thereon, shall not disturb any distribution ordered before notice of the petition, or notice of the intention to present it was given to the executor or administrator. The debts, if any, proved and allowed in the case last mentioned shall be paid only out of such assets as remain in or come to the hands of the executor or administrator after paying the sums due on such prior order of distribution." [R. S. § 6232.][30]

§ 1011. Distribution among creditors after commissioners return. "After the expiration of thirty days from the return made by the commissioners, the court shall make such order for the distribution of the effects among the creditors as the case requires. If, before making an order, the court has notice of an appeal from the commissioners, then made or pending, it may suspend any order until the determination of such appeal, or order a distribution among the creditors whose debts are allowed, leaving in the hands of the executor or administrator a sum sufficient to pay the claimant, whose demand is disputed, a proportion equal to what is paid to the other creditors." [R. S. § 6235.][31]

When the commissioners have filed their report, then their duties cease and the orders made thereafter are to be enforced by the administrator or executor in the same manner as if such administrator or executor were acting as commissioner.[32]

§ 1012. Compensation of commissioners. "The court shall allow the commissioners such compensation as it deems reasonable, for their services, which the executor or administrator must pay as a part of the costs of administration." [R. S. § 6253.][33]

[30] § 10892 G. C.

[31] § 10895 G. C.

This section is very much similar to § 10904 G. C., § 976, and the order made in reference thereto would be similar to an order made under § 10904 G. C., § 976.

[32] See § 977 for form of entry which can be readily adopted to meet an entry under the above section.

[33] § 10914 G. C.

CHAPTER LIV.

WILLS — GENERALLY.

§ 1013 Definitions, etc.
§ 1014 Distinguishing characteristics.
§ 1015 Confusion between wills and other instruments in writing.
§ 1016 Law governing will.
§ 1017 Right to make.
§ 1018 Who may make a will.
§ 1019 Any person.
§ 1020 Full age.
§ 1021 Sound mind and memory.
§ 1022 Idiots, imbeciles and lunatics.
§ 1023 Blind, deaf and dumb persons.
§ 1024 Person under guardianship.
§ 1025 Not under any restraint.
§ 1026 Having property.
§ 1027 May give any person.
§ 1028 Bequest or devise to charitable purpose, when void.
§ 1029 Corporation and charitable uses.
§ 1030 Entailed estates pass to issue of first donee.
§ 1031 Rule against perpetuities.
§ 1032 Contract to make a will.
§ 1033 Statutory meaning of certain words as applied to wills.

§ 1013. Definitions, etc.

It can not be within the province of a work of this character to enter into an extended discussion of the subject of wills. But such examination of the subject will be given as is most likely to be useful in the practice of law in the Probate Court.[21]

A "will," "last will," or more accurately, "last will and testament," may be defined, in the present condition of the common and statute law, as the legal declaration of a man's intention which he wills to be performed after his death, touching either the disposition of his property, the guardianship of his children, or the administration of his estate.[22]

[21] For full discussion of this subject, the reader is referred to works exclusively devoted thereto. The most voluminous is Jarman on Wills. The most recent and a very excellent work is Page on Wills, which has been used liberally in this work. Schouler's law on Wills is also a very good work.

[22] Am. & Eng. Ency. of Law, Wills.

The expressed wish of the testator that all the property shall go as the law directs with certain modifications, is a testamentary disposition. Huber vs. Carey, 26 O. C. C. 389; affirmed, 74 O. S. 469; Huber vs. Carew, 7 C. C. (N.S.) 609; 16 Cir. D. 389; affirming, 2 N. P. (N.S.) 81; 14 Law D. 656; affirmed, no report, etc.

Will defined. Hall vs. Hall, 2 O. L. R. 328; 15 Dec. 167.

See § 1033, Statutory meaning of certain words.

The above definition seems to be a broad one and permits an instrument to be classed as a will which does not make a disposition of property. Upon this question the Courts are not in accord; one of our Probate Judges held that it was not a will unless it disposed of property,[23] and a Common Pleas Judge held to the contrary.[24] Our statute, however, gives an inference towards the idea that in order to be a valid will, it must contain a disposition of property.[25]

Of course there can be no valid will, unless it is executed in conformity to the statute, which recognizes only written wills and nuncupative wills. A number of terms or words are used in the making and construction of wills, which may be defined as follows:

"Testament" — An instrument which disposes of personalty only, is called a "testament," and an instrument disposing of both realty and personalty is known as a "will and testament." The popular meaning of "will" has so far encroached upon the technical meaning, that "will," is used indiscriminately of instruments passing realty or personalty or both. "Testament," however, is almost never used of an instrument passing realty only.

"Testator" — The word "testator" is very commonly used of the person making either a will or a testament.

"Devisor"—"Devisor" is, according to derivation, the correct term for one who makes a will, but, while used, is not common.[25*]

"Devisee," on the other hand, is the word regularly used to denote one to whom realty passes by will.

"Legatee" is properly used to denote one to whom personalty passes by will.[26]

[23] See § 1026, Having property; *In re* Williamson, 5 N. P. 1; 6 Dec. 505.

[24] *In re* Williamson, 6 N. P. 79; 8 Dec. 47.

[25] § 5914 R. S., § 1018.

In Moon vs. Stewart, 87 O. S. 349; below 33 O. C. C. 337. When a will properly executed and an executor appointed "after my death to settle up all my property both real and personal," the second item being—I hereby make my two granddaughters, L. and B., each equal heirs with my own children—held the instrument was dispositive and devised to each of the granddaughters an equal share with the children.

[25*] Coke on Littleton, vol. 11, chapt. 10, § 17.

[26] Neville vs. Dulaney, 89 Va. 842.

There is no property in a dead body, therefore it can not be disposed of by will. Herold vs. Herold, 3 N. P. (N.S.) 405; 16 Dec. 303.

"Legatee" and *"devisee"* are frequently interchanged in popular usage, however.

"Devise" and *"bequeath"*—Of the verbs used to denote the act of making a will, " devise " is properly used of realty, and " bequeath " of personalty.

" Devise "—Of the nouns used to name the various forms of gift, " devise " is used of a gift of realty.

" Legacy "—" Legacy " is used of a gift of a sum of money.

" Bequest " — " Bequest is used of a gift of personalty in general.[27]

None of these words have so fixed a legal meaning, however, that a gift will fail because testator does not use the words descriptive of the gift or the act of giving with technical accuracy.

A " devise " is often miscalled a " bequest," [28] or " bequest " is often used to include both realty and personalty,[29] or is used of a gift of money alone.[30] So the verb " devise " is often used to refer to personalty alone.[31]

§ 1014. Distinguishing characteristics.

The Probate Judge will be sometimes called upon to pass upon the question whether a paper properly attested and signed is after all a will or not. In such cases where the paper submitted for probate, is otherwise entitled to be probated as a will, the Court should, if any doubts exist, resolve the doubt in favor of the will and probate it and let the matter be settled on contest. There are some qualities in a will which are termed inherent. They are those which cannot be altered without destroying every idea of a will, and entirely altering its place in our law. These inherent elements are grouped under two general heads, first the *animus testandi,* second the revocability. *Animus testandi* means the intention of making a testamentary disposition. This matter is not gathered from the words that the testator may use entirely, but from the instrument itself. A man might make a valid will and yet call it a deed.[32]

[27] Keating vs. McAdoo, 180 Pa. St. 5.

[28] *In re* White, 125 N. Y. 544.

[29] Evans vs. Price, 118 Ill. 593; Allen vs. White, 97 Mass. 504; Lamb vs. Lamb, 131 N. Y. 227.

[30] White vs. Mass. Institute of Technology, 171 Mass. 84.

[31] *In re* White, 125 N. Y. 544; Clark vs. Clark, 46 S. Car. 230.

Page on Wills, 3. This work is made use of quite frequently herein. See § 1026.

[42] See Page on Wills 38.

A distinguished author divides, as to what constitutes this *animus testandi*, in three separate ideas. The first is, that the will may deal with any or all of three things:

(a) It may deal with property of the testator either real or personal.

(b) It may appoint an executor to take charge of the estate of the testator, and deal with it according to the law and the will.

(c) It may appoint a guardian for the minor children of the testator.[33]

Accordingly the formal expression by the testator of his wishes as to any matter not included under a, b and c as above given is not a will, because the subject matter is not testamentary in its character. The second idea is, that the instrument must express the wishes of the testator in reality as well as in outward form, that is, the testator must be able mentally to make a will and not under restraint, etc.[34]

And the third idea included under the term *animus testandi* is, that the will can take effect only at the death of the testator. This is one of the important distinctions between a will and an instrument whereby title to property is conveyed.

Revocability, heretofore given as the second of the inherent elements follows very closely the last idea of *animus testandi,* that the will does not take effect until the death of the testator. So essential a feature of a will is revocability, that the insertion in the instrument which is clearly a will of a clause providing that it is not to be revoked, has no effect whatever in preventing revocation.[34*]

If an instrument is executed as such, that the maker cannot revoke it, it may be a deed or contract, but cannot be a will. An instrument which unites the elements included and discussed under the heads *animus testandi* and revocability, is a will as far as the inherent elements are concerned. An instrument which possesses any number of these elements less than all is not a will.[35]

[33] Page on Wills 39.

[34] Page on Wills 41.

[34*] Page on Wills 48.

[35] See *in re* Williamson, 5 N. P. 1; 6 Dec. 505; 6 N. P. 79; 8 Dec. 47.

See § 1082, What may be probated; § 1173, Revocability of joint wills; § 1224, Gifts *causa mortis.*

§ 1015. Confusion between wills and other instruments in writing.

I cannot go into detail on this subject, but a few examples may be given. Thus an instrument in form of a warranty deed, but containing a clause, "This paper to be in full force till I desire to act," or "to alt," possess a present estate, though with a possible right of revocation, and is a covenant, to stand seized to uses, *i. e.*, a deed.[36]

In another case an instrument, in form a warranty deed, contained a clause: "Conditions of this deed is such as said party of the second part that this land shall not be encumbered in any way, or this deed shall be void. The party of the first part is to hold said property his lifetime." This was held a deed.[37] Where the grantor deeded his estate in trust, reserving a life estate to himself, and also reserving the power of revoking the trust deed as to some of the objects of the trust, for fifteen years, it was held a deed.[38]

Where, on the other hand, testator's intention is manifest from the whole instrument that it shall not take effect until the death of the maker and shall not pass any property right, till that time, it is held to be inherently a will, no matter what outward form it may assume.[39]

Thus, where the maker executed the following instrument: "Know all men by these presents that I, Joseph Robinson, for the consideration of one hundred dollars to me in hand paid, as well as my affection, do hereby assign and set over to my

[36] Watson vs. Watson, 24 S. Car. 228.

See 13 Green Bag, § 567, for quaint and curious wills.

[37] Cates vs. Cates, 135 Ind. 272; Bevins vs. Phillips, 6 Kan. App. 324.

[38] Pres. of Bowdoin College vs. Merritt, 75 Fed. 480; Stewart vs. Stewart, 5 Conn. 317; Page on Wills 49.

[39] Mosser vs. Mosser, 32 Ala. 551; Walker vs. Jones, 23 Ala. 448.

daughter, Elizabeth Jane Brewster, all of my property, both personal and real, to have the same after my death.

Attest: his
A. S. Post, Joseph x Robinson.
E. McClellan. mark."

Such instrument was held to be a will.[40]

In determining whether an instrument in doubt is a will or a contract, the same test applies as in the case of confusion between wills and deeds. The test is not the time of performance, but the time at which by the terms of the instrument a property right under the instrument attaches. If by the terms of the instrument no property right is to attach under it, until testator's death, the instrument is a will, provided, of course, it is properly executed, but if a property right attaches during testator's lifetime, the instrument is a contract, even though the time of performance may be postponed till the death of testator.[41]

If an instrument possesses all the elements of a contract, the fact that the time of performance is fixed at testator's death, or within a given time thereafter, does not make it a will.[42]

Where the defendants' intestate executed the following paper: "For value received, I promise to pay to Mrs. Hamor, wife of John Hamor, the sum of $300, as a small recompense for the kindness shown to me by her. The executors of my last will and testament are hereby directed to pay the above to Mrs. H., or her sons, Moses and John, after my decease.

Attest: Philip Riggs. John R. Moore."

February 28, 1850.

And delivered the same to the subscribing witness, with injunctions to deliver it to Mrs. Hamor after his death, which was done. Held: 1, That this was not a gift *inter vivos*, nor a gift *causa mortis*, nor was it good as a testamentary disposition. 2, That the "kindness" mentioned in the paper,

[40] Robinson vs. Brewster, 140 Ill. 649; Page on Wills 51.

§ 1214, Gifts *causa mortis*.

[41] Page on Wills 55.

[42] Beatty vs. College, 177 Ill. 280; Miller vs. College, 42 L. R. A. 797; Aff. 71 Ill. App. 587; Hegeman vs. Moon, 131 N. Y. 462.

The reader will find the matter very fully discussed as to these distinctions in Page on Wills.

being acts of friendship and hospitality merely done and accepted at the time as gratutious, does not in law constitute a good consideration to support the express promise.[43]

§ 1016. Law governing will.

Where a person has made a will in conformity to the law, then in force, and the law is changed before his death, the law in force at the time of his death will govern the execution and construction of the will.[44]

When a testator is domiciled in one State at the time of his death, and leaves property in another State, the question arises as to which law is to prevail. As a general rule except where modified by statute, so far as concerns the capacity of the testator or form of the will when the same devises real property the law of the place where the property is situated controls.[45]

And the same may be said to be the prevailing law as to the *construction* to be given to the will in devising real estate. Our statute, however, provides in our State that if a will is executed and proved according to the laws of any State or territory of the United States, etc., an authenticated copy may be placed on record and it would have the same validity as a will probated here.[46]

As to personal property, the validity of the will, is to be determined by the law of the testator's domicile at the time of his death. But a will not recognized by our laws or against the policy of our statute, even though valid where made, could not be effective.[47]

[43] Hamor vs. Moore, 8 O. S. 239.

[44] Root vs. Stuvesant, 18 Wend. 257; Redf. Sur. Prac. 146.

[45] Page on Wills 27.

[46] §§ 10535, 10536 G. C., § 1119. 3 Am. & Eng. Ency. 632.

The *lex rei sitae* controls the construction of a will executed in another State by a resident thereof devising land in this State. Horton vs. Haines, 7 C. C. (N.S.) 261; 28 O. C. C. 79. Reversed, but not on this ground. 76 O. S. 588.

[47] Manuel vs. Manuel, 13 O. S. 458.

In this case, M. domiciled in Ohio, made a will of personalty in the olographic form valid by the laws of Louisiana, while in New Orleans for business purposes. He returned to his domicile in Ohio and died here, the will was sent to New Orleans and there admitted to probate. It was held that the copy of the will was improperly admitted to record in this State. It will be observed that in this case, the maker of the olographic will had his actual domicile in Ohio. If he would have had his domicile in Louisiana it is probable that an authenticated copy of

And generally it may be said that questions of construction are controlled by the law of the testator's domicile in a bequest of personal property. If a testator makes a will which is valid by the laws of the place where he then lived and afterwards moves to another place, by the law of which latter place his will is invalid and he died, at the latter place, his will will be controlled by the place of his death and would be invalid.[48]

Where a devise of land creates a trust its validity is to be determined by the law of the place where the land is situated. A bequest of personalty is to be determined by the law of the domicile of the testator, and not of the place where the property is situated. In determining the validity of the execution of a power given by will, the law of the domicile of the testator controls.[49]

When no evidence is given as to what the law of the domicile is, the Court trying the case will take judicial notice that the State of testator's domicile recognizes the common law as the basis of its system, if such be the case, and will construe the will by the common law.[50]

If the law of the State of testator's domicile is not based upon the common law the Court will, in the absence of evidence as to what such foreign law is, treat the will as controlled by the law of the forum.[51]

§ 1017. Right to make.

The right of testamentary disposition, depends solely on the municipal law and has never been regarded as a natural or inalienable right. It has always been subject to the control of legislative power and such power is not limited in this State by constitutional provision.[52] The right to make a will may be

the olographic will would have been admitted to record in our State.

Thus an olographic will made in New York by one domiciled in Quebec, while on a short visit to New York is valid by the Quebec law. Page on Wills 30.

[48] See § 1180, Construction of wills; § 758, Distribution, etc; Page on Wills 31.

[49] Page on Wills 35.

[50] Benbow vs. Moore, 114 N. Car. 263; 19 S. E. 156.

[51] Davison vs. Gibson, 56 Fed. 443; Page on Wills 35.

[52] Patton vs. Patton, 39 O. S. 590. See § 1119, foreign will.

limited or regulated in any manner the Legislature sees fit or taken away altogether.[53] And as heretofore said it is the law in force at the time of a testator's death that controls.[54]

§ 1018. Who may make a will. "A person of full age, of sound mind and memory, and not under restraint, who has property, or an interest therein, may give and bequeath it by last will and testament lawfully executed." [R. S. § 5914.][55]

§ 1019. Any person.

The statute gives the only restriction as to what person may make a will, when it says that he must be of full age and of sound mind and memory and not under any restraint. Formerly there were other restrictions, such as aliens, married woman, or a person convicted of a heinous offense, outlawry, etc. Of course the words " any person " means a natural person and not an artificial one.

§ 1020. Full age.

In Ohio, all male persons of the age of twenty-one years and upward, and all female persons of the age of eighteen years and upward are considered to be of full age, any law or custom, to the contrary notwithstanding.[56] The ecclesiastical law had settled the matter that males of fourteen years of age and females of twelve years of age could make testaments disposing of personalty, but no such distinction exists in Ohio.[57]

[53] Folsom vs. Haas, 9 C. C. 473; 6 C. D. 460.

[54] Page on Wills 18; See Woerner on Administration 19 and 6.

[55] § 10503 G. C.

[56] § 8023 G. C.

[57] Page on Wills 100.

A rule of computing time should be noticed in connection with the question of infancy and majority, which is a departure from the ordinary rule. At common law, in computing the age of a person for testamentary purposes, the day of his birth is included. As the law does not recognize fractions of a day, but directs both the day of the birth and of the anniversary to be reckoned as full days, it results that a person born on the first day of January, 1800, in the last hour of that day, will attain majority on the first instant of the thirty-first day of December, 1900,— nearly two days less than twenty-one years. 1 Jar. on Wills 45; Woerner on Admin. 25.

§ 1021. Sound mind and memory.

A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. It is not necessary that he should collect these in one review. If he understands in detail what he is about and chooses with understanding and reason between one disposition and another, it is sufficient for making a will.[58]

The real test of capacity has finally been agreed upon by the great weight of authority, as follows:

The testator must have strength and clearness of mind and

[58] Wilson vs. Mitchell, 101 Pa. St. 495; Miller vs. Oestrich, 157 Pa. St. 264; Hoopes' Estate, 174 Pa. St. 373.

The expression "sound mind" does not mean a perfectly balanced mind. The question of soundness is one of degree. Boughton vs. Knight, 42 L. J. P. 25.

"Sound and disposing mind" means a mind of natural capacity, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence. Smith vs. Tebbetts, 36 L. J. 97; 16 W. R. 18.

The term "unsound mind" includes every species of unsoundness. Willett vs. Porter, 42 Ind. 250.

A "sound mind" is one wholly free from delusion. Tittel's Estate, Myr. Prob. (Cal.) 12.

A person may not be of "sound mind," and yet be of "disposing mind," and capable of making a will. Freeman vs. Easly, 117 Ill. 317.

"Sound and disposing mind" means the power of understanding the nature of the property, the family, and the rest of the will. Sefton vs. Hopwood, 1 F. & F. 578.

Under the statute providing that persons of "sound mind and memory" may make a will, an instruction in those terms can not be complained of because it makes no distinction between "sound mind" and "disposing mind." Keithley vs. Stafford, 126 Ill. 507.

The words "mind" and "memory," as used in the New York statute regarding testamentary capacity, are convertible terms. Forman's Will, 54 Barb. (N. Y.) 274.

"The words 'unsound mind' include every species of mental defect, and are not confined to idiots, *non compotes*, lunatics, monomaniacs, or distracted persons, though so defined by statute. Durham vs. Smith, 120 Ind. 463.

A person may be of "sound mind and memory" though his recollection be impaired. Yoe vs. McCord, 74 Ill. 33; 25 Am. & Eng. Ency. of Law 971.

See West vs. Kroppenberger, 4 C. C. (N.S.) 305; 26 O. C. C. 168.

A person eighty-four years of age who can enumerate all his property without suggestions, etc., and in his instructions in reference to his will, shows himself to be acquainted with its value and disposition, is competent. Revell vs. Warden, 4 C. C. (N.S.) 545; 24 O. C. C. 344.

Mere eccentricity will not be sufficient to destroy power to make a valid will. Ketteman vs. Metzgar, 3 C. C. (N.S.) 224; 23 O. C. C. 61.

What undue influence is sufficient to set aside a will. Hall vs. Hall, 2 O. L. R. 328; 15 Dec. 161.

memory sufficient to know in general, without prompting, the nature and extent of the property of which he is about to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty, and his relation towards them.[59]

Greater capacity than this the law does not demand; less than this is insufficient; and in each case it is a question of fact or of mixed law and fact whether the testator possess the requisite capacity.[60]

Woerner gives the following as the rule: "While the law does not undertake to measure a person's intellect, and define the exact quantity of mind and memory which a testator shall possess to authorize him to make a valid will, yet it does require him to possess mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient active memory to retain all these facts in his mind long enough to have his will prepared and executed; if he has sufficient mind and memory to do this, the law holds that he has testamentary capacity; and even if this amount of mental capacity is somewhat obscured or clouded, still the will may be sustained." [61]

§ 1022. Idiots, imbeciles and lunatics.

Following very closely the facts which constitute a sound mind and memory is the capacity of idiots, lunatics, imbeciles, etc., to make a valid will. Idiots are defined to be persons who are born without reasoning and understanding. As a matter of

Incapacity to make a will is not shown by physical helplessness. Gregg vs. Moore, 23 O. C. C. 534; nor a delusion which does not show lack of testamentary capacity. Foreign Missions vs. Bevan, 17 O. C. C. (N.S.) 275; 2 O. App. 182.

[59] Campbell vs. Carnaham, 13 S. W. 1098; Thompson vs. Ish, 99 Mo. 160.

[60] Page on Wills 114.

[61] Woerner on Admin. 31.

A testamentary disposition should indicate the wishes of a man absolutely free from pains that are incident to death, and rather than the testator's will made under such circumstances should be upheld the law will make a new will for him. *In re* Burrows, 8 N. P. 358.

Want of mental capacity on the part of the testator is not shown by a recital of circumstances and incidents which go no further than to indicate physical weakness, or failure of memory, or mistake of an unimportant character in business affairs, nor because he did not make a will as in the judgment of witnesses he ought to have made. Wilson vs. Wilson, 22 O. C. C. 498.

course a person of that kind could not make a valid will. The trouble in these cases is not whether the person has any intellect but whether he has sufficient intellect, and in order to determine this, we must go back to the definition of what constitutes a sound mind and memory. While there must be intellect, a high grade is not absolutely essential. It is not even necessary that he should possess the average intellect. The fact that the testator was competent to transact the ordinary business of life conclusively establishes his capacity so far as a charge of idiocy or imbecility is concerned.[62]

Imbecility is the same as idiocy except that it is a failure and not a want of mental powers. Senile dementia is merely a form of imbecility applicable to persons in old age. The test here is whether the testator had mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will. If testator does not possess mental capacity of this degree he can not make a will, even if he wrote it out himself, and has carried on business transactions with apparent ability.[63]

But old age alone never deprives a testator of testamentary capacity. Insanity is defined to be a prolonged departure without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health.[64] Of course if a person is insane, he could not be said to be possessed of testamentary capacity. A person might be generally sane and yet seized of an insane delusion which has been defined to be "a false belief for which there is no reasonable foundation."[65] Some Courts have defined an insane delusion as a belief in facts that no rational person would believe.[66]

[62] Page on Wills 120.

[63] Bever vs. Spangler, 93 Ia. 576; Campbell vs. Carnaham,— Ark. —; 13 S. W. 1098; O'Connor vs. Madison, 98 Mich. 183; Norton vs. Paxton, 110 Mo. 456; Clifton vs. Clifton, 47 N. J. Eq. 227; Waddington vs. Buzby, 45 N. J. Eq. 173; Blair's Will, 16 N. Y. Supp. 874; Naple's Estate, 134 Pa. St. 492; *In re* Bowyer's Estate, 166 Pa. St. 630; *In re* Loesor's Estate, 167 Pa. St. 498; McKnight vs. Wright, 12 Rich (S. Car.) 229; Trezevant vs. Rains, 85 Tex. 329; Sehr vs. Lindemann, Mo. (1899), 54 S. W. 537.

[64] Bouvier's Law Dic. "Insanity." Mundway vs. Croft, 3 Curt. Ecc. Rep. 671 (Eng.).

[65] Kimberly's Appeals, 68 Conn. 428.

[66] Duffield vs. Robeson, 2 Harr, (Del.) 375; Nicewander vs. Nicewander, 151 Ill. 156; Orchardson vs. Cofield, 171 Ill. 14.

In an Ohio case, Judge Longworth charged the jury that if the testator did not believe that any woman was virtuous; that all women were prostitutes; that they were created simply for the purpose of gratifying the lusts of man; that they were therefore able to support and maintain themselves out of the wages of sin; and that therefore no provision ought, in any case, to be made for them, and that acting on this belief he gave the bulk of his property to his son and not to his daughters, and that he made this disposition of his property by reason of this belief, then the jury would be justified in finding that his will is void.[67]

It will not be within the province of this work to enter into a discussion of what will constitute imbecility or insanity in its various forms. Somewhat in the same line is drunkenness, delirium, etc., they are all more or less a species of insanity. No matter what the condition of the mind of the testator may have, at some time, been, the question is, what was the condition of the mind of the testator at the time the will was made. If at such time he has a disposing mind and memory, he may make a valid will. It, therefore, follows that a person generally insane might make a valid will; and likewise if a person made a valid will while insane, the fact that he afterwards became sane would not make the will a valid one.[68]

§ 1023. Blind, deaf and dumb persons.

At common law it was held that persons who were deaf, dumb and blind, were not capable of making wills. "They are incapable," says Blackstone,[69] "of having *animum testandi* and their testamentary acts are therefore void." Those who were only deaf and dumb were likewise held incapable of having that understanding which is necessary to make a valid will. From observation of persons laboring under these disabilities, it has been discovered that this common law doctrine is founded

[67] Joslyn vs. Sedam, 2 Bull. 147; Page on Wills 127.

[68] See § 1361 *et seq.*, Gd. of imbeciles, etc.

[69] 2 Blks. Comm. 497.

upon an untruth, and it is now held, that such persons are not to be considered as lacking testamentary capacity.[70]

The question now in reference to such persons is the same as if they were not under such disability; and if it is shown that they have mental capacity, sufficient that they may make a valid will they may do so. Deaf and dumb persons are generally capable of reading, and some few have shown themselves capable of reading, although they were deaf, dumb and blind.[71] There is a chance of imposition when a blind person signs a will, but perhaps no more than where one is unable to read. It is said to be the best test, where a blind person executes a will, that the act must be done in such proximity to the person, that he can by means of his remaining senses, know what is being done.[72]

In executing a will of this character, great care should be taken to convey in some way, the contents of the will to the testator; and the testator by express signs or otherwise, indicate to the witnesses, that he understands and knows what is in the will.

§ 1024. Persons under guardianship.

A suggestive as well as a practical question to Probate Judges and lawyers engaged in probate practice is what effect will an adjudication of guardianship have upon the testamentary capacity of the person adjudged a proper subject of guardianship. Some no doubt would say that a person under guardianship could not make a valid will, but such is not the law.[73]

Such person may make a valid will if he has, at the time his will is made, a testamentary capacity which is required by law in such cases. But the fact of such guardianship is *prima facie* evidence of the party's incapacity, and the adjudication would make a *prima facie* case of the testator's incompetency

[70] Weir vs. Fitzgerald, 2 Bradf. (N. Y.) 42.

[71] Helen Kellar for instance.

[72] See Page on Wills, § 117, p. 138; § 214, p. 234.

[73] Page on Wills 136. Guardianship, for intemperance, does not raise a presumption of testamentary incapacity that might arise from insanity or imbecility. Fagan vs. Welsh, 19 O. C. C. (N.S.) 177.

from the date of the guardianship and during its continuance,[74] and where the guardianship is made on the ground of insanity, very clear evidence is required to overthrow the presumption of insanity arising from such an adjudication;[75] but the record of a guardianship which did not exist for several years after the will was made, is incompetent.[76]

The record of discharge from a guardianship of insanity as cured is also only *prima facie* evidence of such cure.[77] Whether there would be a distinction drawn where the guardian was appointed for some of the other statutory grounds, such as habitual drunkards, etc., is a question without judicial light. It would seem that the presumption ought not to be as strong against the testamentary capacity of a person who is adjudged an habitual drunkard as against one found to be a lunatic.[78]

§ 1025. Not under any restraint.

"Not under any restraint" means that the testator acted in conformity to the conclusions of his own judgment when such conclusions were formed by the free exercise of his reasoning power. Our Supreme Court in passing on this question makes use of the following:

Restrictions are imposed upon none, but all are alike left to the exercise of their own free wills and inclinations in the disposition of their property. The power thus given to dispose of property does not depend upon the disposition thereof, nor is it restricted to those who may employ it only for just and wise purposes; but all upon whom the right is conferred may use it without "any restraint." Indeed, it is contemplated by the statute that this is the only way in which it can be exercised.

[74] Millen vs. Young, 18 C. C. 575; 8 C. D. 394; Page on Wills 478.

[75] Stevens vs. Stevens, 127 Ind. 560.

[76] Entwistle vs. Meikle, 180 Ill. 9.

[77] Page on Wills 479.

[78] § 1538, Incapacity to contract. See § 1511, Effect of finding of disability.

A person weakened by sickness may be capable of making a will if he has sufficient memory to understand fully what he is doing. Stark vs. Cress, 22 O. C. C. (N.S.) 88; 4 O. App. 92; 14 N. P. 545.

Freedom from restraint is essential to the validity of a will. So careful is the law in this respect, that it will not uphold a will that has been induced by restraint upon the testator, whether in the form of fraud practiced upon him, or any other influence that destroys the free exercise of his own will.[79]

It would be inconsistent with the right conferred by the statute, and with the spirit of the construction it has hitherto received, to sanction restraints upon a testator, based alone on the character of the motives or causes that may have induced any disposition of his property that he may make while in the free exercise of his own inclinations and judgment. He may give his property to whomsoever he pleases, and his motives or reasons therefor, so long as he is " not under any restraint," are matters of his own conscience, for which he is not accountable to the law. His will, executed in conformity to the statute, if it be his own, and not in any sense the will of another, cannot be invalidated, however much its provisions may be disapproved by others.

It is claimed, in the proposition under consideration, that the will, upon the facts therein assumed, would be void for " illegal influence." In the solution of the question made by this proposition, much of the difficulty disappears when we consider what " influence," as applied to the invalidation of wills, is " illegal."

Every will, as before remarked, is the result of influences strong enough to produce it. Since, then, it is the policy of the law to secure to every one the right to dispose of his property in accordance with his individual will, that influence alone is illegal which places the freedom of a testator's will under some kind of restraint. If this be so, it follows that it matters not what may be the origin or character of any influence operating upon a testator, if it does not place him " under any restraint." It would seem to follow, also, that it would be equally immaterial how an individual may have acquired an

79 Redf. on Wills 524, 527.

Undue influence over the testator on the part of his second wife is not shown by the fact that her children fared better than a child of a first wife since the second wife was not herself given an undue portion. O'Rourke vs. Kinney, 22 Dec. 56.

Changing a will, even if it makes an unfair and unreasonable disposition of testator's property is alone insufficient to show undue influence. Gregg vs. Moore, 33 O. C. C. 534.

influence over a testator, unless such influence is exerted in a manner that tends to restrain the free exercise of his will in the disposition of his property.[80]

Under this subject of restraint may be included a will that was caused to be executed by practicing a fraud or deceit upon the testator. The question at issue always is, does the paper purporting to be the will of a testator convey or declare the real intention of the testator. If for any reason it does not convey the real intention of the testator, it is not his will. Thus if he was induced to sign a paper which is supposed to be his will, but is not,[81] or by false representations is induced to make a will of a certain character,[82] and likewise if he is under such coercion that he makes what purports to be a will,[83] in all of these cases it must be shown that the power or the undue influence which causes the testator to make his will, are exercised at the time or before its execution. If exercised after its execution no matter how overpowering, even if it goes to prevent the testator from revoking his will when he wishes so to do, it will not be held to affect the disposition already made. Where it is shown that undue influence existed before the will was made it must also be shown that the influence existed up until the time of its execution.[84]

[80] Monroe vs. Barclay, 17 O. S. 302.

"To make a good will, a man must be a free agent. But all influences are not unlawful. Persuasion — appeals to the affections, or ties of kindred — to a sentiment of gratitude for past services, or pity for future destitution, or the like — these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or hopes, if so exerted as to overpower volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats such as the testator has not the courage to resist — moral command asserted and yielded to for the sake of peace and quiet; or of escaping from distress of mind or social discomfort,— these if carried to a degree in which the free play of the testator's judgment, discretion, or wish is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, but not the record of some one else's. Hall vs. Hall, 37 L. J. P. 40; Woerner on Admin. 45.

[81] Page on Wills, 143.

[82] Page on Wills 144.

[83] Page on Wills 154.

[84] Page on Wills 151.

§ 1026. Having property.

Formerly there were limitations upon the power of disposition of property by will, but these have all been taken away until now both in England and America, the right to dispose of property by a will is as broad and comprehensive as the right of disposition while living.[85]

The provisions of our statute would seem to convey the idea that if a person had no property, then he could not make a will, and the reason why such should be the law is very palpable, for if he possess no property there is nothing to devise.[86] However, it would take a very small amount of property to give the right to make a will. Of course, no property can be disposed of by testator's will except such as belongs to him. The line of decision in all such cases is, was it such property that the testator could have disposed of in his lifetime; if it was, then he can convey it by will. Thus if a person was given certain property for support during his life, the accumulation of the income over and above such support could not be devised by him.[87] Neither can a testator by will pass the proceeds of insurance policies upon his own life where the policies are by their terms made payable to specified persons. But if the policy is made payable to his executors or administrators, then it may be disposed of by will or where the name of the beneficiary is left in blank. Neither husband nor wife can by will, without the consent of the other, make such disposition of his real estate as will destroy the dower rights of the other therein. Neither can the husband or wife by will destroy the right of the other to a distributive portion of the personalty.[88] Neither could the right to a year's allowance or property set apart to the widow be affected by a will; such as is provided for under secs. 10654, 10656, General Code.[89]

In some States it is held that the husband could not devise away the rights of the widow or children to have a homestead set apart in the real estate. But these decisions are generally

[85] See § 1030. Definition, etc.: Woerner on Admin. 20.

[86] See § 68.

[87] Page on Wills, 157, 700.

[88] See §§ 327, 939.

[89] See § 310 *et seq.* There is no property in a dead body. Herold vs. Herold, 16 Dec. 303.

upon statutes which give the widow and children a right to a homestead during the testator's life, such that the testator could not dispose of it without the consent of his wife.[90]

In our State there being no restriction upon the power of the husband to sell the same during his life time he would have the power to dispose of the same by will. A legacy might, however, be defeated by the claim of homestead made by the widow, where the personalty was insufficient to pay the same. In such a case, the real estate would need to be sold in order to pay the legacies and in the proceedings to sell such real estate, it would be the duty of the appraisers to set apart to the widow and children the homestead as provided by law.[91] The question has never been passed upon to my knowledge by our Courts.[92]

At common law it was settled that a will could only operate on real property which was owned by the testator at the time that he executed the will. But it is now provided by statute that after acquired property shall pass in the same manner as if held or possessed by him at the time of making the will if such shall appear to have been the intention of the testator,[93] after acquired personalty, could by the common law be disposed of by will.[94] Likewise, estates to commence in the future might be devised,[95] but a mere possibility, such as the hope of an heir to succeed to his ancestor's estate, could not be devised.[96]

§ 1027. May give any person.

At common law there were some limitations upon the capacity of a person to receive a devise or bequest, such as a rule, that an alien could not acquire realty, etc. But such laws have never existed in this country. The only limitations upon the power to receive under a will are those which will be found in the statutes presented in the subsequent sections of this chapter,

[90] Pratt vs. Pratt, 161 Mass. 276.

[91] See §§ 819, 868.

[92] This question is discussed in Page on Wills 160.

[93] § 10579 G. C., § 1191.

[94] Page on Wills 162

[95] See previous § 1013. Page on Wills 165.

[96] Needles vs. Needles, 7 O. S. 432.

where a provision is made against perpetuities, and certain institutions receiving under a will where the will is executed within one year of the testator's death. As a general rule, unless *ultra vires* a corporation can receive property under a will. It has been held that the State may be a beneficiary, but whether the United States may take property by devise is a question upon which the Courts are at variance.[97]

§ 1028. Bequest or devise to charitable purposes, when void. "If a testator dies leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator, gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to this state or to any other state or country, or to a county, city, village, or other corporation, or association in this or any other state or country, or to a person in trust for such purposes, or municipalities, corporations, or associations, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not; such will as to such gift, devise, or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator." [R. S. § 5915.][98]

§ 1029. Corporation and charitable uses.

It will be observed that three things are necessary to constitute a bequest to charitable uses, void. First, the testator must die leaving issue of his body or an adopted child,[99] or the legal representative of either. Second, the will must be made less than one year prior to the testator's decease. Third, the bequest must be for benevolent, religious, educational or charitable purposes, either directly or indirectly. Very little trouble will be experienced in the application of the first two. The latter may sometimes afford considerable ingenuity in determining whether the bequest is made for a charitable purpose.

[97] Page on Wills 174.

[98] § 10504 G. C.

This statute does not include heirs designated under § 8598 G. C., § 1902.

Theobald vs. Fugman, 64 O. S. 473.

See § 1321.

[99] The gift to a religious denomination is a gift to a public charity. First German Church vs. Winkel, 19 Dec. 239.

The above section no doubt had its origin in the statute of mortmain.[100]

The statutes of mortmain were never in force in this country, and with us the corporation may receive property by bequest the same as a private individual, unless expressly prohibited by law.[101]

The object of the limitation that a bequest for the purpose mentioned in the previous section shall be void if not made one year before the testator's death, is to prevent persons interested in such purpose, from, by reason of the testator's dangerous illness and proximity of death prevailing upon him, to make a disposition of his property which he would not otherwise have done.[102]

[100] These statutes are known by the name of the statutes of mortmain, and they applied only to real property; and were introduced during the establishment and grandeur of the Roman church, to check the ecclesiastics from absorbing in perpetuity, in hands that never die, all the lands of the kingdom, and thereby withdrawing them from public and feudal charges. The earlier statutes of mortmain were originally levelled at the religious houses; but the statute of 15 R. II., c. 5, declared that civil or lay corporations were equally within the mischief and within the prohibition; and this statute made lands conveyed to any third person, for the use of a corporation, liable to forfeiture in like manner as if conveyed directly in mortmain.

Kent's Com. 282.

[101] Woerner on Admin. 910; Page on Wills, 172–173; 4 Am. & Eng. Ency. of Law, 235.

[102] The reason of the limitation placed upon the power of the testators, under § 5915 R. S., to devise or bequeath their property to religious, benevolent, educational, or charitable purposes, only in wills executed more than a year before their death, was founded upon a broad public policy; it was for the protection of the testators against the importunities of designing persons, and against themselves, as well as for the protection of their families, and the interest of the State. Folsom vs. Haas, 9 C. C. 474; 6 C. D. 460.

§ 10504 of the General Code, which avoids legacies and devises of the character therein mentioned upon the happening of the specified event, was designed specially for the protection of the children of adopted child of the testator and their representatives, though it inures to the benefit of the collateral heir when the lineal heir survives the testator and then dies. Davis vs. Davis, 62 O. S. 411.

40 Cyc. 1056, 1565, 1947.

It does not apply to a person designated as an heir at law under § 8598 G. C. Theobald vs. Fugman, 64 O. S. 473.

A statute of this character is constitutional,[103] and gifts to charitable uses are to receive the most liberal construction.[104]

These provisions in reference to benevolent, religious, educational or charitable purposes seem to have their origin in an English statute which defined what should constitute a valid charitable trust.[105] Our statute is more specific and includes benevolent, religious, and educational, together with charitable purposes. The support and propagation of religion is clearly a charitable use.[106] Thus devises for the erection of buildings for public worship or keeping them in repair are upheld as charitable devises. Devises in aid of the poor and destitute are al-

[103] Patton vs. Patton, 39 O. S. 590.

[104] Zanesville Canal and Man. Co. vs. Zanesville, 20 O. 483.

A fund given to establish "a school in the town of Zanesville for the poor children of said town," is not limited in its benefits to the children of parents residing in that locality which constituted the corporate of Zanesville at the decease of the testator. The charity will be administered for the benefit of poor children in the town of Zanesville, according to the most general and popular sense of the term. 20 Ohio 483.

To same effect, concerning same fund. McIntire vs. Zanesville, 17 O. S. 352; 9 O. 203.

[105] The general objects which come within the description of "charitable uses," and which may therefore constitute a valid charitable trust, were enumerated in the "statute of charitable uses," passed in the reign of Queen Elizabeth, as follows: "The relief of aged, impotent, and poor people, the maintenance of mained and sick soldiers and mariners; the support of schools of learning, free schools, and scholars of universities; repairs of bridges, ports, havens, causeways, churches, sea banks, and highways; education and preferment of orphans; the relief, stock, and maintenance of houses of correction; marriage of poor maids; aid and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives; aid of poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes." It will be seen that this list omits some most important and familiar charitable objects — as, for example, the support and propagation of religion. The English and American courts have never regarded this enumeration as exhaustive, but as designed to be merely illustrative. Numerous objects analogous to those mentioned in the statute, are held to be charitable. The doctrine is settled that all particular objects, embraced within the general spirit, intent, and scope of the statute, are to be considered as charitable, unless they violate some rule of public policy, or the provisions of some positive statute. Pomeroy's Equity, 586.

[106] Pomeroy's Equity, 587.

ways upheld as charitable devises if the other requisite elements of a charity are present.[107]

The beneficiaries may be limited to the poor of a certain area,[108] and in some States the beneficiaries may be restricted to the poor of a certain church,[109] or to the poor of a non-charitable association.[110] But in some States a devise to the poor of an unincorporated church or association is held void as too indefinite.[111]

The other use of specific designation is charity to education.[112] Education is held to be a charitable use, where the recipients of the gift are so indefinite as to render the grant charitable.[113] Thus, a devise to a State to establish a permanent

[107] *In re* Geck, 69 L. T. N. S. 819 (a devise "to the poor"). Duggan vs. Slocumb, 83 Fed. 244; Wood vs. Paine, 66 Fed. 807; Strong's Appeal, 68 Conn. 527 (devises to the "worthy poor of said town"); Phillips vs. Harrow, 93, Ia. 92 (a devise to the "poor and needy people" of a given city "who are dependent on their own labor for a livelihood"); Doughten vs. Vandever, 5 Del. Ch. 51; Hunt vs. Fowler, 121 Ill. 269; Dascomb vs. Marsten, 80 Me. 223; McAllister vs. Burgess, 161 Mass. 269; 24 L. R. A. 158; Bullard vs. Chandler, 149 Mass. 532; 5 L. R. A. 104; Kelly vs. Nichols, 18 R. I. 62; 19 L. R. A. 413; Tichenor vs. Brewer, 98 Ky. 349; 33 S. W. 86; Fox vs. Gibbs, 86 Me. 87; Wardens, etc., of St. Paul's Church vs. Attorney General, 164 Mass. 188; Chadwick vs. Livesey, 56 N. J. Eq. 453; 41 Atl. 1115, affirming 55 N. J. Eq. 204; Trim's Estate, 168 Pa. St. 395 (a devise "for the benefit of the poor" of a named township); Staines vs. Burton, 17 Utah, 331; 53 Pac. 1015.

[108] See some cases especially quoted in last note; and Urmey vs. Wooden, 1 O. S. 160; Scott vs. Trustees, 39 O. S. 153; Trim's Estate, 168 Pa. St. 395; Sheldon vs. Stockbridge, 67 Vt. 299; Sawtelle vs. Witham, 94 Wis. 412; 69 N. W. 72.

[109] Bird vs. Merklee, 144 N. Y. 544 (a devise to certain named churches "according to the number of members to buy coal for the poor of said churches"); O'Neal vs. Caulfield, 5 N. P. 149; 8 Dec. 248.

[110] Willey's Estate, 128 Cal. 1; 56 Pac. 550 (a devise to the "widows' and orphans' fund" of a non-charitable association); Guilfoil vs. Arthur, 158 Ill. 600.

[111] Yingling vs. Miller, 77 (Md.) 104; 26 Atl. 491; Page on Wills, 755.

[112] Pomeroy's Equity, 590; Woerner on Admin. 925.

[113] Birchard vs. Scott, 39 Conn 63; Doughten vs. Vandever, 5 Del Ch. 51; Fox. vs. Gibbs, 86 Me. 87; Grand Prairie Seminary vs. Morgan, 171 Ill. 444; John's Will, 30 Ore. 494; Attorney-General vs. Parker, 126 Mass. 216; De Camp vs. Dobbins, 29 N. J. Eq. 36; Clement vs. Hyde, 50 Vt. 716; Dodge vs. Williams, 46 Wis. 70; Almy vs. Jones, 17 R. I. 265.

school fund is a charitable devise;[114] so a devise for the benefit of public schools generally is a charitable devise, even though taxation provides such schools already;[115] so is a devise to existing educational institutions of a private nature,[116] and to parochial schools,[117] and a devise to trustees for paying the tuition of poor children;[118] so are devises to educate young men, one at a time, for the priesthood.[119] Public libraries are recognized by the Courts as a most valuable means of education, and devises for such purposes are upheld as charitable.[120] A devise to maintain a cemetery is generally upheld as charity.[121] Likewise the establishment of a public park or playground was held to be a charitable devise. So have bequests for the advancement of woman suffrage been upheld as valid, and a devise for the purpose of promulgating the views of Henry George as to land ownership is upheld as valid.[122]

Where bequests are void because made within one year of a testator's death the heir at law is not the only party who may

[114] Sears vs. Chapman, 158 Mass. 400; Almy vs. Jones, 17 R. I. 265.

[115] John vs. Smith, 91 Fed. Rep. 827; John's Will, 30 Ore. 494; 47 Pac. 341; 36 L. R. A. 242; Page on Wills. 753.

[116] Abend vs. Endowment Fund Commission, 174 Ill. 96; Curlings vs. Curlings, 8 Dana (Ky.) 38; Blackburn vs. Tucker, 72 Miss. 735; 17 So. 737 (though void as to realty, yet valid as to personalty).

[117] Hanson vs. Little Sisters of the Poor, 79 Md. 434.

[118] Dye vs. Beaver Creek Church, 48 S. Car. 444.

[119] O'Neal vs. Caulfield, 5 N. P. 149; 8 Dec. 248 (Gen. Edu.); *in re* Rymer (C. A.), (1895), 1 Ch. 19; 64 L. J. Ch. (N. S.) 86 (Theological Seminary); Barnard vs. Adams, 58 Fed. Rep. 313 (2 at a time); Field vs. Drew Theol. Sem., 41 Fed. 371.

[120] Page on Wills, 754.

[121] Page on Wills, 758.

[122] Page on Wills, 759.

The following Ohio cases have in one way or the other considered this question. Thus in McIntyre vs. Zanesville, 17 O. S. 352. The one to be applied for the support of a poor school. See also same case, 9 O. 213.

Another case is a Board Ed. vs. Ladd, 26 O. S. 210. Where property has been devised for a charitable purpose, the Court of Equity will see that the trustees perform their business. Cincinnati vs. McMicken, 6 C. C. 188; 3 C. D. 409.

As to when a Court of Chancery will supply the defect, see Urmey vs. Wooden, 1 O. S. 160.

The trustees of a township may receive the bequest. Scott vs. Marion Township, 39 O. S. 153.

So may County Commissioners. Christy vs. County Comm'rs, 41 O. S. 711.

object to such bequests, but any party interested in the estate may do so.[123]

§ 1030. Entailed estates pass to issue of first donee. "No estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." [R. S. § 4200.][124]

§ 1031. Rule against perpetuities.

The above section is the law in Ohio against what is commonly known as a law against perpetuities. This term is defined as follows: In the technical sense a perpetuity is a grant of property "wherein the vesting of an estate or interest is unlawfully postponed; and they are called perpetuities not because the grant as written would make them perpetual, but because they transgress the limits which the law has set in restraint of grants that tend to a perpetual suspense of the title of its vesting."[125]

Our Supreme Court in passing upon this question, makes use of the following language: "If the devise in question is not within the limitation, it is valid under the general authority. This supersedes inquiry as to the scope of the rule of the common law upon the subject. The statute does not contemplate mere possibilities. It forbids devises to persons who are in fact more remote than the immediate issue of persons in being at the time of the testator's death. That further issue of the first donee in tail might come into being, is immaterial."[126]

[123] Davis vs. Hutchings, 15 C. C. 174; 8 C. D. 52.

[124] § 8622 G. C.

Where an estate is devised to certain trustees, and their successors, the limitation over is void. Miles vs. Fisher, 10 O. 1.

Where land is conveyed "to A, the heirs of his body and assigns forever," the grantee takes an estate tail, and under the statute the issue of A take an absolute estate in fee. Pollock vs. Speidel, 17 O. S. 439; 27 O. S. 86.

[125] Page on Wills, 728.

[126] Phillips vs. Herron, 55 O. S. 478.

Under § 8622 G. C., the issue of the donee in tail during the life of such donee, has no interest or estate in the lands inherited that he can alienate. Dungan vs. Kline, 7 O. L. R. 578; 81 O. S. 371.

As to sale of entailed estates, see § 11925 G. C.

The expression, "time of making a will," is construed to mean the death of the testator, and the words, "immediate issue or descendants," includes grandchildren of one in being where the parent of such grandchildren, who was the child of such person in being, dies before such person in being,[127] and a person *in ventre sa mere* is, of course, a person in being within the meaning of the statute.[128] This rule is applicable to all persons holding property, except a charitable devise, as to such a devise it is held that the statute against perpetuities does not prevail.[129]

There seems to be no limitation in Ohio as to personalty,[130] yet an inferior Court held that the common law rule against perpetuities as to personalty is in force in Ohio.[131]

[127] McArthur vs. Scott, 113 U. S. 340; Stevenson vs. Evans, 10 O. S. 307; Turley vs. Turley, 11 O. S. 173.

[128] Phillips vs. Herron, 55 O. S. 478; Page on Wills, 738.

[129] O'Neill vs. Caufield, 5 N. P. 149; 8 Dec. 248; Page on Wills, 747; Woerner on Admin. 919.

A devise to one for life and then to his children, or to the children lawfully begotten of the body of such children, *held*, the remainder is not void for uncertainty. The designation is of persons in being at the end of the life tenancy, either children, or the children of predeceased children, and not of a succession, first to children, and then to their children. Stevenson vs. Evans, 10 O. S. 307.

A will may be good in part and void in part. Limitations illegal as creating entails or perpetuities do not invalidate the rest of the will. Mears vs. Mears, 15 O. S. 90, 95.

That in a devise of successive estates some are void under our statute against perpetuities, R. S. 4200, does not invalidate the intermediate ones, which are not too remote. Hatch vs. Hatch, 31 B. 57.

[130] Smith vs. Lowenstein, 50 O. S. 346.

[131] Dayton vs. Phillips, 28 Bull. 327.

No interest, subject to a condition precedent is good, unless the condition is to be fulfilled, if at all, within twenty-one years after some life, or lives, in being at the creation of the estate. The number of lives upon which the vesting of the estate depends is immaterial if all the lives are in existence at the time the estate is created. To this length of time is added the period of gestation, whenever gestation in fact exists, whether it is the gestation period of a person in *ventre sa mere*, who is the person in being whose life determines the estate, or the gestation period of the person whose minority is the twenty-one year period after a life in being. By the wording of the rule it can not apply to invested estates; but it does apply to every sort of property right other than a vested interest, such as a contingent remainder, or an executory devise; and it includes both legal and equitable estates. Page on Wills 730.

See Pollock vs. Speidel, 27 O. S. 86; Harkness vs. Corning, 24 O. S. 416; Poor vs. Hart, 11 N. P. 49;

§ 1032. Contract to make a will.

While our Supreme Court has declared that contracts by an owner in respect to a disposition of his property to take effect after his death, and different from such as the law would prescribe in a case of intestacy, are of no validity unless made through the medium of a last will and testament,[132] yet the right to make a contract agreeing to make a certain disposition of one's property has on several occasions been upheld by the same Court.[133] It must, however, be in writing.[134]

Our Court has not only recognized the validity of such contracts, but has sustained an action against the heir to compel a specific performance of the contract.[135] The enforcement of such a contract does not prevent the will itself, if there be one made, from being revocable. If it is irrevocable it is not a will. A will made in pursuance of a contract to make a will, as far as the Probate Court is concerned, should be treated as a will, and whatever objections are made thereto, must be made in some other tribunal. The remedy that a person has against the testator must be an action at law against his estate for damages, for breach of contract, or a suit in equity, to have the heirs and next of kin, or the beneficiaries under the will, if the testator has left another will, declared trustees for the promisee,[136] or as above stated, a suit for specific performance. It is said "that while such contracts are enforceable as valid contracts, they do not stand upon a special favorite footing. In order to be enforceable they must have all the essential elements of any valid contract.[137] The contract to make a will must, in order to be enforceable, be clearly proved and be certain and unambiguous in all its terms.[138]

21 Dec. 260; Naylor vs. Loomis, 9 C. C. 96; 6 C. D. 41; Harris vs. Maholm, 20 N. P. 439; 28 Dec. 228.

A devise to a son "and his heirs to the third generation," is an entailment within the meaning of § 6222 G. C. Under the provisions of that section the son takes a life estate in fee simple. Naylor vs. Loomis, 9 C. C. 96; 6 C. D. 41.

132 Phipps vs. Hope, 16 O. S. 586; 40 Cyc. 1134.

133 Phipps vs. Hope, 16 O. S. 595; Emery vs. Darling, 50 O. S. 160; Norris vs. Clark, 3 Bull. 994; Shaham vs. Swan, 48 O. S. 25; Hopple vs. Hopple, 3 C. C. 102; 2 C. D. 59.

134 Kling vs. Bordner, 45 Bull. 442.

135 Emery vs. Darling, 50 O. S. 160.

136 Page on Wills, 79.

137 Page on Wills, 80.

As to the various kinds of consideration which will support a contract, see Page on Wills, § 72, p. 80.

138 Shaham vs. Swan, 48 O. S. 25; Page on Wills, § 73, p. 83.

A question which frequently arises in these cases is, whether the action comes within the statute of frauds, and the Courts hold that it does;[139] and also hold that where the contract is entire and some part of the matter agreed to, if it stood alone, would not be within the statute, yet in such case it all comes within the provisions of the statute of fraud.[140]

There is some controversy among courts, as to what will constitute a part performance that will take it out of the statute of frauds.[141] Of course, in such case the death of the promisor not having made the provisions agreed upon, will constitute the breach of the contract. The promisee has several remedies. He may sue on the contract, in which case the measure of damages will be the value of the property which by the terms of the contract was to have been devised or bequeathed to him. Or he may treat the contract as rescinded and sue on *quantum meruit* for the reasonable value of his services,[142] or he may maintain an action in specific performance.[143]

The right of such an action accrues at the death of the testator and the statute of limitation must be calculated from that date.[144]

§ 1033. Statutory meaning of certain words as applied to wills. "In the interpretation of part third, unless the context shows that another sense was intended, the word 'person' includes a private corporation; 'writing' includes printing; 'oath' includes affirmation; 'of unsound mind' includes every species of mental deficiency or derangement; 'bond' includes an undertaking; 'and' may be read 'or,' and 'or' read 'and,' if the sense requires it. Words in the present tense include a future tense, and in the masculine gender include the feminine and neuter genders. Words in the plural include the singular, and in the singular include the plural number. This enumeration shall not be construed to require a strict construction of other general words in this part." [R. S. § 4947, 5913.][145]

Definition of terms. "In this title the term 'will' includes codicils." [R. S. § 5913.][145*]

[139] Shaham vs. Swan, 48 O. S. 25.

[140] Shaham vs. Swan, 48 O. S. 25.

[141] See discussion of this subject, § 75, Page on Wills, 86.

[142] Page on Wills, 90.

On promise to pay by will, the damages are the value of the services when rendered, but without interest until after the death. It is a question of fact whether services are worth more when paid for in the future. Norris vs. Clark, 3 Bull. 994.

[143] Emery vs. Darling, 50 O. S. 160; Page on Wills, 91; 36 Cyc. 436.

[144] Page on Wills, 97.

See also Schouler on Wills, 451, 454.

[145] § 10213 G. C.

[145*] § 10502 G. C.

CHAPTER LV.

WILLS. EXECUTION.

§ 1034 How will made.
§ 1035 In writing.
§ 1036 Will being on several pieces of paper.
§ 1037 Signed at the end.
§ 1038 By party making the same.
§ 1039 Signed by other person.
§ 1040 Attestation.
§ 1041 Subscription.
§ 1042 In presence of testator.
§ 1043 Two or more competent witnesses.
§ 1044 Effect of a person being a devisee or legatee.
§ 1045 Who saw testator subscribe or heard him acknowledge.
§ 1046 Suggestions for drawing wills.
§ 1047 Form of will.

§ 1034. How will made. "Except nuncupative wills, every last will and testament must be in writing, but may be handwritten or typewritten. Such will must be signed at the end by the party making it, or by some other person in his presence and by his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge it." [R. S. § 5916.][1]

§ 1035. In writing.

In our State there can be no valid will except it conforms to the provisions of the above section. Except nuncupative wills, every will must be in writing. It may be written by a pen as in ordinary writing, or it may be printed or lithographed or typewritten.[2]

"In writing," as used in this section, would include a will which was partly printed and partly written.[3]

[1] § 10505 G. C.

A faulty execution of a will may be remedied by a codicil.

See § 1177.

See Sears vs. Sears, 77 O. S. 104. In the interpretation of the statute the intention of the legislature controls.

[2] Page on Wills, § 159, p. 181.

[3] Rousch vs. Wenzel, 15 C. C. 133; 8 C. D. 141.

A testamentary clause in a will disposing of the testatrix's property after death, in case she does not recover, is a contingent will, and valid if recovery does not happen. Underwood vs. Rutan, 65 Bull. 268; Supreme Court (1920); 101 O. S. —.

A will may be executed on the Lord's day. Bennett vs. Brooks, 9 Allen (Mass.) 118.

It may also be written in lead pencil,[4] and it may be written on any material which can be used to write upon. But it has been held that a will written on a slate is so easily altered, that it should not be recognized as a valid will.[5]

Where, in accordance with the custom of a country, a will was written in a book, it was held proper, and if the book could not be produced an authenticated copy could be admitted to probate.[6]

The will may be written in any language; it is not necessary that it be the English language nor that it be a language with which the testator is acquainted, but it must be shown that he understood what the will contained. If a will was written in a language that the testator did not understand, it seems that the burden would be upon the person propounding the will to establish the fact that the will was made in conformity to the idea of the testator. A will ought also to be written in the simplest and plainest words that express the intention of the testator, and the person drafting the will should be careful to use the words that will carry into effect the ideas of the testator.[7]

§ 1036. Will being on several pieces of paper.[7a]

A will is valid if written upon several pieces of paper.[8] It is valid even if the testator's signature is on a piece of paper separate from the dispositive clauses of the will; and it is held that it is not necessary that these papers be fastened together if their sense connects them. But it must be shown from the several pieces of paper themselves that they constitute but one entirety.[9]

[4] Harris vs. Pue, 39 Md. 535; Myers vs. Vanderbilt, 84 Pa. St. 510; Knox Estate, 131 Pa. St. 220.

[5] Reed vs. Woodward, 11 Phila. 541.

[6] Faber's Estate, 7 N. P. 561; 5 Dec. 575.

[7] Page on Wills, 182.

[7a] Cited Chaney vs. Coulter, 29 O. C. C. 186.

See § 1046.

[8] Bond vs. Seawell, 3 Burrows, 1773; Barnewall vs. Murrell, 108 Ala. 366; St. John's Parish vs. Bostwick, 8 App. D. C. 452; Jones vs. Habersham, 63 Ga. 146; Harp vs. Parr, 168 Ill. 459; Ela vs. Edwards, 16 Gray (Mass.) 91; Burnham vs. Porter, 24 N. H. 570; Grubb, Estate of, 174 Pa. St. 187; Ginder vs. Farnum, 10 Pa. St. 98; Wikoff's Appeal, 15 Pa. St. 281; Gass vs. Gass, 3 Hump. (Tenn.) 278.

Where a disposition clause is placed in the margin before it is signed by the testator, this will make the will void, as it is not then signed at the end. *Fac simile* of will, on page 398, of Irwin vs. Jacques, 71 O. S. 395.

The mere fact that the testator writes the will himself will not do away with the requirement that he must sign at the end. Sears vs. Sears, 77 O. S. 104. For criticism of this case, see 5 Bull. 137.

Where a will is written on a blank form, and there is a space of twenty-one inches between the last disposition part and signature, it is signed at the end. Mader vs. Apple, 6 N. P. (N.S.) 592; 80 O. S. 691; reversing 18 Dec. 301.

See Cruft vs. Wilber, 9 N. P. (N.S.) 161; 19 Dec. 421.

[9] Page on Wills, 182, § 161.

From the proposition that a will may be written on several pieces of paper, follows the doctrine that a document or writing may be made a part of the will by reference, the same as if copied in the will. "In order to incorporate," says a distinguished author,[10] "three things are necessary. 1. The will itself must refer to such paper to be incorporated (a) as being in existence at the time of the execution of the will, and (b) in such a way as to reasonably identify such paper in the will, and (c) in such a way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof. Thus a paper placed with a will is not a part thereof where the will shows no intention to incorporate it.

"2. Such document must, in fact, be in existence at the time of the execution of the will. If this were not the rule testator could, by executing a will and incorporating therein a document to be executed in the future, create for himself a power to dispose of his property in a testamentary manner by an instrument not executed in accordance with the statute of wills.

"3. Such instrument must correspond to the description thereof in the will and must be shown to be the instrument therein referred to." *

§ 1037. Signed at the end.

It is the obvious and general recognized object of the Legislature in requiring a testamentary paper to be signed at the foot or end thereof, to prevent the possibility of fraudulent interpolation between the will and the signature of the testator after execution.[11]

The general meaning attached to the requirement that the testator must sign at the end, means that he must sign at the end of the dispositive parts of the will; and it has been held to comply with the law where the testator signs either before or after the attestation clause. And where there are blanks in a

[10] Page on Wills, 183, § 162.

[11] Judge Dickman, in Baker vs. Baker, 51 O. S. 217.

A will executed on Sunday is valid. See Gedding vs. Schmid, 37 Cyc. 565; 20 O. C. C. (N.S.) 142.

See Thompson on Wills, § 152, where authorities are cited on incorporation by reference. Newton vs. Seaman's Friends, etc., 130 Mass. 91.

Where in the physical construction of a will, a piece of paper, ruled and very similar in all respects to the body of the paper, has been adhered to the face of the sheet, and underneath this attached paper originally there were written other words which are entirely covered and obscured by it, and there is no testimony showing when or for what purpose this change was made in the original construction of the paper, but the words upon the attached slip are proved to have been written by the testatrix and are so framed in the will with reference to what precedes and follows that the literary construction is complete, it will be presumed that the paper,

will, even though such a blank would permit interlineation, yet a will signed after the last clause of such an instrument is held to be signed at the end thereof.[12]

Although the Courts do not look with favor on wills executed in this manner, for wide blanks in a will permit the very thing which it is the object of the statute to prevent, to-wit, interlineation. Yet where the writing is incorporated by reference, and the original writing is signed at the end, this complies with the statute. It is sometimes a matter of no little difficulty where the writing is placed on a will after the testator's signature, to determine whether such writing invalidates the entire will because it is not signed at the end.

In an Ohio case it was held, where a decendent in his lifetime drew a will and signed it, but without having it witnessed, and afterwards added thereto a clause making an additional devise of the property mentioned in the will, and then caused it to be subscribed by two witnesses, but without again signing the same himself " at the end thereof," as required by the " act relating to wills:" that the whole instrument was invalid as a last will and testament.[13]

Generally in such cases if the writing added was a part of the original will, as intended by the testator, subsequent matter written thereon will not affect the original will unless it is signed and witnessed as a codicil. In such a case the question of the intention of the testator must govern. If the part added to the will after the testator's signature, even though made at the time of its execution, does not make a disposition of his property, the same will not affect the will. Thus it has been held in our State that where the testator wrote after his signature, "My sister-in-law is not required to give bond when probated," that it did not invalidate the will.[14]

Where, after signing his name the testator added a clause, directing the executor to sell certain realty, and devote the proceeds to pay the debts and legacies and then the witnesses signed, it was held that the will was invalid as not signed at

when it was intended to be made final by subscription and attestation, contained the attached slip in question. Estate of Nicholson, 49 Bull. 379; reversed, 72 O. S. 104.

Where an interlineation was made after the will was subscribed, but before it was published or the signature acknowledged, the will, with the interlineation, was signed at the end though the testator did not again subscribe his name thereto. *In re* Buffington's Will, 88 Atl. 1093 (N. J., 1914).

[12] Page on Wills, §§ 183 and 184, p. 202.

[13] Glancy vs. Glancy, 17 O. S. 134.

[14] Baker vs. Baker, 51 O. S. 217.

The recent case of Irwin vs. Jacques, 71 O. S. 1905, will no doubt be the leading case in Ohio, as to what constitutes signing at the end. In this case, at the suggestion of the testator, and before he signed the same, a clause disinheriting any

the end.[15] In our State, however, the Court would probably have held that such a direction did not invalidate the entire will.[16]

§ 1038. By party making the same.

It has always been absolutely essential that the testator must in some way sign the will. To write out "One's own name in full," says Schouler, "is doubtless the safest course as well as the most natural; for such compliance best indicates a rational mind, free will, and physical power at the date of execution. But, undoubtedly, the making of his mark or cross by the testator will satisfy the statute; and that, too, as various cases rule, notwithstanding he was able to write at the time.[16*]

The testator may sign his name by writing it out in full or by abbreviating it, or by writing the initials of his Christian name, or by using an assumed name where not done with intent to deceive. Misspelling the name signed does not invalidate the will. The signature may be in ink or with a pencil, or with a stamp, or a seal.[17]

The testator may sign by mark if he is in good health. However, it is not a safe thing to do, as it may give rise to suspicions of fraud or forgery;[18] but such a mark must be made with the intention of being considered the signature of the testator.[19]

If the name by the mark is written incorrectly, such mistake does not invalidate the will. Where a person guides the course of a pen or traces his own name while the name is written by another, this would be his own signature and made by himself. If the right instrument is intentionally signed as one's own will, a mere misnomer or discrepancy of signature does vitiate the paper, provided its genuineness be duly established. As where the will of T. D. describes the testator throughout by

child that should contest the will, was written on the margin, opposite to the name of the testator, and it was held the will was not signed at the end, although it was admitted that the testator intended it to be a part of his will.

15 *In re* Blair, 152 N. Y. 645.

16 See Page on Wills, 203, § 186; Schouler on Wills, 312; Woerner on Admin. 64.

See note § 1036. In the case of Sears vs. Sears, 77 O. S. 104, the testator attached her name in the attestation clause and not after or immediately below the testimonium clause and it was held that the will was signed at the end. The holding goes to the extreme and justly subject to the criticism made in 53 Bull. 137.

16* Schouler on Wills, 303.

17 Page on Wills, 191, § 172.

18 Page on Wills, 193.

19 But where testator tried to sign the will himself, and was unable to do so from weakness, a small line made by him in such unsuccessful attempt, not intended by him as a signature, is not a mark within the meaning of the law. Page on Wills, 192.

a wrong name, such as C. D., and he signs it by his right one, or where against the testator's mark a wrong name is written, the will describing him by the right one.[20]

§ 1039. Signed by another person.

If the testator for some reason is unable to attach his signature, it may be done by some other person in his presence, and by his express direction. It will be observed from the statute, that two things are essential in thus attaching the signature of a testator: it must be done in his presence and by his express direction. In the absence of statute, the signature could not be so attached. As to what shall constitute his presence, will be discussed under a subsequent section when treating of how a will must be witnessed. The same rules apply in order to constitute "in the presence of the testator" in both cases. As to what shall constitute an express direction, it must be such action either by words or otherwise on the part of the testator, as will convey to the person who is to attach his signature, the idea that it is the will of the testator to which the testator wishes such person to attach his signature. Thus it was held that where an attorney had drawn a will and then said to the testator, "you can make your cross, and I can sign for you if you so direct," and the testator said, "very well; do so," that this was a sufficient request.[21]

Under our statute there need be no special reason why the signature is attached by another person, although, as was said in a previous section, when a person is able to attach his own signature, and does not, it gives suspicion of fraud. There is no particular limitation as to who may attach such signature in our State.[22]

[20] Schouler on Wills, 310; Woerned on Admin. 63.

Where a testatrix did no writing in the presence of the witnesses of her will and they did not observe her signature thereto because the paper was folded in such a manner that they could not see whether it was signed or not, but both were perfectly cognizant of the fact that they were subscribing and attesting a will and not any other document, and the testatrix's name is written at the end of the paper writing, but so placed as to be within a blank space in the printed attestation clause immediately under dotted lines intended for the signature, and the will was not otherwise subscribed or acknowledged, said signature is signed at the end thereof in compliance with the requirement of § 5916 Rev. Stat. Estate of Nicholson, 49 Bull. 379 (1904).

[21] Page on Wills, 195, § 176.

[22] See Trembly vs. Trembly, 11 Bull. 59, where it was held that a witness to a will could write the name of the testator.

"The best method in signing a will in such a case," says Page,[23] "is to write the name of testator, followed by the statement that it was written by subscriber, naming such subscriber, in the presence of testator and at his express request. But such accuracy of statement is not indispensable unless demanded by the provisions of the statute."

It has been held that if the name of the testator be written by another in the will and a place is left for the testator to make his mark, which is not done by the testator, that this would not invalidate the will, if it was shown that the testator had adopted such signature as his own.[24] The fact of such signing and the authority to sign, when done in the absence of the attesting witnesses, may be shown by the acknowledment to the witnesses, or by other competent testimony, or may be presumed from the facts and circumstances of the case.[25]

§ 1040. Attestation.

The signature of the testator, whether made by himself or by another for him, must be attested and subscribed by two or more witnesses, etc. Unless statute required, it would not be necessary that the will be attested or subscribed by witnesses.[26] Some Courts have been inclined to treat these two words, attest and subscribe, as synonymous,[27] but I think it may be safely

[23] Page on Wills, 196, § 178.

[24] Cleveland vs. Spilman, 25 Ind. 95; Page on Wills, 198, § 179, provided it is signed at the end.

[25] Haynes vs. Haynes, 33 O. S. 598.

Where a will has been signed for the testator by another person, in his presence and by his express direction, in the absence of the attesting witnesses, the acknowledgment of the fact by the testator in the hearing of the witnesses, which is requisite, is not required to be made in any particular form of words of any specified manner; but, if by signs, motions, conduct, or attending circumstances the attesting witnesses are given to understand, by the testator, that he acknowledges the signature thereto as his, and the instrument itself as his will, it is sufficient. Haynes vs. Haynes, 33 O. S. 598.

[26] Page on Wills, § 188, 207.

[27] "It would be difficult, no doubt, to satisfactorily define that element in the attestation of a will which is not also present in the mere subscription to a will. No physical act is required in the one which is not also required in the other, and it is not clear what mental act or fact appropriate to the one is absent from the other, and the definitions of the most recent lexicographers do not make it quite perspicuous. The Century Dictionary defines an attesting witness to be a person who signs his name to an instrument to prove it and for the purpose of identifying the maker or makers. The Standard Dictionary defines attestation to be the subscription by a person of his name to a written instrument to signify that the same

said from the syllabus of the case of Keyl vs. Feuchter,[28] that they are not to be treated as synonymous in this State. Attestation is the act of perceiving the performance of the various acts necessary to the legal execution of a will; and while our statute has not in expressed terms provided that the witness must know that the paper he is signing is a will, yet our court has followed those courts which hold that in order to constitute a valid execution, the witness must know that it is a will.[29] In other words, our court has declared, although the statute does not in express terms, so require, that the testator must make a publication of his will, and by attesting the will, therefore, the witness attests that the paper he signs is the will of the testator, and not merely that it is the signature of the testator; and further he also attests that the testator is of legal age, has a sound mind and memory and not under any restraint.[30]

Draftsmen in making a will too often neglect this important feature, and witnesses often sign such an instrument when they think they are only attesting the signature. The distinction between attestation and subscription has been clearly drawn by the Supreme Court of Kentucky.[31] It certainly is very

was executed in his presence, or that it is correct. Since it is well settled in this state that it is not necessary to the validity of a will that the witnesses at the time when they attest it, shall know the nature of the instrument that they are attesting (Allen vs. Griffin, 69 Wis. 529), it is not clear what, if anything, attestation is intended to add to the mere fact of subscription." Skinner vs. American Bible Society, 92 Wis. 209; Page on Wills, 209.

[28] 56 O. S. 424. Recently the Supreme Court has held that it is not necessary for the witness to know that it is a will, the second syllabus being: "Where two subscribing witnesses have seen a testatrix subscribe her name to a will by directing another to sign her name thereto in her presence, the testatrix attaching her mark thereto, and the signature so made is then attested and subscribed by said witnesses in the testatrix's presence, the will is properly executed. In such case it is not necessary that the testatrix declare that the instrument is her will or that she has signed it." Keyl et al vs. Feuchter et al., 56 Ohio St. 424, distinguished Underwood vs. Rutan, 65 Bull. 268; 101 O. S. — (June 8, 1920).

[29] Keyl vs. Feuchter, 56 O. S. 424; Missionary Society vs. Ely, 42 Bull. 273; Page on Wills, 247, § 227.

[30] See Page on Wills, 228, § 208.

[31] "To attest the publication of a paper as a last will," observed Robertson, C. J., of Kentucky, in 1840, "and to subscribe to that paper the name of the witnesses, are very different things, and are required for obviously distinct different ends. Attestation is the act of the sense; subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification. Schouler on Wills, 330.

Acknowledgment by the testatrix of either the will itself, or of her signature, is a sufficient acknowledgment or publication of the will, as required by § 5916 Rev. Stat. Keyl vs. Feuchter, 56 Ohio St. 424, explained. Estate of Nicholson, 49 Bull. 379.

questionable whether a person can attest a will without being conscious of the fact that the paper to which he attaches his signature is a will.[32]

§ 1041. Subscription.

Subscription is the act of the attesting witness in signing his name upon the will to identify the instrument thus attested. This subscription, like that of the testator's, should be made in his full name, but such is not indispensable. The witness may sign his initial or an assumed name, unless such name is assumed for the purpose of deceit or a witness may sign by his mark,[33] but the statute does not permit the signature of a witness to be made by another. This does not prevent the witness from signing by mark or even tracing his own name, for this is not the signature of another, but the signature of the witness.[34]

It is not required that the witnesses sign at any particular place on the will, but it must appear that their names were signed with the intention of attesting and subscribing the instrument. Of course, the witnesses cannot sign their names before the testator signs his, unless the signature of the testator and witnesses are all made at the same time and form one transaction.[35]

It is usual in the making of a will to add a full attestation clause.[36] While it is not indispensable, it is said,[37] "a full attestation clause is of the highest value. It removes all doubt as to the *animus attestandi,* and on proof of the signature is

[32] An inferior court has held that if the witness attests the signature of a party to an instrument, although he does not know that it is a will, that it will be sufficient to entitle the will to probate. *In re* Williamson, 6 N. P. 81; 8 Dec. 47.

See Missionary Soc. vs. Ely, 42 Bull. 273.

[33] Page on Wills, 238, § 219; Schouler on Wills, 331.

[34] Page on Wills, 239, § 220.

[35] Page on Wills, 241, § 222.

[36] A good form of attestation clause is as follows: "Signed, and sealed by the said testator, as and for his last will and testament, in the presence of us, who at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses." This, it is perceived, recites some details useful on such an occasion, but not under most of our codes absolutely indispensable. Schouler on Wills, 346.

[37] Page on Wills, 244, § 223.

This is my will, I want you to witness it, is a sufficient acknowledgement. Eggleston vs. Gardner, 16 O. C. C. 455.

prima facie evidence that the acts therein recited have all been properly done. This is true even where the subscribing witnesses have forgotten what took place at the time of executing the will."[38]

§ 1042. In presence of testator.

The statute requires that if a person signs the name of the testator by his request, it shall be done in his presence and also that the witnesses shall sign their names in his presence.[38*] The question arises, what constitutes " in presence of testator ? " This matter has been a subject of extended discussion by Courts and text-book writers. In the first place, the testator must be in a condition to know and understand what is being done before an act can be said to be done in his presence. Thus if he is so faint or asleep or in a stupor or dying, so that he is not able to know what is being done, it cannot be said to be done in his presence.[39]

The design of the Legislature in requiring witnesses to sign in presence of the testator, was, as English authorities state, that the testator might have ocular or other bodily evidence of the identity of the instrument subscribed by them; and this design the Courts have kept steadily in view, while fixing upon the legal sense of the word " presence."[40]

Carrying into effect this idea above stated, the English Courts have held with strictness that a signature of a witness attached to a will at a place where it was impossible for the testator to see the act done, was not in the testator's presence. A difficult question that Courts have contended about is, where the signature of the witnesses was attached in such a place that there was no visible obstacle preventing the testator from seeing the act done. If the act is done in the same room with the testator, it is *prima facie* done in his presence,[41] while if done

[38] Page on Wills, 244, § 223; Schouler on Wills, 347; Raudebaugh vs. Shelley, 6 O. S. 307; Carpenter vs. Denoon, 29 O. S. 379.

[38*] But witnesses are not required to sign in each *other's presence.*

[39] Page on Wills, 229, § 209.

[40] Schouler on Wills, 340; Jarm. Wills, 86, 87.

[41] Ayres vs. Ayres, 43 N. J. Eq. 565; Stewart vs. Stewart, 56 N. J. Eq. 761.

A witness signing before the testator signs does not invalidate the will where the signing was one continuous transaction. Slemmons vs. Toland, 25 O. C. C. (N.S.) 485; 5 O. App. 201.

in another room, it is *prima facie* done out of his presence.[41*]

In either case the presumption is only *prima facie,* and may be rebutted,[42] for one who can see, the test of presence, as far as physical proximity is concerned, is that the act must be done where he can, with reasonable effort, see what is being done, so as to identify the whole act. If he can, with reasonable efforts, see what is being done, it is not necessary that he actually see it.[43]

As before stated, the general rule seems to be, that the act must be done within the range of the vision of the testator. Our Supreme Court has not passed upon this question. There has been a departure from this rule by some of the courts, which hold that if the testator was in such a position that he knew what was taking place, and that he knew, or acknowl-

[41*] Lamb vs. Girtman, 26 Ga. 625; Lamb vs. Girtman, 33 Ga. 289.

[42] Hopkins vs. Wheeler, 21 R. I. 533; 45 Atl. 551; Page on Wills, 230, § 210.

[43] Page on Wills, 231, § 210.

Page on Wills says, that an analysis of the adjudicated cases will show that the weight of authority established the following proposition:

1. If the person in whose presence the act is to be done can see what is taking place by changing the direction of his gaze, without moving from the place where he is at the time; and he is able to change the direction of his gaze without pain, discomfort or danger, the act thus done is done in his presence.

2. If the testator is so situated that he can not see what is taking place without leaving his place, and he does not leave it, the act is not done in his presence; even though he was able to move with comfort. Thus, where a door-shutter was partially closed so that testator could not see the witnesses sign without moving, and he did not move, it was held that the act was not done in his presence. Where the witnesses signed in an adjoining room, and testator could have seen them sign by walking to the door and looking into the next room, which he did not do, the will was not attested in his presence.

3. If the exertion necessary for such person to change the direction of his gaze, is painful but not dangerous, it seems that the act is not done in his presence, unless it is done where he can see the transaction without making such painful exertion to change the direction of his gaze.

4. Likewise, if the exertion necessary for him to change the direction of his gaze is dangerous to his life, an act done where he does not in fact see it, but where he could see it by changing the direction of his gaze, can not be said to be done in his presence.

5. If it is physically impossible for him to move, so as to see the act done, such act can not be said to be done in his presence.

Page on Wills, 232, § 211.

See Riggs vs. Riggs, 135 Mass. 238; Raymon vs. Wagner, 178 Mass. 315.

edged that he knew, the witnesses had attached their signatures to *his* will, it would be sufficient.[44]

Where the strict rule is in force, it is held that if the witness sign out of testator's presence and afterwards acknowledge in his presence that they signed their names, the will is invalid; and retracing their signature with a dry pen is nothing more than an acknowledgment, and to retrace the former signature with a dry pen is not a signature by the witness.[45]

It seems that a proper rule to adopt in such cases would be, did the testator know that the witness had attached his signature to the testator's will, or was the witnesses signature attached at such a place that it is reasonable to presume that the testator did know that the witness attached his signature as a witness to his will. Where a person is blind, the act must be done in such

[44] Page on Wills, 234, cites the following cases: In Riggs vs. Riggs, 135 Mass. 238, the witnesses signed in the same room with the testator about nine feet away from him. He lay on the bed flat on his back, and by reason of an injury to his neck could not turn his head so as to see the witnesses sign the will, though his sight was unimpaired. He knew what was taking place and had requested the witnesses to sign. *Held*, such signature was in his presence, citing and refusing to follow Aiken vs. Weckerly, 19 Mich. 482; Downie's Will, 42 Wis. 66; Jones vs. Tuck, 3 Jones (N. Car.) 202; Graham vs. Graham, 10 Ired. Law, 219.

On similar facts the same view of what "presence" means was taken in Cook vs. Winchester, 81 Mich. 581; 8 L. R. A. 832.

In Smith vs. Holden, 58 Kan. 535, the evidence developed that a witness had been inattentive and apparently had gone into an adjoining room at the moment of signature by testatrix and returning had found the act done. The Court held that even if the witness did not see the signature written and heard no acknowledgment thereof, it was nevertheless signed in his presence. Speaking of the witnesses, the Court said: "If not at all time within her (the testatrix's) sight and hearing, they were within the circle and continguity of her presence." In Cunningham vs. Cunningham, 83 N. W. (Minn.), (1900) 58, testator signed the will in the presence of the witnesses. They then stepped into the next room to a table and subscribed their name to the will. Testator could have seen them sign by arising from the chair in which he was sitting and stepping forward about three feet; but by preference he remained in the chair from which he could not see the table. In less than two minutes the witnesses returned with the will and pointed out their signatures to testator, who looked over and pronounced it "all right." This was held to be a valid attestation in the presence of testator.

[45] See Page on Wills, 235, § 215, and cases there cited.

proximity to the testator, that he can, by means of his remaining senses, know what is being done.[46]

§ 1043. Two or more competent witnesses.

In order to be a valid will, it must have two or more competent witnesses. If it has a less number than two, the will is not sufficiently attested. By "competent witnesses" is meant that the persons subscribing their names are qualified to testify under the rules of evidence in force at the date of the execution of a will.[47] In our State there is no disqualification except as provided in the subsequent section. Where a person is a legatee, he disqualifies himself by being a witness to receive under the will. As a general rule it may be said that idiots, lunatics and insane persons would be incompetent to serve as subscribing witnesses to a will. But even in a case of this kind, where the insanity was of a mild form, it would be a *question* whether the witness would be incompetent. Infants less than fourteen years of age might be presumed to be incompetent, but this incompetency might be removed by proof to the contrary.[48] An executor is a competent witness to a will. So may an attorney whom the will provides shall be employed by the executor.[48a]

§ 1044. Effect of a person being a devisee or legatee. "If a devise or bequest is made to a person who is a witness to the will, and the will can not be proved except by his testimony, the devise or bequest shall be void. The witness shall then be competent to testify to the execution of the will in like manner as if such devise or bequest had not been made. If he would have been entitled to a share of the testator's estate, in case the will was not established, he shall have so much of such share as does not exceed the bequest or devise to him. The devisees and legatees must contribute for that purpose in the mode here-

[46] Page on Wills, 235, § 214; Schouler on Wills, 243.

[47] Page on Wills, 210, § 191.

[48] Schouler on Wills, 352.

[48a] Wyman vs. Symnes, 10 Allen. (Mass.) 153.

[48b] *In re* Richards Estate, 143 N. W. (Iowa 1914) 1106.

The draftsman of a will ought to exercise care in the selection of persons asked to become witnesses to a will. It is better in all cases not only to take what might be termed competent witnesses, but also those that are disinterested, by way of relation or otherwise. A person under fourteen years of age or of weak mind, should never be taken as a witness to a will, except where no others are obtainable. No person should be a witness who receives property under the will. Pease vs. Allis, 110 Mass. 474. Neither wife or child should be a witness, yet it was held that a child who was disinherited by the will might be competent. Sparhawk vs. Sparhawk, 10 Allen (Mass.) 155. And a member of a corporation to which property is given for charitable uses,

inafter directed for an absent or after-born child." [R. S. § 5925.][49]

The above section of the Revised Statute does not destroy the competency of a witness, but invalidates whatever portion the will may have given to him. If he is an heir it places him in the same position as he would have been in if the testator had died intestate; and the statute would also apply only to where the bequest or devise was made to the witness in his own behalf, and would not defeat a bequest or devise which was made to him in trust or otherwise.[50]

§ 1045. Who saw testator subscribe or heard him acknowledge.

In order for the witness to be competent, he must either have seen the testator write his name to the instrument or heard him acknowledge the same. The ordinary meaning of this language would be, that by acknowledging the same, the testator acknowledged that the *signature* to the will is his. Our Supreme Court, however, seems to have given a wider signification to this term "acknowledge."[51] For it is said that "one essential to the admission of a paper or writing, purporting to be a will, to probate is, that it shall be acknowledged by the maker *as his will,* and his signature also acknowledged, in the presence of two subscribing witnesses.[52]

So in our State, whatever the rule may be elsewhere, it is necessary that the testator acknowledge that the instrument to which the witness is to attach his signature, is his will; and if the testator has previously attached his signature he must also acknowledge that the signature to the paper presented is his. This rule in effect, requires the testator to make what is known as a publication of his will. This may be done in any method

held competent. Loring vs. Park, 7 Gray (Mass.) 1856.

[49] § 10515 G. C.

This section is not applicable to verbal wills. Vrooman vs. Powers, 47 O. S. 191.

As to what will constitute proper witnesses to a nuncupative will. § 1158, *et seq.*

[50] Page on Wills, 213, § 194; Schouler on Wills, 353, 358.

This section does not repeal § 10503 G. C., but simply places a limitation upon it. German Ins. Co. vs. Lushey, 11 C. D. 52; 20 C. C. 198.

[51] Keyl vs. Feuchter, 56 O. S. 424. See Curry vs. Horner, 43 Bull. 273.

[52] *Id.*

See § 1040 G. C. Estate of Nicholson, 49 Bull. 379.

In Tims vs. Tims, 32 O. C. C. 589, it is expressly held that the witness must know at the time he is attaching a signature that it is a will. See 40 Cyc. 1115.

Other courts have declined to follow this decision. See § 1040, recent holding of Supreme Court.

whereby he communicates to the witnesses that the instrument is his will.[53] In the same manner he may make an acknowledgment to the signature already made. The acknowledgment by the testator that it is his will or his signature, must be made by himself or by some one else in his presence and by his knowledge.[54]

§ 1046. Suggestions for drawing wills.

In drawing a will, the following suggestions are given.

1. In the first place, let me say, that too much care cannot be exercised in the making of a will. It differs from other instruments, in one important feature, in this, after the death of the testator it cannot be changed, it must stand as it has been written, and Courts can only give construction to the words it contains. If a mistake has been made, no matter how clear and how satisfactory it may appear, yet the will must stand as it is written. Furthermore, where not required by the exigencies of the case, it should not be written hurriedly.

2. In the second place, the draftsman should require the testator to give him full information as to all the property he possesses, where it is situated, and by what title he holds the same. Also whether it is incumbered by mortgage or otherwise.

3. In the third place, the draftsman should get from the testator, the real purpose and manner in which he wishes to dispose of his property.

4. He should explain to the testator, the claims that the law places upon his property, which he has no power to alter by testamentary disposition. That is, the testator should be informed that his debts must be paid, and that his wife has a

[53] Haynes vs. Haynes, 33 O. S. 598; Page on Wills, 246, § 226.

[54] Page on Wills, 224, 227, § 205; *In re* Williamson Estate, 6 N. P. 81; 8 Dec. 47, in the Common Pleas Court, reversing the decision of the Probate Court, held that it was not necessary that the testator had to acknowledge the instrument to be his will, if the witnesses were present when the testator subscribed the same. The Court says the statute requires either and not both. This seems to be in conflict with the decision of the case of Keyl vs. Feuchter, 56 O. S. 424.

See Estate of Nicholson (1904), 49 Bull. 379.

dower in his real estate, and is entitled to a certain portion of the personal property on distribution, and that certain property will be set aside to the widow and children for their year's sustenance.

5. He should inquire of the testator if any property is to be sold, whether the same is to be done by the executor without order of court. The draftsman should then place in writing, the express wish of the testator. He should be careful that the words used are understood by the testator, and that they are such words as the law will construe to carry into effect the intention of the testator. If any technical words are used, he should be careful that the testator understands their meaning. The draftsman should remember that he is making the testator's will and not his own, and not to influence the testator in any manner.

6. In the execution of the will, the draftsman should see that the testator signs the same at the end thereof, and that two witnesses attest the testator's signature, and that the witnesses either see the testator write his name or hear him acknowledge that the signature is his. He must further see that the testator, or some one for him, informs the witnesses that the paper which they are attesting is testator's will.

7. The draftsman should call the witnesses' attention to the fact whether the testator is in his right mind, and understands the nature of the transaction, as well as to the fact whether the will is the free expression of the testator — that is, that it is not made under restraint.

8. The will should be written on one piece of paper, or if on several, they should be so attached as to constitute one entirety. If any interlineations are made, it should be stated that they were made before the will was signed by the testator. The will should be so written that interlineations or changes can not easily be made without detection.

Mr. Jarman suggests the following considerations:

1. That in a devise of real estate there be accurate description, and that where the same estate is described by boundaries,

and the name of the occupant, care be taken that both precisely concur.

2. That where an estate is devised to a class not certain to be in existence at the death of the testator, provision be made for the disposition of the intermediate profits of the estate.

3. That where any particular funds are set apart for the payment of debts, it should be clearly defined whether it is the intention of the testator to thereby exonerate the general personalty from being primarily liable to that charge.

4. Instructions for wills should be taken from the testator himself, rather than from third persons, particularly where such persons are interested.

§ 1047. Form of will.

I, A. B., of Cincinnati, Hamilton County, Ohio, do hereby make my last will and testament.

I appoint my son, C. D., sole executor of this will and direct that he shall not be required to give bond in qualifyng as such executor.

I give and bequeath to E. T., G. H. and I. J. the sum of one thousand dollars each. I give and bequeath to my servant, K. L., the sum of one hundred dollars. All the residue of my estate, real and personal, I give, devise and bequeath to my children, C. D., M. N. and O. P., to be divided among them in equal portions.

In testimony whereof, I have hereunto set my hand this first day of September, in the year of one thousand, eight hundred and ninety-four.

A. B.

Signed, published and declared by the above-named A. B. as for his last will and testament in presence of us, who in his presence and in the presence of each other, and at his request have hereto subscribed our names as witnesses.

Q. R.
S. T.[55]

[55] The object of this full attestation has been referred to in the previous § 1040. As to the advantage of such a full attestation clause, Schouler says: "The advantage of an attestation clause with suitable recitals is shown in many of our decisions relating to the proof of wills. Where, indeed, there is nothing but a formal attestation clause on one side, and the testimony decidedly adverse of all subscribing witnesses on the other, probate of a will has been refused. But, with the aid of a proper attestation clause to contradict such persons, or possibly without it, wills have been established in proof, against the concurring statements of both subscribing witnesses or the statement of either, that the legal requirements of execution were not fully complied with. And wherever these witnesses fail to recollect and give no positive testimony, or cannot, both or all, be produced in Court, the clearer the recitals of an attestation clause, the stronger becomes the presumption that the will was executed in all details as the

law requires. It matters little, under such circumstances, that subscribing witnesses can not testify affirmatively to the facts thus recited; that the memory fails; that details are not orally shown with clearness. And though the attesting witnesses were all dead or beyond the reach of process, proof of their handwriting would in general make out a *prima facie* case of due execution, which, if aided by the recitals of a full attestation clause, would afford a very strong presumption, unless the contrary appeared on the face of the will. Schouler on Wills, 347.

The testator should be asked in the presence of witnesses if the instrument they are asked to witness is his will, and the witness might also be asked to notice the condition of the person making the will.

See Missionary Society vs. Ely, 42 Bull. 273, where the Supreme Court confirmed without report a Circuit Court decision, holding that the witness must see the testator write his name or hear him acknowledge the same and know that the instrument he is witnessing is a will. See Haynes vs. Haynes, 33 O. S. 598.

The draftsman should especially call the attention of the witnesses to the matters recited in this full attestation. If such is done many troublesome questions arising in the probate of a will, will be avoided.

CHAPTER LVI.

REVOCATION OF WILLS.

§ 1048 General principles.
§ 1049 How will expressly revoked or cancelled.
§ 1050 Tearing, etc.
§ 1051 Interlineation.
§ 1052 By some other will or codicil.
§ 1053 Destruction of second will not to revive first, unless, etc.
§ 1054 Revocation of latter will, etc.
§ 1055 By other instrument in writing.
§ 1056 Revocation by sales, or conveyance of property, etc.
§ 1057 Property sold by bond, sale or agreement not a revocation, etc.
§ 1058 Charge or incumbrance not deemed a revocation.
§ 1059 Conveyance, etc. Altering but not divesting estate, not a revocation unless, etc.
§ 1060 When provisions of instrument are inconsistent with terms of will.
§ 1061 Marriage will not revoke the will.
§ 1062 Revocation by birth of child.
§ 1063 Having child and making provision, etc.
§ 1064 Child absent, reported dead, or born after will made to have portion of estate. How portion raised.
§ 1064a How contribution apportioned.
§ 1065 Advancements to be taken into account in such settlement.

§ 1048. General principles.

Revocability is one of the characteristics that distinguishes a will from other instruments in writing. A paper that is not revocable in its character is not a will. By revocation of a will is meant the annulling or destruction of the will. A revoked will has no legal effect whatever. It leaves the testator's property just as if the will had never been in existence. A will may be revoked by acts of the testator or by operation of law, resulting from changed conditions in his circumstances or his property. For a testator to revoke a will by his own acts he must possess the same capacity as is requisite for him to make a valid will, and he must act under similar conditions — that

is, he must be of sound mind and memory, and not under any restraint when the act of revocation is carried into execution. Similarly to the execution of a will, it can only be revoked in the method provided by statute. Two things are essential in our State to constitute a revocation of a will, when the same is done by the act of the testator, otherwise than by codicil or a paper executed as provided by statute. In the first place, the act must be done with the intention of the testator to revoke his will. If this intention is wanting, no matter how complete the destruction, it will not be a revocation, provided its substance can be otherwise proved, and it could be probated as a spoliated will. The second essential in Ohio is that the intention must be carried into execution by a physical act to or upon the will which is sought to be revoked.[1]

A written will can not be revoked by the mere wishes of the testator, and therefore is not affected by a subsequent nuncupative will.[2]

If a will is valid when executed and afterwards revoked, as provided in sec. 10555, G. C.,[3] it should nevertheless be admitted to probate and recorded, that any person interested in having it set aside as valid may contest its validity by proceeding under the statute. That is, where the will is revoked by operation

[1] "Revocation is an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation. The statute has specified the form of these (burning, tearing, cancelling or obliterating), and if these or any of them are performed in the slightest manner, this, joined with the declared intent, will be a good revocation. Kent vs. Mahaffey, 10 O. S. 213.

A testator, being blind, told J. to bring his will, and J. handed it to testator inclosed in an envelope with three seals. Testator, having felt the seals handed it back, with the seals unbroken, to J., directing him to throw it into the fire and burn it. J. pretended to do so, but, in fact, put the will into his pocket, and threw another paper into the fire calling upon testator to listen and hear it burn, and the testator, smelling the paper burning, believed the will destroyed, as he had directed, and died in that belief. After testator's death, the will was produced and admitted to probate. *Held*, that such facts do not amount to a revocation under the statute, no sign or symbol of such attempted revocation appearing upon the paper itself. *Id.* 204.

[2] M'Cune vs. House, 8 O. 144.

[3] § 1049.

To effect a revocation there must be some positive act, either a total or partial destruction or obliteration concurrent with intent to revoke. Coghlin vs. Coghlin, 9 C. C. (N.S.) 385; 29 O. C. C. 257.

A clause in a will can not be revoked by drawing a line through it. In such cases the erasure will be disregarded and such clause will be regarded as a valid part of the will. Porterfield vs. Porterfield, 4 N. P. (N.S.) 654; 17 Dec. 448.

Where a will is found among the papers of a deceased person with the name torn off or his name erased, it will be held to be revoked. Crosby vs. Crosby, 10 C. C. (N.S.) 57; 30 O. C. C. 14.

of law. If it is revoked by the acts of the testator, then it ought *not* to be admitted to probate.[4]

Where a will was in the testator's custody and can not be found after death, the presumption is that he destroyed and revoked it, but this may be rebutted by recent declarations of the testator, as that he had made a will and was glad he had done so, and spoke of its contents, and gave reasons for making it, coupled with proof of inability to destroy it thereafter.[5]

§ 1049. How will expressly revoked or canceled. "A will shall be revoked by the testator tearing, canceling, obliterating, or destroying it with the intention of revoking it, by the testator himself, or by some person in his presence, or by his direction, or by some other will or codicil, in writing, executed as prescribed by this title, or by some other writing, signed, attested, and subscribed, in the manner provided by this title for the making of a will, but nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator." [R. S. § 5953.] [6]

§ 1050. Tearing, etc.

It will be observed that the above section provides four ways in which a will may be revoked — first, by some act upon the will itself by tearing, cancelling, etc.; second, by some other will or codicil; third, by some other writing signed and subscribed in the same manner as a will; fourth, by operation of law, such as birth of child, conveyance of property, etc.

As to the first of these methods, to-wit, tearing, cancelling, obliterating or destroying, as before stated, the same can not be done except by some physical act appearing on the paper itself, made with an intention to revoke.[7]

[4] Myers vs. Barrow, 3 C. C. 91; 2 C. D. 52.

The probate of a will may be revoked by admitting a more recent will to probate. §§ 10522 G. C. 1131a.

[5] Wisewell's will, *In re* Goebel, 19; Blymyer's Will, *Id.* 14. See § 1050, Tearing. § 1138, Spoliated wills. § 1224, Revocating of gifts, *causa mortis.*

See Cole vs. McClure, 88 O. S. 7, as to what is necessary to overcome presumptions as to revocation by reason of being incapable to revoke.

[6] § 10555 G. C.

[7] Kent vs. Mahaffey, 10 O. S. 204. See note, § 1048.

Tearing a page from a will several years after its execution, with intention to revoke the part torn out, will not revoke the entire will, and if the part torn out is preserved, the entire will should be probated. Coghlin vs. Coghlin, 9 C. C. (N.S.) 385; 29 O. C. C. 251.

The question whether the tearing was done with intent to revoke the will, is one for the jury on contest of the will. Coghlin vs. Coghlin, 9 C. C. (N.S.) 385; 79 O. S. 71.

Our statute does not include burning, but Courts have included it as coming within the terms mentioned in the statute.[8] Where the instrument is destroyed by burning, the marks of fire must appear upon the paper itself.[9]

Any act of tearing which is manifest upon the paper on which the will is written, however slight it may be, is an act of tearing within the meaning of the statute, if done with the intention of revoking the will. Tearing includes cutting.[10]

Revocation by cancellation means a revocation of a will by means of drawing lines through the name or through the body of the will with a manifest intention to revoke it. A will can not be revoked in part by cancellation, either the cancellation is inoperative or it cancels the entire will.[11]

Obliterating probably means the erasing or marking over or mutilating the will in such a manner as to indicate an intention to revoke the same.[12]

Destruction is a term which needs no definition, as the word itself manifests its meaning.[13]

The destruction of a duplicate will with intention to destroy the will operates as a revocation.

§ 1051. Interlineation.

It sometimes happens that after a will has been executed, testator, without knowing the law in relation thereto and without any intention of revoking the will, makes interlineations, adding to the same or changing the will in some of its terms. This can not be done in Ohio and such interlineations are held

[8] The limitation of this work will prevent an extended discussion of these various ways of revoking a will. Reference is made to Page on Wills, where the same is discussed in detail.

[9] Bibb vs. Thomas, 2 W. Bl. 1043. In this celebrated and most quoted case the testator crumpled the will up so as to tear it slightly and threw it on the fire where it was scorched. It was surreptitiously removed without his knowledge before it burned. It was held that this amounted to a revocation.

[10] Page on Wills, 276, § 248.

[11] Giffen vs. Brooks, 3 C. C. 110; 2 C. D. 64; Aff. 48 O. S. 211. See Page on Wills, 277, § 249.

[12] See Page on Wills, §§ 250, 251, page 281.

[13] Page on Wills, 281, § 251.

merely as surplusage.[14] Neither can a testator by interlineations or obliterations or erasures cancel a part of the will. In such cases the interlineation or obliteration will be treated as of no effect and the will will exist as it was originally executed.[15]

A will can never be revoked until after it is made, and therefore, if immaterial words are erased or the will is interlined before the will is executed, it has no effect as revoking the will.[16]

An alteration of a will, to be effective, must be made by a codicil or a re-execution of the will.

§ 1052. By some other will or codicil.

When sec. 10535, G. C.,[17] speaks of revoking a will by codicil, it is in a certain sense a misnomer. If a writing had no disposition in it other than revoking the will, it would not be a codicil, and if it changed the entire disposition of a testator's property, it would be a new will. What is meant is that some portion of the will may be changed or modified by a codicil, and that is the only way in which a portion of the will may be revoked or modified by codicil.[18]

[14] Brundage vs. Benton, 17 Bull. 243.

[15] Giffen vs. Brooks, 3 C. C. 110; 2 C. D. 64; Aff. 48 O. S. 211. See Page on Wills, 291, § 260.

[16] Hollman vs. Riddle, 8 O. S. 384.

[17] § 1049.

A codicil only revokes a will as far as absolutely necessary. Blume vs. Thompson, 15 N. P. 97; 23 Dec. 512.

[18] The word "codicil" has a definite legal signification. Its signification is, "a supplement to a will." The province of a codicil is not to revoke a will, but to change, add to, or subtract from, a will; so that, *ex vi termini*, the legislature have authorized a revocation in part, by the use of the term "codicil." It is a misuse of words, to speak of revoking a will by codicil. The thing to which it is a supplement must have an existence. It is a part and parcel of a will. The only province of a codicil known to law is to change, add to, or subtract from, a will. Now, this accords, too, with the object to be accomplished in the change as made by the legislature. The evil to be remedied, we have seen, was not the act of revocation, but the manner in which it was done, allowing it to be done in the closet, secretly, by the testator, simply by drawing ink lines over the words. But a codicil is a thing to be in writing, and it is required to be executed with the same punctilio as the will itself. Here the legislature, then, secured the object to be gained, in allowing it to be done by codicil; because that must

A will may be revoked by a subsequent will either when the subsequent will contains a new disposition of the property, or where the subsequent will contains an expressed provision of revocation. If the subsequent will in either of these methods revokes the previous will, such previous will is of no effect; and where there is no clause of expressed revocation it becomes a question of construction whether the testator intended the new will to be a codicil or in fact a new disposition of his property. If the latter, then it is a revocation; if the former, it is a revocation *pro tantum* only. If the latter will is consistent with the former will, no revocation is effected, and the two wills will be taken together as one in effect. But if it is inconsistent, where it does not appear to have been the intention to make a new disposition of the property, it will revoke the earlier will so far as it is inconsistent. Where there is no revocation clause, if the second will fails of effect for any cause (for invalidity, etc.), the earlier will is not revoked.[19]

It seems that the distinction to be drawn here is whether the new will is in effect, a new disposition of the testator's property, or a mere codicil. It is an elementary principle in wills that the latter part of a will controls the former, and that a latter disposition controls a former.[20]

§ 1053. Destruction of second will not to revive first, unless, etc. "After making a will, if the testator duly makes and executes a second will, the destruction, canceling, or revocation of the second will, shall not revive the first will unless the terms of such revocation show that it was his intention to revive and give effect to his first will; or, after such destruction, canceling, or revocation, he duly republishes his first will." [R. S. § 5960.][21]

§ 1054. Revocation of later will, etc.

It was a matter of considerable dissension among Courts as to what effect the destruction of a later will would have upon a

be in writing, and executed with the same formalities as a will. Giffen vs. Brooks, 3 C. C. 118; 2 C. D. 64.

[19] Page on Wills, 298.

[20] Page on Wills, 299, § 269. See § 1174, Definition of codicil.

[21] § 10562 G. C.

former will. Some Courts held that if the former will was left intact and the later will was destroyed, that thereby the testator showed his intention of establishing the former will as his last will. It is the object and purpose of the above section to settle this question in Ohio, and therefore here the destruction of such second will does not revive the first, unless it appear by the terms of such revocation that it was the intention of the testator to revive and give effect to the first will, or by republishing his first will.

The question might arise what is meant by the statute when it says "unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will." How is this intention to be manifested? It seems, taking into consideration the entire policy of the statute of the wills, that this intention can only be made effective if it is done in writing, and in the same manner that a new will might be executed. In other words, that when a will is once revoked it cannot be revived except it be in effect re-signed, re-witnessed and re-published.[22]

§ 1055. By other instrument in writing.

In order for a will, or a codicil to a will, to be revoked by any other instrument of writing, such other instrument must be executed with all the formalities of a will, and this provision of the statute would seem to imply that a will can be revoked in writing in no other manner than where such writing is attested and witnessed according to law; and hence, if the testator should write across an envelope in which was contained his last will, merely the words "I revoke this will," and then attach his signature, without having it witnessed according to the law of wills, that it would not be a revocation. It is not necessary that the second instrument be probated in order that it may be used in the contest of the first will to show a revoca-

[22] Stickney's Will, 161 N. Y. 42; Page on Wills, 306, § 274.

Republication with us means a re-execution with all the formalities of a new will.

See § 1131a as to revocation of probate of will.

A will can not be revoked by a later will unless it can be shown that there was a later will in existence at *the time of testator's death*. *In re* Estate of Murray, 63 Bull. 84; 20 N. P. 305.

Secs. 10543 and 10544, G. C., must be read in connection with § 10562. See *In re* Thompson, 11 O. L. R.; 58 Bull. 316.

tion thereof.[23] Of course, in such an instrument it must appear on its face that it is the intention of the testator to revoke his will, and it must show that by the act of such instrument testator intends to revoke his will. If it merely shows that he intends to revoke his will at some *future* time, it will not be a revocation.[24]

§ 1056. Revocation by sales, or conveyance of property, etc.

At common law, if the testator disposes of property that he had devised in the will, this was held to revoke the will, on the theory that the testator had changed his intention.[25] But such common law idea has been entirely abrogated, especially in our State, by the provisions of the four following sections of the General Code.[26] So it may be said that, as far as the will itself is concerned, no subsequent act of the testator in reference to his then property, or subsequently acquired property, will have any effect as a revocation of the will. It may destroy certain parts of the will, or even make ineffectual the entire will, but the will itself exists as the testator made it.[27]

§ 1057. Property sold by bond, sale or agreement, not a revocation, etc. "A bond, agreement, or covenant, for a valuable consideration made by a testator, to convey property previously devised or bequeathed in a will, shall not revoke such devise or bequest, either at law or in equity. The property shall pass by such devise or bequest, subject to the remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, which might be had by law against the heirs of the testator, or his next of kin, if it had descended to them." [R. S. § 5954.][28]

[23] Page on Wills, 295, § 265.

[24] Schouler on Wills, 421, 422.

[25] See Woerner on Admin. 102.

[26] §§ 10556, 10557, 10558, 10559 G. C., § 1057 *et seq.*

[27] A deed of conveyance, made subsequent to a devise, does not revoke the will unless it makes an entire disposition of the estate, but to any portion undisposed of by the deed the will attaches *pro tan* and carries it to the devisee. Brush vs. Brush, 11 O. 287.

[28] § 10556 G. C.

§ 1058. Charge or incumbrance not deemed a revocation. "A charge or incumbrance upon real or personal estate for the purpose of securing the payment of money, or the performance of a covenant, shall not revoke a will relating to the same estate, previously executed; but the devises and legacies therein contained shall pass and take effect, subject to such charge or incumbrance." [R. S. § 5955.][29]

§ 1059. Conveyance, etc., altering but not divesting estate, not a revocation unless, etc. "A conveyance, settlement, deed, or other act of the testator, by which his estate or interest in property previously devised or bequeathed by him, is altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest." [R. S. § 5956.][30]

§ 1060. When provisions of instrument are inconsistent with terms of will. Effect. "But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of the previous devise or bequest, such instrument will operate as a revocation thereof, unless the provisions depend on a condition or contingency, and such condition be not performed, or contingency does not happen." [R. S. § 5957.][31]

§ 1061. Marriage will not revoke the will.

At common law the will of a man was not revoked by his subsequent marriage alone, without the birth of a child. In this matter a subsequent statute now places a woman in the same

[29] § 10557 G. C.

[30] § 10558 G. C., § 1056.

[31] § 10559 G. C.

The careful reading of the above section will convey the meaning that such inconsistent provisions will revoke the will as to such provisions in the will and not the entire will. The fact still remains that a will in Ohio can only be revoked in some of the methods provided by § 10555 G. C., § 1049.

position.[32] The reason generally given for the rule was that, as the wife could not inherit under the laws of descent, she would not be benefited by the revocation of the will, and there was no reason for making the marriage act as a revocation of the will, for the benefit of the collateral heirs of the husband.

At common law the will of a married woman was revoked by marriage, for the reason that by such law she could not after marriage make a valid will, and therefore being incapacitated to make a will after marriage, the marriage itself was held to revoke the will already made. As the common law held that a husband's will was not revoked by marriage, for the reason that the wife did not inherit his property, a question has arisen whether under the statute which now makes the wife the heir of the husband, such fact might not change the law. But it has been held in our State, upon what seems to be the soundest of reasoning, that it does not have such effect,[33] and therefore it may be said that in Ohio a subsequent marriage of either the husband or wife, unless a child be born, does not revoke a prior executed will. Of course, in such a case the marital rights would attach, and in that manner some of the provisions of the will before marriage might be revoked in part or as a whole.

§ 1062. Revocation by birth of child. "If the testator had no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless provision has been made for such child by some settlement, or he is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received." [R. S. § 5959.][34]

§ 1063. Having child and making provision, etc.

Several things in the above section of the statute are essential in order to make a revocation of the will. In the first place, the

[32] "A will executed by an unmarried woman, shall not be deemed revoked by her subsequent marriage." § 10560 G. C.
See 47 Bull. 844.

[33] Mundy vs. Mundy, 15 C. C. 155; 8 C. D. 44.

[34] § 10561 G. C. See §§ 10563-4 G. C., § 1064.

testator must have no child or children at the time the will is made. This means that the testator must have no child alive and does not include a child in *ventre sa mere*. In the second place, he must afterward have a child living or one born alive after his death; and third, he must have failed to make provision for such child in his will. As to the first of the above, if he had children, then the provisions of sec. 5961 R. S.,[35] would apply. Afterwards having a child, living or born alive, includes a child that was in being at the time of his death. Thus, where E. made his will June 12, 1830, devising all his property to his wife, and died without issue on the 7th of July following, seized of lands. The will was admitted to probate October 7, 1830; and on the 4th of December following the widow of E. was delivered of a son, the child of E. It was held that at the time of executing such will the testator had no child *in esse,* within the meaning of the statute, and that the probate of the will is not impugned by the subsequent birth of the child; but that event, by virtue of the statute, avoids the will.[36]

It is generally held that the adoption of a child subsequently to the making of a will will not revoke it.[37] Likewise, where an illegitimate child is afterwards legitimatized by marriage of the parents, it is held not to revoke the will. Where a person having no child, makes her will and afterwards has a living child, and such child dies before she dies, nevertheless the will is revoked.[38]

As to what will constitute a provision for such child, the Courts have held that it must be a present vested interest to take immediate effect in possession upon the death of the testator. A vested interest in *futuro,* such as a remainder or reversion, is not sufficient. "A reversionary interest, whether vested or contingent, is not a provision for an after-born child within the words or spirit of the statute." [39]

[35] § 1064.

[36] Evans vs. Anderson, 15 O. S. 324.

[37] Page on Wills, 331, § 290.

[38] Ash vs. Ash, 9 O. S. 383.

A devise of real estate by a testator to his widow for life, with remainder to his children generally without naming them, is not a "provision" for an afterborn child within the meaning of § 5961 Rev. Stat., notwithstanding the interest in remainder may subsequently inure to the benefit of such child. Weiland v. Muntz, 2 C. C. (N.S.) 71; 25 C. C. 185.

[39] Page on Wills, 336, § 293.

Where a testator devised his real

Where a testator devised property to his wife and each of his children then living, and provided that the residue should be divided among his "surviving children," it was held that a posthumous child was not provided for within the meaning of the statute, nor did the fact that the residuary clause was by accident so worded as to include such child show an intent to exclude it further.[40] So a devise of testator's real estate to his wife to hold till his youngest child, "if any be born to me," should come of age, and if no child of testator is alive at his death to the wife absolutely, is an implied gift to the children when the youngest comes of age, and is a "provision" within the meaning of the statute.[40*]

A gift to the surviving consort and his or her heirs, as the case may be, is usually held neither to be a provision for after-born children nor to show an intent to exclude them.[41]

A gift for the maintenance and support of after-born children during their minority is a provision for them.[42]

Where a will contains a clause "disinheriting an unborn child," such clause does not constitute a provision for the after-born child within the meaning of sec. 10564, G. C., (§ 1064), and the intention of the testator being contrary to the law, does not control.[43]

§ 1064. **Child absent, reported dead, or born after will made to have portion of estate. How portion raised.** "When, at the time of executing his will, a testator has a child absent and reported to be dead, or having a child at the time of executing the will, afterward has a child who is not provided for therein, the absent child, or child born after executing the will, shall take the same share of the estate, real and personal, that he would have been entitled to if the testator had died intestate." [R. S. § 5961.][44]

estate to his wife for life, "and after her death to the heirs of her body begotten," a child born to him after the execution of the will is not "provided for in the will," in the sense of § 10561 G. C., § 1062. Rhodes vs. Weldy, 46 O. S. 234.

40 Bowen vs. Hoxie, 137 Mass. 527.

40* Donge's Estate, 103 Wis. 497.

41 Page on Wills, 338, § 293.

42 Forbes vs. Darling, 94 Mich. 621. See Woerner on Admin. 106.

43 German Fire Ins. Co. vs. Lushey, 20 C. C. 198; 11 C. D. 52; 7 N. P. 62; 10 Dec. 24.

See article in 37 Bull. 265, 306, 327, 344, 364, as to revocation of wills by marriage and birth of child.

44 § 10563 G. C.

§ 1064a. How contribution apportioned. "Toward raising the portion of such child, the devisees and legatees shall equally contribute, in proportion to the value of what they respectively receive under the will, unless, in consequence of a specific devise or bequest, or of some other provisions in the will, a different apportionment among the devisees and legatees be found necessary, in order to give effect to the intention of the testator, as to that part of the estate which passes by the will. If such child, supposed to be dead at the time of executing the will, has a child or children, provision for whom is made by the testator, the other legatees and devisees shall not be required to contribute. The child, supposed to have been dead, shall take the provision made for his child or children, or such part of it as the circumstances of the case, in the opinion of a proper court may be just and equitable." [R. S. § 5961.][44*]

§ 1065. Advancements to be taken into account in such settlement. "In settling the extent of the claim of a child, as provided for in the next two preceding sections, any portion of the estate of the testator received by a party interested, by way of advancement, shall be deemed a portion of the estate, and charged to the party who has received it." [R. S. § 5962.][45]

[44*] 10564 G. C.

The above section is very much similar to § 5959 R. S., § 1062, except that where a testator has a child or children and makes a will, and afterwards has another child, the will is not revoked, but such after-born child is entitled to receive out of the estate such portion of the same as it would have received had its father died intestate, and the section provides how the other children shall contribute to make up the portion of such after-born child. In a recent case, Insurance Co. vs. Lushy, 66 O. S. 233, where a will provided, "Should any child or children, we having now only one, G. G., be born to me hereafter, it shall in no wise alter or revoke this will and testament," it was held that an after-born child, notwithstanding this explicit language, would inherit from the testatrix as her heir-at-law.

[45] § 10565 G. C. See § 928 *et seq.*, as to advancements.

See Farmer vs. Cope, 55 O. S. 695.

CHAPTER LVII.

CUSTODY.

§ 1066 Generally.
§ 1067 May be deposited with Probate Judge. Notice of probate.
§ 1067a Notice of probate.
§ 1068 How such will enclosed, etc.
§ 1069 To whom it may be delivered.
§ 1070 When to be opened.
§ 1071 Comments.
§ 1072 Who may enforce the production of a will and how.
§ 1073 Application for citation, etc.
§ 1074 Form of entry and order of citation.
§ 1075 Attachment or warrant.
§ 1076 Into what counties such process may issue.
§ 1077 Liability of officer serving same.
§ 1078 Hearing, etc.
§ 1079 Punishment and liability of persons refusing to produce will.
§ 1080 Form of entry and warrant, etc.

§ 1066. Generally.

There is no mandatory provision in our statute as to who shall have custody of a will from the time it is executed until it is probated. Of course, after it is probated, it is then exclusively in possession and under control of the Probate Court. In some of the continental countries of Europe, perhaps following the civil law, it is required that when a person makes a will, he appear before some officer who has charge of such matters, and make his will, which is recorded in a book and kept there until the decease of the testator. Such a law has never been in force in countries which have adopted the common law. While our statute permits the testator to deposit his will in the Probate Court, it can safely be said that more wills are kept under the control of the testator or his legal advisor than are placed in the possession of the Probate Court. To prevent unauthorized destruction or tampering, it will always be a safer course to file the will with the Probate Court. Our

statute recognizes these two methods of keeping the will, by provisions for the filing in the Probate Court, and for compelling the production of a will where the same is held by another. If a person wrongfully gets possession of a will, it might be replevied during the lifetime of the testator.[1]

§ 1067. May be deposited with Probate Judge. Notice of probate. "A will may be deposited by the person making it, or by some person for him, in the office of the judge of the probate court in the county in which such testator lives, to be safely kept until delivered or disposed of as hereinafter provided. The probate judge, on being paid the fee of one dollar therefor, shall receive and keep such will, and give a certificate of deposit for it." [R. S. § 5917.][2]

§ 1067a. Notice of probate. "No will shall be admitted to probate without notice to the widow or husband and next of kin of the testator, if any, resident in the state, in such manner and for such time as the probate court directs or approves." [R. S. § 5917.][2*]

In such cases provided for by the above section, the following certificate of deposit should be issued to the depositor:

FORM OF CERTIFICATE OF DEPOSIT.

State of Ohio, Clark County, ss.
Probate Court.

This is to certify that ..... has this day deposited in the Probate Court in and for the County of Clark, a paper in writing purporting to be the last will and testament of ....., now a resident of said county, the same to be delivered to ..... on the decease of said testator and subject to withdrawal[3] during the lifetime of testator as provided by law.

§ 1068. How such will enclosed, etc. "Every will intended to be deposited as aforesaid, must be inclosed in a sealed wrapper, which shall have indorsed thereon the name of the testator. The probate judge must indorse thereon the day when, and the person by whom it was delivered. The wrapper may also have indorsed the name of a person to whom it is to be delivered after the death of the testator. It shall not be opened or read

[1] In some Probate Courts wills "on deposit" are kept in the usual file boxes. This is a loose practice. They should be kept under lock and key, inaccessible to the public.

[2] § 10506 G. C.

[2*] § 10507 G. C.

[3] See § 1069, To whom delivered.

until delivered to a person entitled to receive it, or otherwise disposed of as hereinafter provided." [R. S. § 5918.][4]

§ 1069. To whom it may be delivered. "During the lifetime of the testator, such will shall be delivered only to himself or to some person authorized by him, by an order in writing duly proved by the oath of a subscribing witness. After his death it shall be delivered to the person named in the indorsement on the wrapper of the will, if there be a person so named, who demands it." [R. S. § 5919.][5]

It would be well if the certificate of deposit provided for in sec. 1067 should have printed on the back of it a blank order for a delivery of such will, which order might be in the following form:

To the Probate Judge of Clark County:

I hereby authorize and direct you to deliver to.....a paper filed in your office purporting to be the last will and testament of the undersigned.

Witnessed by (Sign.)

.....

.....

State of Ohio, Clark County, ss.

A. B., one of the subscribing witnesses to the above order, being first duly sworn, says that he was present and saw the testator subscribe the above order and heard him direct that his will be delivered to the person therein mentioned.

(Sign.)

Sworn to before me and subscribed in my presence this.....day of.....190...[6]

§ 1070. When to be opened. "If no person demands the will in pursuance of such appointment, it shall be publicly opened in the probate court within two months after notice of the testators' death, and be retained in the office of the probate judge until offered for probate. Or, if the jurisdiction belongs to any other court, it shall be delivered to the executor or other person entitled to its custody, to be presented for probate in such other court. If the jurisdiction of such will belongs to

[4] § 10508 G. C.

When the writer filled the office of Probate Judge, he found it very convenient to keep an index of the wills filed by testators. This index was made about the size of an ordinary file envelope, and kept in a box with such wills, and had in it blanks for marking the date of filing and a date for marking when it was taken out and by whom.

[5] § 10509 G. C.

[6] See § 1067.

the probate judge opening it he shall immediately give notice of its existence to the executor if any is named in the will, but if none is named, then to other persons immediately interested." [R. S. § 5920.][7]

§ 1071. Comments.

By the above provision of the General Code, the Probate Judge is authorized, if no one appears to have the will probated, to open it himself within two months after the death of the testator. It is presumed that the Probate Court has knowledge of testator's death, and also that the Court has remembered that such a will is on file. Practice, however, has demonstrated that many cases of death occur when the Probate Judge has no knowledge either of the death of the testator or of the fact that he has a will on file. Usually, however, parties interested search for such matters and bring the same to the knowledge of the Probate Court. If the person has died in some other jurisdiction, it is the duty of the Probate Court to deliver the same to the person entitled to its custody. If no one is mentioned who is entitled to its custody, he should send it by express or registered letter to the Probate Court that has jurisdiction of the matter. When the will is opened in the absence of the parties interested, the judge should in some manner notify the executor or executrix therein named, or if there be no one named, then some interested party.

§ 1072. Who may enforce the production of a will and how. "If real or personal estate be devised, or bequeathed, by a last will, the executor, or any person interested therein, may cause it to be brought before the probate court of the county in which such estate is situated. By citation, attachment, or warrant, or, if circumstances require it by warrant or attachment in the first instance, such court may compel the person having the custody or control of such will, to produce it before the court for the purpose of being proved." [R. S. § 5921.][8]

[7] § 10510 G. C.

[8] § 10511 G. C.

§ 1073. Application for citation, etc.

The above section gives ample provision to enforce the production of a will. The essentials in such a case seems to be that the application for citation must be filed by the executor or by a party interested, and can only be filed in the Probate Court in which there is an estate.[9] It would be proper and better practice to file such application where the same can be conveniently done, in the Probate Court of the county of the testator's domicile, as that is the county in which an executor must be appointed. It may be in the following form:

(*Title.*)

Now comes A. B. and represents to the Court that on or about the..... day of....., C. D. died leaving a will in the custody of G. H.. who has neglected and refused upon request to produce the same in the Probate Court of.....for the probating of the same. And the said C. D. was a resident of.....county, Ohio, and had the estate therein. That the undersigned is interested in said will in this manner, to-wit: That he is the executor thereof (or legatee or heir, etc.) of the deceased. Said A. B. therefore asks the Court that a citation may be issued against G. H. ordering him to bring said will in this Court for probate, if it be in his possession.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

§ 1074. Form of entry and order of citation.

When such an application for citation is filed, the practice generally followed would be to put an entry on the journal, ordering the issue of a citation and fixing a date for the hearing of the same. The entry may be in the following form:

(*Title.*)

A. B. having this day filed an application for a citation to G. H. to bring the will of C. D., deceased, for probate in this Court, said application is set for hearing on the.....day of.....at..... o'clock, and said A. B. (or the sheriff) is ordered to notify said G. H.

CITATION.

State of Ohio, Clark County, ss.

To the Sheriff of said County, Greeting:

We command you that you cite and give notice to G. H. to be and appear before J. P., judge of the Probate Court within and for the county aforesaid at the Court House, on the.....day of.....at.....o'clock, to have then and there the will of the said C. D., deceased, and then and there to show cause, if any he have, why he has not produced for probate the said will of A. B., deceased. Of this writ make due service and return to our said Court, at the time and place aforesaid.

In testimony whereof I have hereunto set my hand this .... day of ....

[Seal] J. P., Judge.

[9] See § 1086. Where should be probated.

This is a special proceeding. Missionary Soc. vs. Ely, 56 O. S. 405. And any person interested may have the will probated.

§ 1075. Attachment or warrant.

Sec. 10511, G. C.,[9*] provides that, in addition to the provision for bringing a party before the Probate Court by citation, he may be brought by warrant or attachment. This is an extraordinary remedy provided, and one which will not be used very often. Just what will authorize the Court to direct a warrant to be issued for arrest of a person holding a will, the statute does not provide. However, if there is any reasonable cause shown that the person intends to destroy or secrete the will or remove beyond the jurisdiction of the Court, either would be a sufficient cause to justify the Court in issuing a warrant in the first instance, on the filing of the application. In such cases the application should state the reason for desiring the Court to issue a warrant. The following might serve as an entry ordering a warrant or attachment on the original application:

FORM OF ENTRY.

(*Title.*)

A. B., having this day filed his application in the Probate Court of this county, represents therein that C. D. died on the.....day of....., leaving an estate in this county, and also died leaving a will which he represents is now in the possession and under the control of G. H.; and further represents therein that said G. H. is now about to remove from this county (or state other cause justifying the issuance of a warrant); and that the said G. H. has failed and refuses to produce the said will in this Court for probate, and it appearing to the Court that the allegations of said application are true, it is ordered that a warrant be issued to the sheriff of this county commanding him to arrest the said G. H. and bring him before the Court on the.....day of....., to show cause why said will has not been produced for the purpose of being probated.

FORM OF WARRANT FOR ARREST.

State of Ohio, Clark County, ss.

To the Sheriff of said County, Greeting:

Whereas, on the.....day of....., there was filed in the Probate Court of Clark County by A. B. a paper alleging that the said G. H. had in his possession the will of C. D., deceased, and, whereupon the Court ordered that a warrant be issued to the Sheriff of Clark County to arrest said G. H. and bring him before said Court on the....day of..... .....at.....o'clock, to show cause why said will has not been produced for the purpose of being probated. You are therefore commanded to take G. H. and have his body forthwith before this Court to abide such order concerning him in his behalf. Hereof fail not; and of this writ make due return.

Witness my signature and seal of said Probate Court at..... this.....day of....., A. D. 190..

J. P., Probate Judge

9* § 11320 G. C.

§ 1076. Into what counties such process may issue. "The process mentioned in the next preceding section may be issued into any county in the state, and must be served and returned by the sheriff, or other officer to whom it is delivered." [R. S. 5922.][10]

§ 1077. Liability of officer serving same. "The officer to whom such process is delivered shall be liable for neglect in its service or return in like manner as sheriffs are, or by law may be, liable for neglect in not serving or returning a capias issued upon an indictment." [R. S. § 5923.][11]

§ 1078. Hearing, etc.

When the person alleged to have the will in his possession is before the Court, either by reason of the service of a citation or by arrest, it will then devolve upon the Court to try the question whether or not the said party has the will in his possession or under his control. If the party stands mute the Court might go on the assumption that he has the will in his possession, and if he fails to produce it, commit him to prison. If he denies the charge, it will devolve upon the party filing the application to sustain his charge by testimony, and in such cases the Court will proceed to the trial of the matter in the same manner as causes are usually heard and tried. The defendant, however, has no right to a trial by jury. If the party charged fails to appear, the Court should proceed and hear the cause, and if the evidence justifies, should make an order committing the party to imprisonment, the statute saying that "if the party having the custody of the will shall, without any reasonable cause, neglect or refuse to produce the same, then he may be committed." The first question in all such cases is, Has the party the custody of such will? It will be observed that in addition to a liability to be committed to jail, the party who has a will, and fails to produce it, is liable to a suit in damages to any person that may be aggrieved by failure to produce such will.

[10] § 10512 G. C.

[11] § 10513 G. C.

§ 1079. Punishment and liability of person refusing to produce will. "If the person having the custody or control of a will, without reasonable cause, neglects or refuses to produce it for probate, after being duly cited for that purpose, he may be committed to the jail of the county there to be kept in close custody until he produces the will. He also shall be liable to the action of any party aggrieved for the damages sustained by such neglect or refusal." [R. S. § 5924.][12]

§ 1080. Form of entry and warrant, etc.

(Title.)

This day came said G. H. in obedience to the citation issued for him (or in the custody of the sheriff) and was examined concerning his refusal to produce the will of the said C. D. for probate, and after full consideration the Court finds that he has the custody and control of said will and that without any reasonable cause he neglects and refuses to produce the same for probate after having been duly cited for that purpose, and that he still refuses without any reasonable cause to produce the same. Therefore it is ordered that said G. H. be committed to jail of this county, there to be kept in close custody until he shall produce the said will.

COMMITMENT.

State of Ohio, Clark County, ss.

To the Jailer of said County, Greeting:

Whereas G. H. has been brought before the judge of the Probate Court of the above county for the purpose of compelling him to produce for probate the last will and testament of the said C. D., and whereas, afterwards the said matter came on for hearing before the said Probate Court, and the said G. H. being present, the Probate Court found that said G. H. still neglects and refuses to produce the same. Whereas the said Probate Judge ordered and required him to produce the said will on the.....day of .....and that he refuses and neglects so to do without reasonable cause. Wherefore, I, the Judge of said Court order that said G. H. be committed to the jail of said county, there to be kept in close custody until the production of said will. You are therefore hereby commanded to receive the said G. H., to confine him in the jail of said county until he produce said will or until he be otherwise duly discharged according to law.

Given under my hand and seal of the said Court this.....day of.....190...

.....

[12] § 10514 G. C.

CHAPTER LVIII.

WILLS. PROBATE.

§ 1081 Definition. Nature of proceedings, etc.
§ 1082 What may be admitted to probate.
§ 1083 When should be presented.
§ 1084 Effect of devisee withholding will from probate for three years.
§ 1085 Who should present will for probate.
§ 1086 In what court wills should be probated.
§ 1086a Persons interested in probate of will may contest jurisdiction of court to entertain application; appeal from decision.
§ 1086b Contest.
§ 1087 Application for probate.
§ 1088 Form of application for probate of will.
§ 1089 Time of hearing.
§ 1090 Entry fixing time, etc.
§ 1091 To whom notice should be given.
§ 1092 Service of notice.
§ 1093 Form of notice.
§ 1094 Essentials to be proven in probate of a will.
§ 1095 Examination of witnesses to will.
§ 1096 What witnesses may be heard, etc.
§ 1097 Form of testimony.
§ 1098 How will proved, if witnesses unknown or incompetent, etc.
§ 1099 Sufficient testimony where witness is dead or absent.
§ 1100 Form of testimony of subscribing witnesses.
§ 1101 When court may issue commission to take their testimony.
§ 1102 Order to take testimony of absent witness.
§ 1103 Form of commission.
§ 1104 Return of commissioner.
§ 1105 Admission of will to probate.
§ 1106 Sufficient proof, etc.
§ 1107 Entry ordering probate.
§ 1108 Effect of order.
§ 1109 Record of title by will.
§ 1109a Certificate of probate judge when will devises real estate.
§ 1109b Record by county recorder.
§ 1109c Fees.
§ 1110 Certified copy of will, etc., evidence.
§ 1111 Recorded in each county where real estate is situate.
§ 1111a Record of title by descent.
§ 1112 Uncontested probate after one year binding.
§ 1112a Contests, etc.
§ 1112b Set aside by agreement.
§ 1113 Duty of judge on notice of contest.
§ 1114 Error, etc.
§ 1115 Repropounding of will.
§ 1115a Probating second will.
§ 1116 Appeal from refusal to admit will to probate.
§ 1117 How appeal perfected and proceedings in Common Pleas.

§ 1081. Definition. Nature of Proceedings, etc.[a]

The probate of a will is defined to be the proof before an officer authorized by law, that an instrument offered to be proved or recorded is the last will and testament of the de-

[a] On the hearing of an application to probate a will the court has jurisdiction to fully and finally determine all questions involved, including that of domicile of the testator. The judgment of the court is protected by the same rules as to collateral attack as other judgments of courts of record. Wilberding vs. Miller, 98 O. S. 28; State vs. Allen, 96 O. S. 10.

But it has no power to refuse to probate a will merely because a devise therein may be against public policy, illegal or immoral, or give aid and comfort to the enemies of the United States. *In re* Estate of Schrader, 63 Bull. 95; 20 N. P. 433.

ceased person whose testamentary act it is alleged to be.[1] This is a matter which deserves full treatment in this work, as it comes within the exclusive jurisdiction of the Probate Court.[2] Formerly such matters came within the jurisdiction of the ecclesiastical court, and there were two kinds of probate — one was designated "probate in common form," and the other the "solemn form." Probate in the solemn form was a proceeding upon citation to all persons interested and upon full proof by witnesses for and against the will.[3]

Probate under common form was an *ex parte* proceeding, and did not require a notice to any of the interested parties. The proceedings to probate a will in our State are usually termed to be proceedings in the common form and *ex parte* in their character. It departs, however, somewhat from the ordinary rule of "probate in common form" when it requires that no will shall be probated without notice to the widow or husband and next of kin of the testator. It preserves its distinctive feature of probate in "the common form" in this that it is not of an adversary character, and no testimony can be heard on the admission to probate except such as is necessary to make out a *prima facie* case to establish the will.[4] The proceeding is of

[1] Vol. 2, Bouv. Law Dic.

[2] § 10492 G. C., § 27.

[3] Page on Wills, §§ 312, 352.

In England there are two modes of proving a will of personalty in the proper Court of Probate; 1. "In the common form." 2. "In the form of law," or "solemn form," or "*per testes*." The first, like our ordinary mode of probate in the Probate Court, was *ex parte*, the last was *inter partes*, upon citation of all persons interested and upon full proof by witnesses, for and against the will. It is manifest that our legislature in its provisions for the contest of a will by bill in chancery, above cited, simply designed a mode of bringing up the will for final probate or rejection, all persons interested being made parties, and having an opportunity of being heard with all their proofs for and against the will, corresponding nearly with the mode of probate in England, "in solemn form" or "*per testes*." The jurisdiction exercised in all such cases by the Court and jury is virtually that of a Court of Probate. 1 B. Mon. 390; Hamberlin vs. Terry, 7 Howard (Miss.) 143; Coalter's executor and others vs. Bryan and others, 1 Grattan 18, 80; Small vs. Small, 4 Greenleaf 220; Mears vs. Mears, 15 O. S. 96.

[4] An application to admit a will to probate is not an adversary proceeding. Those who may be interested adversely are not required to be notified or summoned to be pres-

a judicial nature, and not being an action within the sense of the Code, it follows that it belongs to that class known as special proceedings.[5]

A will is of no effect in the conveyance of title to property until it is admitted to probate, and such proceedings must be in compliance with the statute of our State. When once probated the will becomes effective from the date of the death of the testator.

§ 1082. What may be admitted to probate.

As a general rule, it may be stated that all papers of a testamentary character should be admitted to probate.[6] The difficulty we encounter is the determination of whether or not the paper presented is of a testamentary character. This matter has been discussed in a previous chapter.[7]

It seems to be the rule that where there is doubt, whether the paper presented is testamentary or not, that the Probate Court should admit the will to probate and then let the matter be settled in contest.[8]

ent; and no issue is made for a contest between adverse parties. This is not the proceeding in which those who deny the validity of a will are authorized to contest it. After a will shall have been admitted to probate those who have adverse interests have the right to contest its validity by petition in the Court of Common Pleas. Last will of Hathaway, 4 O. S. 383.

[5] Missionary Society vs. Ely, 56 O. S. 408.

[6] Schouler on Exe. 60, 63.

[7] § 1014 *et seq.*

Attempts to defeat the probate of unwelcome wills by family arrangements connived at by attestory witnesses are contrary to public policy and should be frustrated in a court of probate if possible. *In re* Solomons Estate, 145 N. Y. Supp. 525. See Walker vs. Hollister, 20 N. P. 225; Rohr vs. Gatch, 21 N. P. 65, as to illegal arrangement to set aside a will.

[8] *In re* Williamson Estate, 6 N. P. 79; 8 Dec. 47.

The paper which was presented for probate in the above case was as follows: "I, the undersigned, George H. Williamson, citizen of the United States of America and of the State of Ohio, legally domiciled in the city of Cincinnati, Ohio, but sojourning at present at Paris, France, 182 Boulevard Saint Germain, for reasons of health, sick in body but of sound mind, at the moment of appearing before God, (do) solemnly declare that I have always intended to return to my country and that the bad state of my health has prevented me from doing so. I declare that I am still a citizen of the State of Ohio and subject to its laws. I further solemnly declare, that the two persons who live, and have always lived with me and with their mother under the names of Georgette and Henriette Williamson, are my legitimate daughters, issue of my union with Marguerite Grandcamp, dwelling with me (at) 182 Boulevard Saint Germain, Paris. I declare further that I expressly revoke all testamentary dispositions

Codicils are usually so connected with the will that they can not be probated apart from the will. If they are of such a character as to be probated apart from the will, they would lose their characteristics of codicils and become in themselves new wills. However, a will may be probated even though the codicil can not be found, for it may operate separate and apart from the codicil. A paper, it is said, which disposes of no property has, generally speaking, no testamentary character so as to enable the probate thereof to be granted.[9]

Yet a will which makes a mere designation of a person to be an executor of the estate should be probated, and likewise the designation of a person to be a guardian of a testator's children ought to be admitted to probate.[10]

The question as to the effect the will may have upon the testator's property, or even upon dispositions made of the same, is not a question to be brought up in the probate of a will. A will would be entitled to probate even though it takes effect in certain provisions only and is void as others.[11]

In the probate of wills all papers which are by reference made a part of the same, should be offered with the will, and in that way become effective and placed on record.[12]

that I have made up to this day. "In testimony whereof I have signed and sealed these presents this fourth (day) of December, eighteen hundred and ninety-six.

(Signed) "George H. Williamson.

"Signed and sealed, and declared to be the expression of his last wishes, by George H. Williamson, in the presence of the subscribers, who at his request and in his presence, and in the presence of each other, have signed as witnesses this fourth day of December, eighteen hundred and ninety-six.

"P. G. Tremond,
9 Ecole de Medicine,
Paris, France.
"B. Gerguad,
32 Ave de l'Opera,
Paris, France."

This was held in the lower Court, 5 N. P. 1; 6 Dec. 505, not to be a paper of a testamentary character. The Common Pleas Court held, however, that it was, and even if they were in doubt about that matter, that being a paper properly executed, it should have been admitted to probate.

[9] Schouler on Ex. 60.

[10] Schouler on Ex. 60.

Upon this last proposition there seems to be some controversy, but it seems that in Ohio where testamentary guardians are recognized, § 10930 G. C., § 1307, that there would be little doubt upon this proposition.

[11] Schouler on Ex. 60; Page on Wills, § 314, p. 359.

[12] Sometimes testators make di-

§ 1083. When should be presented.

Our statute has no provision limiting the time in which a will should be presented for probate. In the previous chapter we have seen that if a will is left on deposit with the Probate Judge, and if it is uncalled for within two months, it is the judge's duty to open the will and notify the executors or next of kin of the fact of such will being there. But it makes no provision for the enforcement of a probating of the will. A delivery of the will can be compelled, but if no one applies to have it probated, it seems that the Court of its own motion has no right to probate it. It might therefore be said that the rule adopted in Massachusetts, from which State our testamentary and administration laws have largely been taken, would be the rule in our State. In that State a will may be admitted to probate at any time in order to establish title to real estate, etc.[13]

In the same State it was held that a codicil to a will which had escaped attention and was not passed upon at the time of the probate of the original will, might be admitted to probate fourteen years after the original was probated.[14] In a recent case a will was admitted to probate sixty-one years after the death of the testator.[15]

vision of their property among their children and execute deeds for the same and simultaneously make a will and reference is made to such deeds. Usually the deeds are left in the control of the testator and therefore, as deeds they are wanting in the essential character of delivery and convey no title to the children. In such cases it becomes very important that the deeds are presented with the will and made a part of it and placed upon the record.

The expressions of a man standing upon the verge of eternity, with the grave yawning before him, with every indication of dissolution, can not be said to be those of a man of sound mind and memory, and a will made under such conditions will not be admitted to probate. *In re* Burrows, 8 N. P. 358.

[13] Shumway vs. Holdwood, 1 Pick. 114; 11 Am. Dec. 153.

[14] Waters vs. Stickney, 12 Allen 1.

[15] Haddock vs. Boston Ry. Co., 146 Mass. 155.

In this case it was said "So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed a title. The fact that he

Of course, as a matter of good practice a will ought to be presented for probate as soon as a decent observation of the ceremonies attending the death of the testator have been observed. Many reasons might be given for prompt execution of this matter, such as the destruction of the will or its loss, or the effect it might have upon various persons. The only provision that our statute seems to have is one made inflicting a penalty upon a devisee for withholding a will, which is as follows:

§ 1084. Effect of devisee withholding will from probate for three years. "No lands, tenements, or heriditaments, shall pass to any devisee in a will, who for three years knows of its existence and has it in his power to control it, unless, within that time, he causes it to be offered for, or admitted to, probate. By such neglect, the estate devised to such devisee shall descend to the heirs of the testator." [R. S. § 5943.][16]

The above limitation does not refer to the record or admission to probate of a will probated in a sister State.[17] The fact that a devisee has held the will for three years has no effect upon the will itself, and it shall be admitted to probate when presented, even after that time, provided it meets the other requirements.[18]

§ 1085. Who should present will for probate.

In earlier procedure it was often said that the executor was the proper person to propound the will for admission to probate; and he is no doubt a very proper person under our law to make the application. But any one may make the application who has an interest in the will, or the estate of the person de-

could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authority should not be established in the Probate Court by its regular course of procedure." 19 Am. & Eng. Ency. of Law 179.

[16] § 10542 G. C. This section is punitive and should be strictly construed—mere delay may not be sufficient. Mitchel vs. Levy, 9 N. P. (N.S.) 113; 20 Dec. 41.

[17] Carpenter vs. Denoon, 29 O. S. 379.

[18] Will of Blymyer, Goebel 14.

A custodian of the last will and testament, probated it within thirty days after a lapse of more than three years upon the setting it aside, second probate of an earlier will also left in his possession is not deprived from holding as legatee, because his withholding it more than three years. Avery vs. Howard, 7 N. P. (N.S.) 97; 19 Dec. 71.

ceased.[19] Whoever has a right to offer the will in evidence, or to make title under it, may insist on having it proved.[20]

§ 1086. In what court wills should be probated.

Of course, the will must be filed in some Probate Court, as no other Court has jurisdiction. If a resident of Ohio dies living in one county and having an estate in another, in which county should the will be presented for probate? It is a singular fact that the statutes of our State do not present a direct answer to this inquiry. In sec. 10511, G. C.,[21] it provides that where real or personal property is devised, a person interested may cause the same to be brought before the Probate Court of the county in which the estate may be. It does not say here that the will shall be probated in such a Court, but merely states that such Probate Court has jurisdiction to compel the *production* of a will. The will having been produced, it might be taken to some other county for probate so far as the directions of the statute are concerned. But from the fact that a subsequent section [22] provides that "said Court shall cause the witnesses to such will," etc., to go before it for the purpose of having the will probated, the inference is strong, if not irresistible, that it was the intention of the legislature to confer jurisdiction to admit a will to probate in the Probate Court of

[19] Page on Wills, 363, § 317. See § 1082.

It is a matter of public interest that the will should be produced. Anyone expecting a legacy may thus petition, as the old books say, "to the intent that they may thereby be certified whether the testator left them a legacy." Godolph pt. 1, chapt. 20, § 2; 3 Redf. Wills, 2d ed. 45; 1 Wms. Exrs. 318-320; Foster vs. Foster, 7 Paige, 48.

The jurisdiction of the local Probate Court for thus subserving public policy is usually detailed by the local statute. A probate judge should entertain a petition for the allowance of a will wherever the law authorizes him to do so; and it is unimportant that the petitioner applies under the wrong statute. Schober vs. Pro. Judge, 49 Mich. 323; Schouler on Exrs. 65.

[20] Steibbus vs. Lathrop, 4 Pick. 33.

The devisees and legatees under a will, which after the decease of the testator has been wrongfully spoliated, may maintain proceedings in the Probate Court to have the will admitted to probate and record. Taylor vs. Bennett, 1 C. C. 95; 1 C. D. 57. See § 1142, Spoliated wills.

[21] § 1072.

[22] § 10515 G. C., § 1095.

the county in which there was an estate of testator's.[23] The statute makes no reference whatever to the admission of a will to probate in the county where the deceased had his *domicile*. Yet from the fact that the statutes provide that a deceased may deposit his will in the county in which he lives,[24] and also makes provision that if letters testamentary be issued, they must be issued from the county in which he was a resident.[25] The inference is strong that the will may be probated in the county of the testator's domicile,[26] even though his estate be in another county; and such has been the holding of our Supreme Court.[27]

Admitting that a will might be admitted to probate in any county of this State where the testator had property, yet the law certainly favors the jurisdiction of the Court located in the county in which the testator had his domicile.[28]

If there is to be an administration of the estate, as a matter of convenience a will ought never to be probated in any other county, when the testator was a resident of Ohio, except in the county of his domicile. If it be probated in any other county, a certified copy must be filed for record in the county in which letters of administration are issued. If a resident of Ohio dies in another State, in order to affect property in this State, the will must be probated in the county of his domicile. It can not be probated in the foreign country and an authenticated copy produced here for record.[29]

[23] Limes vs. Irwin, 16 O. S. 488.

[24] §§ 10506-7 G. C., § 1067.

[25] § 10604 G. C., § 72.

[26] It takes very little estate to confer jurisdiction and the presumption is that a testator on his death has an estate at the place of such death, sufficient to at least give jurisdiction to probate his will there. Will of Blymeyer, 1 Goebel 16.

[27] The will of a person whose domicile, at the time of his death is in this State, is a domestic will, and properly admitted to original probate at the place of such domicile, without regard to where the will was made or where such person died. Manuel vs. Manuel, 13 O. S. 459; Story's Conflict of Laws, §§ 467, 468; Converse vs. Starr, 23 O. S. 491.

[28] A will disposing of property should be offered for original probate in the Court within whose jurisdiction testator was domiciled at the time of his death, irrespective of where he might have died. Paige on Wills, 361, § 315.

[29] McNeal vs. Ross, 39 Bull. 353; Manuel vs. Manuel, 23 O. S. 459.

If a non-resident dies owning property in this State, can the will be presented for original probate in this State, or must it be presented for original probate in the State of the testator's domicile, and an authenticated copy presented here for record? It seems to the writer that in such a case the will might be offered for original probate in any county in this State in which there was found to be property of the testator. A recent decision of one of our Common Pleas Courts seems to hold to the contrary.[30] But it is questionable whether this case is well reported. Judge Goebel held that such a will could be probated.[31]

I can see no reason why a will, although executed in another State by a resident of such State, if it be executed in accordance with the laws of Ohio, should not be entitled to original probate in this State.[32] As to what will constitute a "person a resident of a county," such as to give jurisdiction, see discussion of the same under letters testamentary.[33]

In the absence or disability of the Probate Judge, the Judge of the Court of Common Pleas may take the proof of wills.[34]

[30] Fleming vs. Hoffman, 8 N. P. 86; 10 Dec. 560.

See § 1118 G. C.

In the Supreme Court this question is suggested but not passed upon. Hoffman vs. Fleming, 47 Bull. 460.

[31] Will of Blymyer, 1 Goebel 14.

A foreign will in the sense that the same is used in our statutes means that it is a will not only executed but admitted to probate in another State or country. Page on Wills, §§ 355, 423.

And therefore until such will is *probated* in the foreign country it is not a foreign will within the sense that it must be admitted to probate or record in this State as provided by §§ 10535, 10536, 10538 G. C., §§ 1119, 1125.

The jurisdictional facts existing, the Court here is not bound to postpone the probate of a foreign will, until the instrument has been submitted to the proper judicial tribunal of the decedent's domicile. Redf. Sur. Prac. 126.

[32] Provided, of course, there is an estate in the county where the same is presented for probate. See Thompson on Wills, § 487.

[33] § 74.

A person who was born here and lived here until 23 years of age, and thereafter in France for 40 years until he died, but who kept his valuable securities here, and occasionally returned on visits, and declared in his will that he was a citizen of this place, was domiciled here, and his will can be admitted to probate here. Williamson's Will, 8 Dec. 47; 6 N. P. 79.

[34] § 1590 G. C., § 10. See § 1094, Essentials to be proven.

§ 1086a. Persons interested in probate of will may contest jurisdiction of Court to entertain application; appeal from decision. "When a will, claimed to have been executed by a person domiciled in this state, is presented for probate in a county thereof, persons interested in its probate may contest the jurisdiction of the court to entertain the application." [R. S. § 5929a.][35]

§ 1086b. Contest. "When such contest is made, parties shall have the right to call witnesses and be heard upon the question it involves. The decision of the court as to its jurisdiction may be reviewed on error." [R. S. § 5929a.][35*]

The above section is of recent date. The intention seems to be to give a contesting party the right to raise the question of jurisdiction and prosecute error from the Courts ruling thereon, making the finding of the Court as to its jurisdiction or right to entertain the application a final order. I am not sure but what this could have been done without the provisions of the above section. If a person wishes to raise the question of jurisdiction, as provided in the above section, he should file an answer; and the Court should proceed to hear the question raised by such an answer before calling witnesses to prove the will. The answer might be in the following form:

(*Title.*)
Now comes A. B. and represents to the Court that he is interested in the following manner (here state how) in the estate of E. F., deceased, application to probate whose will has been filed in the Probate Court of..... .....county, Ohio. The said undersigned hereby denies that said Court has jurisdiction to entertain said application and asks that the same may be dismissed.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

.....

§ 1087. Application for probate.

The statute contains no direct provision that there shall be a formal application filed to admit a will to probate; and yet it seems doubtful if the statute contemplates that the Court should *sua sponte* order a will to be probated, for in sec. 10510, G. C.,[35†] it is provided that if a will is opened, it shall remain in the office of the Probate Judge until *offered for probate.*

35 § 10520 G. C.
35* § 10521 G. C.
35† § 1070.

See Wilberding vs. Miller, 90 O. S. 281; Hine vs. Cowles, 18 O. C. C. (N.S.) 578; affirmed, no op., 86 O. S. 350.

Whether or not the statute contemplates that a formal application be filed, the practice now is that such an application should be filed.[36]

The advantages of having such an application are many. It gives the Probate Court the jurisdictional facts upon which its action must rest. These facts are, first, that the testator is dead; second, that he left a last will and testament; third, that the paper offered is his last will and testament; fourth, that he resided in the county at the time of his death, or had an estate therein. In addition to these jurisdictional facts, the application should show whether or not the testator left a surviving consort, and should give the name of such surviving consort, as well as the names, ages and address of all of the testator's next of kin. These matters are proper, in order that the Court may order notice to be given as provided in a previous section.[37]

This application should not only state the names of the next of kin, resident in the State, but should give all the names whether resident in the State or not. It is matter of information that may be useful to the Court and others interested in the estate in future proceedings. As the Court acts upon the information contained in this application, it should require the same to be sworn to. The application may be made by any one who knows the facts and has some interest in the estate.

[36] Usually, however, the petition for probate embraces that for the appointment of executor or administrator with the will annexed, and is presented by the party claiming the office; and under the simple probate practice of our American County Courts, the petitioner sets forth, in a printed blank, the facts of death and last domicile of the deceased, the names and places of residence of the surviving widow or husband and next of kin, and, alleging that the paper or papers presented constitute the last will and testament of the deceased, prays his appointment, making due reference to the foundation of his claim for the office, and his willingness to qualify according to law. Schouler on Exrs. 65.

[37] §§ 10506-7 C. C., § 1067.

§ 1088. Form of application for probate of will.

Probate Court.....County, Ohio.

In the Matter of
The Last Will and Testament of
....., deceased.
Application to Admit to Probate.

To the Probate Court of said County:

Your petitioner respectfully represents that....., late a resident of the township of..... in said county, and leaving an estate therein, died on or about the.....day of..... A. D. 190.., leaving an instrument in writing, herewith produced, purporting to be h.... last will and testament:

That the said.....died leaving.....h... widow...who resides at.....and the following named persons h...only next of kin, to-wit:

NAME.	AGE OF MINORS.	DEGREE OF KINSHIP.	P. O ADDRESS.
.....	.....	.....	.....

Your petitioner offers said will for probate and prays that a time may be fixed for the proving of the same, and that said above named persons, resident in this State, may be notified according to law of the pendency of said proceedings.

....., Petitioner.

The State of Ohio,.....County, ss.

The above named.....being first duly sworn, says that the facts stated and allegations in the foregoing application contained, are true as...he verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

.....Probate Judge.[37*]

We, the undersigned.....of the within named decedent, hereby waive further notice, and consent to the probate of said will.

Dated this.....day of.....190....

.....

.....

§ 1089. Time of hearing.

The statute, see § 1067, relating to wills does not fix the kind of notice that must be given or when the case should be set for hearing, or what length of time should intervene between the filing of the probate of the will and the time when the witnesses should be heard to testify. It therefore comes under the provisions of a general section,[38] and the Court may fix the time of hearing and order notice thereof to be given for such a length of time as it shall deem reasonable. This practice varies in different Courts. Some require at least one day to intervene between the filing and the probate of the will, unless all parties in interest agree to the immediate action of the Court. Others re-

[37*] See § 1092.

[38] § 11205 G. C., § 37.

See § 1067.

quire a greater length of time to intervene. The length of time between the offering for probate and the time when the will would be heard should be sufficient to allow any person who is interested in the will, or required to be notified, time and opportunity to reach the Probate Court after service of notice was given to such person. Indeed, while sec. 11205, G. C., provides that the Court may fix the time and length of service, it is not to be left arbitrarily to the Court. The Court must fix a reasonable time.

§ 1090. Entry fixing time, etc.

The will having been produced in Court, and the proper application filed, the Court should then determine, first, when the testimony would be heard for admitting the will to probate; second, how service of notice should be made on those required by statute to be notified; third, that testator died a resident of the county in which the will is offered or had an estate therein; and fourth, the length of time that should intervene between the service of the notice, and the time of probating the will. The entry for probating the same may be in the following form:

(*Title.*)
This day came A. B. and filed in this Court the will of C. D., and his application therewith to have the same duly probated. Whereupon the Court finds that the allegations of said application are true and it is ordered that the time set for hearing the testimony of witnesses to probate the same be on the.....day of.....at.....o'clock. And it is ordered that said A. B. notify (here insert the names of next of kin) by delivering to each of them personally a written notice of the time when said will will be for hearing, which notice shall be served upon them at least.....days before the time so fixed.

§ 1091. To whom notice should be given.

In the absence of a statutory requirement, the Court might admit a will to probate without giving any notice, as the proceeding to probate a will in our State is that kind which was known at common or ecclesiastical law as being in "common form." No notice being required, other than that mentioned in the statute, when the statute is followed, it will be sufficient

Prior to 1878 the statute did not require any notice to be given.

and therefore the proceedings are binding on infants and persons *non compos mentis*. The statute directs that no will shall be admitted to probate without notice to the widow or husband and next of kin of the testator being a resident in the State.[39]

It is never necessary in any case in the probate of a will to appoint a guardian *ad litem* over an infant or person under disability.[40]

If a party has no notice and the will is refused probate, such party may offer the will again for probate.[40*]

§ 1092. Service of notice.

No provision is made as to who shall make the service, or in what manner it shall be made, except that it shall be in such a manner and for such a time as the Probate Court shall direct or approve. Usually it is made by the person filing the application, and it is the general practice of Courts to require the notice to be delivered personally. It is the practice of some Courts that where there are no persons resident in the State who are by law required to be notified, to give notice by publication; and even some Courts have adopted this form of notice when some of the next of kin are non-residents of the county, but residents of the State. I presume that such a notice would be legal, as the entire matter is left in the discretion of the Court. But the better practice is, in all cases, to require the notice to be served personally on the next of kin resident in the State. If they are quite numerous, and the estate is small, the Court might be justified in ordering a notice to be given by publication. If such a notice be given by publication, it ought to be for at least three weeks in a newspaper of general circulation in the county where the will is offered for probate. The

[39] §§ 10506-7 G. C., § 1067.

[40] In Feuchter vs. Keyl, 48 O. S. 370, Minshull, J., intimates that notice must be given the executor, and that the statute so requires. I am not familiar with any such statutory provision.

[40*] Feuchter vs. Keyl, 48 O. S. 357.

person making the service should make an affidavit of the time and mode of making the same.[41]

§ 1093. Form of notice.

State of Ohio,.....County, ss.
Probate Court.
To A. B., of.....County:
We command you that you notify.....(five days' notice required in Hamilton county) that a paper purporting to be the last will and testament of C. D., late of said county, deceased, has been filed in the office of the Probate Court of said county; and that the same will be offered for probate and record before the judge of the Probate Court at the Court House in.....in said county, on the.....day of .....A. D. 190...at.....o'clock....M.
In witness whereof, I, ..., judge of the said Court, have hereunto set my hand and affixed the seal of the said Court, at..... .....this.....day of.....A. D. 190....
.....Probate Judge.
By.....Deputy Clerk.
State of Ohio,.....county. Personally appeared before me, the undersigned, judge of the Probate Court, in and for the county of.....A. B., who upon oath deposes and says that on the.....day of.....189.... he served the persons named herein personally with a true copy of the within notice.
.....A. B.
Sworn to and subscribed before me, this.....day of..... A. D. 189.....
.....Probate Judge.
By.....Deputy Clerk.[42]

§ 1094. Essentials to be proven in probate of a will.

In order to justify the Court in admitting a will to probate, the following essential points should be proven by the proponent: First, the death of the testator must be shown. This is an essential without which there can be no valid probating of a will, for until a person is dead there can be no last will and testament, and any proceeding had during the lifetime of a testator would be of no effect whatever.[43] The second essential is that the testator at the time of his death was either a resident of the county in which the will is offered for probate or had an estate therein.[44] The third matter to be shown is

41 Persons of age may, when not under disability, in writing, waive service of notice. See form in § 1088.

42 Whit. Prob. Code. See § 1145, Spoliated wills.

43 See Schouler on Wills, 55, § 119.

44 See previous §§ 1026, 1026a, §§ 72, 74, where the deceased was a resident of the state the better doctrine is that it must be probated in the county of testator's domicile.

that the parties required by statute to be notified have been notified in the manner required by a former order of the Court. This fact should not be overlooked. While the Court can fix the manner in which the parties are to be notified, the statute is positive in its direction as to who shall be notified. Fourth, it must be proven that the instrument presented is the will of the testator, and that it was by him executed as provided by our statutes — that is, he must have signed it at the end; he must have attached his signature himself, or some one else have done so for him at his request. The testator must have signed it or have acknowledged his signature to two witnesses, who must have attached their names as witnesses to the will, knowing at the time they did so that it was the will of the testator;[44a] and furthermore, it must be shown that at the time the testator signed the will, he was of full age, of sound mind and memory, and not under any restraint. How these matters may be proved will be discussed in subsequent sections.[45]

§ 1095. Examination of witnesses to will. "The court shall cause the witnesses to the will, and such other witnesses as any person interested in having it admitted to probate desire, to come before the court. Such witnesses shall be examined in open court, and their testimony reduced to writing and filed." [R. S. § 5926.][46]

§ 1096. What witnesses may be heard, etc.

As a matter of course, the Probate Court has authority to compel by subpœna all witnesses who are within its jurisdiction[46a] to attend court and give their testimony the same as in any other proceeding in the court. The above section, soon after its adoption, was construed by our Supreme Court,[47] where it was held "that under the proceedings authorized for admitting a will to probate, persons interested to resist the probate of the will, are not allowed to introduce evidence to contest its validity." So it may be said that under the provisions of

44a There is some controversy as to whether the witnesses must know that it is a will they are signing. See § 1040 *et seq.*, note.

45 See § 1106.

46 § 10516 G. C. See §§ 1086, 1086a, As to jurisdiction.

46a This now extends to persons residing in the adjoining county.

47 Matter of Hathaway, 4 O. S. 383; Kamman vs. Kamman, 6 O. App. 455; Barr vs. Cloisterman, 3 C. C. 441; 2 C. D. 251.

the above section, the Court should call the witnesses to the will, and it has been held that it is proper to call all the witnesses to the will, but if only two are called, it will not be error for which the proceedings might be reversed.[48]

The provision of the above section as to the mode of proving a will are conclusive, and they must be strictly pursued in proceedings to probate a will. In addition to the witnesses who have attached their signatures to a will, the Court may hear such other witnesses as any person interested in having the will probated may desire to have brought before the Court for that purpose. A person who is not interested in having the will admitted to probate could not call a witness. He must not merely be interested in the *result* of the admission, to probate, but must have an interest in having the will probated, and not have an interest in having it fail. It is not always clear what range of examination should be allowed of the witnesses called to prove the will, but it seems, if the power be limited, so that only witnesses may be called by a person interested in having the will admitted to probate, that any interested person should be permitted to cross-examine such witness within reasonable limits, and assist the Court in ascertaining whether the testimony offered is sufficient to justify the Court in making an order admitting the will to probate. The matters to be inquired into are as to the capacity of a testator to make a will and whether it was made in accordance with the statute. A further matter may be gone into as to the jurisdiction of the Court, but usually this matter rests upon the application filed for probate of the will.[49]

§ 1097. Form of testimony.

It will be observed by the provisions of sec. 10516, G. C.[49*] the testimony must be reduced to writing and filed in the

[48] Mosier vs. Harmon, 29 O. S. 220; Wadsworth vs. Purdy, 12 C. C. (N.S.) 8; 31 C. C. 110.

[49] See extended opinion in the Estate of Jones, 2 N. P. 190; 2 Dec. 409.

The issue of jurisdiction to entertain the application may now be made, and upon that question witnesses may be heard. §§ 10520, 10521 G. C., § 1086a.

Due execution of a will may be proven by witnesses independent of the subscribing witness, and even in contradiction of such witnesses. Watts' Will, 19 N. P. 225; 27 Dec. 87.

[49*] § 1095.

Court. The usual form of such testimony is as follows, although, if there be additional testimony, it must all be written and filed with the proceedings:

Probate Court, Clark County, Ohio.
In the matter of the Will of ....., deceased. } No.....
Testimony of Witnesses.

The State of Ohio,.....County, ss.

Personally appeared in open Court, A. B. and C. D., who being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, in relation to the execution of the last will and testament of E. F., deceased, depose and say: That they were present at the execution of the instrument of writing now before them bearing date the.....day of..... .....A. D. 190.., purporting to be the last will and testament of E. F., deceased; that they respectively subscribed their names thereto as witnesses at the request of said testator and in his presence; that they saw said testator sign said instrument at the end thereof, and heard him acknowledge the same to be his will; and that said E. F. at the time of executing the same was of full age, and of sound mind and memory, and not under any restraint.

.....
.....

Sworn to before me and signed in my presence by said witnesses in open Court this.....day of.....190...

.....Probate Judge.
.....Deputy Clerk.

§ 1098. How will proved, if witnesses unknown or incompetent, etc. "When a will is offered for probate, if it appears to the court that a witness thereto is gone to parts unknown; or if the witnesses were competent at the time of attesting its execution and afterward became incompetent, or the testimony of a witness can not be obtained within a reasonable time, the will may be admitted to probate and allowed upon such proof as would be satisfactory, and in like manner as if such absent or incompetent witness were dead." [R. S. § 5927.][50]

§ 1099. Sufficient testimony where witnesses are dead or absent.

The requisites of the above section are, first, that the witness has gone to parts unknown. If known, the testimony must either be had in open Court, as provided by sec. 10516, G. C., or by a commission, as provided by sec. 10518, G. C.; or secondly, the witness must have become incompetent or have become so situated that his testimony could not be obtained in

[50] § 10517 G. C.

any reasonable time. This might allow testimony to be taken of an absent witness' signature, even though his place of residence was known, if his testimony could not be obtained in a reasonable length of time. However, the Court should require the direct testimony of the witness where the procuring of the same would not delay the matter to such a length of time that it might result in injury to the estate. If the above matters appear to the Court, then the will shall be allowed upon such proof as would be satisfactory in like manner as if such absent or incompetent witness were dead. But nowhere does the statute say in what manner the proof should be offered if a witness is dead. In such cases, says a recent law writer,[51] and which accords with the practice in our State: "If one or more of the subscribing witnesses to a will are dead, or absent from the jurisdiction of the Court before which the will is offered for probate, proof of the genuineness of the signatures of such attesting witnesses and of testator is sufficient, with the aid of this presumption that the remaining acts were properly done, to establish the validity of the will." [52]

The same rule applies where one of the subscribing witnesses is dead or beyond the jurisdiction of the Court, and the rest do not remember the facts of execution. Proof of the genuineness of the signatures of testator and the witnesses will, with the aid of the presumption under discussion, establish the validity of the will.[53]

This legal presumption is, of course, greatly aided by the direct testimony of such subscribing witnesses as can be produced at probate, or whose evidence can be taken by deposition, that the acts necessary to a legal execution actually took place. Under these circumstances a will may be admitted to probate upon such evidence." [55]

[51] Page on Wills, § 373, p. 442.

[52] Citing Barnewall vs. Murrell, 108 Ala. 366; Robinson vs. Brewster, 140 Ill. 649; Hobart vs. Hobart, 154 Ill. 610; Taylor vs. Cox, 153 Ill. 220; Scott vs. Hawk, 107 Ia. 723; Allison's Estate, 104 Ia. 130; 73 N. W. 489; Nickerson vs. Buck, 12 Cush. 332; Sullivan's Will, 114 Mich. 189; Jackson vs. Van Dusen, 5 Johns (N. Y.) 144.

[53] Tyler's Estate, 121 Cal. 405; Slingloff vs. Bruner, 174 Ill. 561.

[55] (Jones' Will), Jones vs. Roberts, 96 Wis. 427.

In Matter of Dreyer (N. Y. Law

The Court is not limited to witnesses who can testify to any one particular fact, but may hear such testimony as will tend to complete a chain of testimony which will establish the fact that the will presented for probate is the last will and testament of the deceased.

§ 1100. Form of testimony of subscribing witnesses.

The testimony given where witnesses absent or dead must be reduced to writing the same as if the witnesses were present. The following is a general form:

Probate Court,.....County, Ohio.

In the Matter of
The Will of
.....
} No.....
Testimony.

The State of Ohio.....County, ss.

Personally appeared in open Court....., who being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, in the matter of the will of....., deceased, depose and say: That....., whose name appears as one of the subscribing witnesses to the last will and testament of....., deceased, hereunto annexed, has since the date of said will.....A. D. 190...., deceased.....that we are each of us well acquainted with the handwriting and signature of said deceased witness, and that the signature of said....., purporting to be his, as one of the subscribing witnesses to said will, is the true and genuine signature of the said deceased witness.....

.....

Sworn to before me and signed in my presence in open Court this..... day of.....190...

.....Probate Judge.

§ 1101. **When Court may issue commission to take their testimony.** "The court may issue a commission with the will annexed, directed to any suitable person or persons, to take the deposition of a witness to a will who resides out of its jurisdiction, or who resides within it, but is infirm and unable to attend

J., Feb. 27, 1892,) the will was made in 1867. Neither of the witnesses were produced, the testator's son and daughter (proponents) proved his signature; in their younger days they knew the two witnesses, but were unable to prove the signature of either, and did not know where either could be found. Probate was denied, "although," said Ransom, S., "I am morally convinced that the paper was properly executed." Redf. Sur. Prac. 139; See Woerner on Admin. 474. Stephen Dig. Ev., art. 66; Rice Probate Law, 84; 1 Green. Ev. § 572.

court. Every deposition so taken, certified, and returned by one or more of the persons named in such commission, shall be as valid as if taken in open court." [R. S. § 5928.][56]

§ 1102. Order to take testimony of absent witness.

When it is made to appear to the Court that some witness resides out of the jurisdiction of the Court, or is infirm and unable to attend Court, then the Court shall direct that a commission be taken, to take the testimony of such a witness. The following may be used as an entry:

(Title.)

It appearing to the Court that A. B. and C. D., subscribing witnesses of the last will and testament of E. F., are now residents of Chicago, Ill., and without the jurisdiction of this Court. It is therefore ordered that a commission be executed, with the said will thereto annexed, to X. Y. of Chicago, Ill., to take the deposition of said subscribing witness and return the same duly executed with all convenient speed into our said Court.[57]

§ 1103. Form of commission.

State of Ohio,.....County, ss.

To X. Y., Greeting:

Know ye, That we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give to you full power and authority to examine and take the depositions of A. B. and C. D., subscribing witnesses to the last will and testament of E. F., deceased, hereto annexed, late of the county of....., in the State of Ohio, deceased, and therefore we command you that at certain days and places appointed by you, you cause the said A. B. and C. D. to be brought before you, and then and there examine them on oath or affirmation first taken before you touching the due execution of said will of the said E. F., deceased, and that you reduce such examination to writing, and return the same, together with this commission and the will of the said E. F., deceased, thereto annexed, closed up under your seals and our said Probate Court, with all convenient speed.

In testimony whereof, I, ..., judge of the said Court, have hereunto set my hand and affixed the seal of said Court, at....., this.....day of.....A. D. 190....

.....Probate Judge.[58]

[56] § 10518 G. C.

[57] Statute does not say how it shall appear to the Court that a witness is without the jurisdiction of the Court. Usually the Court takes the statement of parties to that effect. It may be required by affidavit.

[58] Whittaker's Probate Code.

§ 1104. Return of commissioner.

In the matter of the last will and testament of E. F., deceased. I, X. Y., duly appointed and commissioned by the judge of the Probate Court of the county of....., in the State of Ohio, to take the testimony of A. B. and C. D., the subscribing witnesses of the last will and testament of E. F., deceased, late a resident of said county of....., in the State of Ohio, which commission and the said will are hereunto annexed, ...do hereby certify, that in pursuance of said commission I caused A. B. and C. D., said subscribing witnesses as aforesaid, to come personally before me, at....., who being by me first duly sworn according to law, to speak the truth, the whole truth, and nothing but the truth, concerning and in relation to the execution of said will, depose and say that they were present at the making of said will, hereto attached, marked "A," and at the request of the deceased, subscribed their names to said will as witnesses in the presence of the deceased, (and of each other); that they saw the said E. F., deceased, sign said will (or heard); him acknowledge the same to be his last will and testament; that the said E. F., deceased, was, at the time of making, signing and sealing said last will and testament, of legal age, and of sound mind and memory, and under no undue or unlawful restraint whatsoever.

....
....

I, X. Y.,....., do further testify that said testimony was reduced to writing by myself, in the presence of said witnesses respectively, and subscribed by said witnesses in my presence, on the.....day of..... .....190....

In witness whereof, I have hereunto set my hand,....., this..... day of.....190....

....., Commissioner.[59]

§ 1105. Admission of will to probate. "If it appears that such will was duly attested and executed, and that the testator, at the time of executing it was of full age, of sound mind and memory, and not under restraint, the court shall admit the will to probate." [R. S. § 5929.][60]

§ 1106. Sufficient proof, etc.

The previous section of the General Code merely requires that the Probate Court shall find that the will has been executed as provided by sec. 10503,[60*] G. C. The thoughtless manner in which wills are sometimes executed, and the informality surrounding such execution, failing to leave an impression on the witnesses of the importance of the document they have attested, often results in the kind of testimony that gives a court some trouble in arriving at its conclusions. While the probating of a will is an *ex parte* proceeding, yet it is one of a judi-

[59] Whittaker's Probate Code.

[60] § 10519 G. C.

[60*] § 1018.

The testimony of one attesting witness that all the formalities by testator and both attesting witnesses have been performed, to the due execution of the will, is sufficient, if believed, to admit the will to probate, notwithstanding the other witness to the will fails to remember or denies compliance by testator with one or more of the essential requirements to its due execution. *In re* Watts, 27 Dec. 87; 19 N. P. 225.

cial character, and the ordinary rules of evidence must control the Court in arriving at its conclusion. In this kind of a proceeding, like others, the burden rests on him who seeks to establish the validity of the will, and it must be done by a fair preponderance of all the evidence.[60*] The Court need not be satisfied beyond a reasonable doubt, but it should appear from all the testimony that it is reasonably certain that the statutory requirements have been complied with. In this kind of a proceeding, like some others, one fact being proven, the law presumes another. Thus where a will had an attestation clause that "it is signed, sealed and published in the presence" of the witnesses, if it was shown that the witnesses signed the instrument, the presumption would follow that it was signed in the presence of the testator.[61] And where a paper propounded as a will is shown to have been signed by the alleged testator, and the requisite number of witnesses, in the absence of any satisfactory evidence to the contrary, the presumption is that all the formalities have been complied with.[62] And it has been held that mere forgetfulness of the accessible subscribing witness, as to certain necessary facts of execution, does not avoid the *prima facie* case made out by proof of the genuineness of the signatures of testator and the subscribing witnesses.[63]

Where the subscribing witness testified that she signed as witness in the presence of the testator and at his request, but could not remember that she saw the signature of testator, it was held to make out a *prima facie* case for the validity of the will. So where the subscribing witnesses identify their signatures, but have no recollection of having attested the instru-

[60*] *In Re* Ludlow, 4 N. P. 9, 6 Dec. 106.

[61] Carpenter vs. Denoon, 29 O. S. 379. See §§ 1042-1046.

[62] Page on Wills, § 371, p. 440.

[63] Page on Wills, 441, § 372, citing Tyler's Estate, 121 Cal. 405; 53 Pac. 928; Gillis vs. Gillis, 96 Ga. 1; Canatsey vs. Canatsey, 130 Ill. 397; Slingloff vs. Bruner, 174 Ill. 561; Hobart vs. Hobart, 154 Ill. 610; Nickerson vs. Buck, 12 Csch. (Mass.) 332; *in re* Kellum, 52 N. Y. 517; *in re* Hunt, 110 N. Y. 278; Luper vs. Werts, 19 Ore. 122; Sullivan's Will, 114 Mich. 189; Abbot vs. Abbot, 41 Mich. 540; Gable vs. Rauch, 50 S. Car. 95; 27 S. E. 555; Welch vs. Welch, 9 Rich. (S. Car.) 133; Will of O'Hagan, 73 Wis. 78.

ment, or of the circumstances of execution, the presumption that it was properly executed will uphold it in the absence of clear and satisfactory proof to the contrary.[64]

If the testimony of subscribing witnesses are not sufficient, the Court should hear other testimony, for the will should not fail by reason of forgetfulness or other acts of the witnesses.[65]

Where it is shown that the testator signed the will, it is presumed that he signed it understandingly,[66] and it is also presumed that the will is made free from restraint and that the testator has the capacity to make a valid will; where it is not shown that the testator labored under some disability,[67] the Court must determine the facts from the testimony of wit-

[64] Hobart vs. Hobart, 154 Ill. 610. The following testimony was held to be insufficient to sustain an order admitting a will to probate. There were three subscribing witnesses to the will; one was dead at the time it was probated, the other two were examined before the probate judge. Neither of these upon examination had any recollection of signing their names as witnesses to the will, although they recognized their own signatures. Neither of them remembered to have seen the will, nor could they tell whether they signed it in the presence of the testator, or at his request, or in the presence of each other. They would not say whether that was the last will and testament of the deceased, or not; nor did they know that the signature to the will was the genuine signature of Baudendistle. They were of opinion that about the year 1842 he was of sound and disposing mind and memory, but did not know that he was so at the time the will purports to have been signed, nor could they tell whether he was under any restraint. Kuntz vs. Baudendistle, Dayton, Ohio, Dec. 225.

[65] That, while the due execution of a will cannot be assumed in the face of positive evidence to the contrary, merely because it has been signed and attested in due form, yet mere failure of the attesting witnesses, or their denial of the facts, will not defeat it if it can be established by other evidence.

Neither failure of memory, nor the corrupt or false swearing of attesting witnesses will be allowed to defeat the will, if its due execution can be shown by other testimony. 3 Redf. on Wills, chapt. 1, § 3, p. 9; Clark vs. Dunnavant, 10 Leigh, 13; 1 Redf. on Wills, chapt. 4, § 19, p. 22; Dean vs. Dean, 27 Vt. 746; Elliott vs. Elliot, 10 Allen, 357; Lawyer vs. Smith, 8 Mich. 411; Tilden vs. Tilden, 13 Gray, 110; Ella vs. Edwards, 16 Gray, 91; Dewey vs. Dewey, 1 Metc. 349; Chaffee vs. Bap. Miss. Con., 10 Paige 85; Adams vs. Field, 21 Vt. 256; Bowman vs. Christman, 4 Wend. 277; 2 Phill. on Ev., 935, note; Kirk vs. Carr, 54 Penn. St. 285. Haynes vs. Haynes, 33 O. S. 598.

[66] Page on Wills, §§ 380, 447.

[67] Page on Wills, § 383, p. 451.

nesses and cannot refuse to admit a will because of an absurd or ridiculous proposition in the will.[68]

Where a will was properly signed by two witnesses, neither of whom saw the testator subscribe his name to the paper, one, however, heard him expressly acknowledge the same, but the other did not, the jury found, from the surrounding circumstances, that the will was properly executed.[69]

In another case one witness was dead, and the other witness could not testify that he saw the signature on the will, or that there was an acknowledgment by the maker that it was his will at the time the witness was asked to attach his signature; and in this case, there being no other testimony, the will was refused admission to probate.[70]

While the Probate Judge should feel satisfied that the formalities of the statute have been complied with in the execution of the instrument, and that the paper ought to be admitted to probate, yet he should only have a reasonable assurance of that fact and should not by reason of possible doubts, refuse admission, for the statute has provided by way of contest a method by which this matter may be fully gone into, and the questions passed upon by a jury under instructions of a competent Court.[71]

§ 1107. Entry ordering probate.

When the Court is satisfied that the paper presented should be admitted to probate, an entry of that fact should be placed on record. It is a common practice to have this entry only state the requirements of sec. 10519, G. C.,[71*] but it seems that it ought also to state, unless the previous entry has made a finding of that fact, that the testator was a resident of the county, or had an estate therein. The following will serve as a

[68] *In re* Oskamp's Will, 7 N. P. 665; 5 Dec. 584.

[69] See Raudebaugh vs. Shelley, 6 O. S. 307.

[70] Keyle vs. Feuchter, 56 O. S. 424. This will, it seems, might have been admitted upon the presumption following the attestation clause.

[71] *In re* Ludlow, 4 N. P. 99; 6 Dec. 106.

[71*] § 1105.

A proceeding where a will is propounded for probate is not adversary, but entirely *ex parte*, and nothing more is required than that a *prima facie* case is made that the testatrix was of full age, of sound mind and memory, and free from restraint; that the paper writing propounded was in writing, and that it

form of entry, and is made to be used where a codicil is attached to the will:

FORM OF ORDER OF PROBATE.

In the Matter of the Probate of the Last Will of....., deceased,.....190....

Notice of the time of hearing of this application having been given (or waived) as heretofore ordered by the Court, and the same now coming on to be heard..... Thereupon said will was duly proved by the oaths of.....and....., subscribing witnesses thereto (and the oaths of.....and....., subscribing witnesses to the codicil, a part thereof) who .....duly sworn and examined in open Court, and testimony reduced to writing and filed therein.....

and it appearing to the Court, from the testimony of said witnesses "that said will (and codicil) is duly attested and executed; and that the testator at the time of executing the same was of full age, of sound mind and memory, and not under any restraint," and that said testator was a resident of and had an estate in this county. It is now ordered that said will (and codicil) be admitted to probate and filed and that the same, together with the testimony so taken as aforesaid, be recorded. Citation ordered and issued to....., widow of said decedent, to elect as to said will as required by law.

.....Probate Judge.[72]

§ 1108. Effect of order.

The statute expressly provides that:

"Unless it has been duly admitted to probate or record, as provided in this chapter, no will shall be effectual to pass real or personal estate." [R. S. § 5942.][73]

It therefore follows that until a will is duly admitted to probate, where it is a domestic will, or to record where it is a foreign will, that no title is passed thereby, and that the title remains in the heirs at law of the testator.[74]

The Probate Court being a court of record, its orders impute absolute verity, and such orders can not be attached in a

is signed at the end thereof by her, and attested and subscribed in her presence by two or more competent witnesses who saw the testatrix subscribe or heard her acknowledge the same. Estate of Nicholson, 2 N. P. (N.S.) 189; 49 Bull. 379.

[72] The order of a Court of Probate which recites that the will was presented to the court for probate, and the subscribing witnesses were sworn and examined in open court, and their testimony was reduced to writing and filed by order of the court, and that thereupon the court ordered the will to be filed and admitted to record, is sufficient evidence that the will was proved in accordance with law, and ordered to be recorded. Holman vs. Riddle, 8 O. S. 384.

[73] § 10541 G. C.

[74] Swazey vs. Blackman, 8 O. 5; Woodbridge vs. Banning, 14 O. S. 328.

collateral proceeding. In reference to the effect of such order of probate, our Supreme Court has laid down the following propositions:

"1. That the Probate Court has exclusive jurisdiction to take the proof of wills, admit them to probate, and record them together with the testimony. A record thus made, in pursuance of these provisions, is the only one authorized or required by law, and without such probating and recording, wills are wholly inoperative in Ohio for any purpose whatever.

"2. That from the time the will is probated and recorded, it is binding and conclusive in every respect, except as evidence against interested persons, who may contest it within the time limited.

"3. If no such contest is made by interested persons within the time limited, then it becomes also forever binding upon them, as it had been on all others in the world, from the date of the probate and record.

"4. If interested persons, as they may, do contest the will, the probate and record are not thereby annulled, or the force and validity of the will weakened during the pendency of the proceedings contesting it. It still remains in full force for all purposes, except as evidence on the trial of the issue between the contestants and contestees, where the validity of the will is directly called in question. Even here, and for this purpose, the record is still accompanied by a legal presumption in its favor, for on the trial it is *prima facie* evidence of the validity of the will, and this presumption attends it until the verdict of a jury against it has been returned, and a proper judicial decree setting it aside has been rendered." [75]

On the contest of a will in the Court of Common Pleas the question of whether the will was properly probated is not involved and can not be gone into. By bringing such action the plaintiffs admit the probate of the will, and will not on trial therefore, be permitted to question or deny the regularity of the order of the Probate Court, or the authority or jurisdiction of the court that made it. Stacy vs. Cunningham, 69 O. S. 176.

[75] Lessees of Swazey's Heirs vs. Blackmann, 8 O. 19; Brown vs. Burdick, 25 O. S. 260.

The probate of a will and the widow's election are constructive notice of the testator's estate, but not of the wife's separate property (as where she owned part of the land devised to her in the will). Hibbs vs. Ins. Co., 40 O. S. 543.

It has been held that the title of a devisee relates back from the probate of the will and takes effect as of the time of the death of the testator, and that if a devisee conveys the same in the interim between the death of the testator and probate of the will, he takes the legal title upon the probate of the will as trustee for his grantee. Miller vs. Douglass, 11 C. C. (N.S.) 205; 30 O. C. C. 666.

If the finding of the Probate

§ 1109. Record of title by will. "When admitted to probate every will shall be filed in the office of the probate judge and recorded, together with the testimony, by him or his clerk in a book to be kept for that purpose." [R. S. § 5930.][76]

§ 1109a. Certificate of probate judge when will devises real estate. "When a will is admitted to probate which devises real estate situated in the county where it is recorded, or when the certified copy of a will is filed in the probate court, as hereinafter provided in this chapter, which devises real estate in the county where it is recorded, upon recording such will, the court shall immediately transmit to the recorder of the county in which the will is recorded, a certificate containing the fact of such filing and probate, the name of the testator, the name of the devisees of the real estate, and a description of such real estate as the will contains, and separately state with each parcel the names of the devisees thereof, together with the volume and page of the record of the will." [R. S. § 5930.][76*]

§ 1109b. Record by county recorder. "Upon receipt of such certificate, the recorder shall record it in the books provided for the recording of deeds and index such records in the name of the testator as grantor and the devisees as grantees, in the index provided for the record of deeds." [R. S. § 5930.][76†]

§ 1109c. Fees. "For recording and indexing such certificate, the recorder shall be paid the fees provided by law for the recording and indexing deeds, and the probate judge be allowed the fees the law provides for similar certificates, which fees of recorder and probate judge the judge shall tax in the costs of probating and recording such will, and collect as other costs." [R. S. § 5930.][76‡]

§ 1110. Certified copy of will, etc., evidence. "A copy of such recorded will, with a copy of the order of probate annexed thereto, certified by the judge of probate under seal of his court, shall be as effectual in all cases as the original would be, if produced and established by proof." [R. S. § 5931.][77]

§ 1111. Recorded in each county where real estate is situate. "If real estate devised by will is situated in any other county than that in which the will is proved, an authenticated copy of the will and order of probate shall be admitted to record in the office of the probate judge of each county in which such

Court on jurisdictional matters is questioned, it must be in a direct proceedins. See § 1112.

[76] § 10525 G. C.

[76*] § 10526 G. C.

This is no part of the probate of the will. Wolf vs. Menager, 14 Dec. 128; 48 B. 617.

[76†] § 10527 G. C.

[76‡] § 10528 G. C.

[77] § 10529 G. C.

real estate is situated, upon the order of such judge, and shall have the same validity therein as if probate had been had in such county." [R. S. § 5932.][78]

APPLICATION FOR TRANSFER AND RECORD OF REAL ESTATE DEVISED.

Probate Court.....County, Ohio.

In the Matter of the Estate of ..... Deceased. No. ..... Application for Transfer and record of Real Estate Devised.

Now comes ..... and represents to the Court that by the terms of the last will and testament of ....., deceased, late of said county, which will was duly admitted to probate on the .... day of ....., A. D. 19.., and recorded in Vol. ....., page ....., of the Will Records of said ..... County, certain real estate was devised to .....

That the following is a description of said real estate such as is contained in the will, to-wit:* (Here describe said real estate in the language of the will, and if not specific, such as would be necessary in making a deed, then after giving said description, say "The following is a specific description of said real estate," and describe it accordingly.)

---

*If there are several parcels devised separately to different persons write the word "To" and give the name of the devisee of the first parcel before describing it. And then follow similarly with the next devisee and his parcel, and so on.

* Your petitioner represents that all the provisions and conditions of said will have been fully complied with upon the part of said devisee.

Wherefore, ...he prays for an order to the County Auditor directing the transfer of said real estate upon the tax duplicate to ..... name, and for a certificate to the County Recorder, as provided by law.

---

*If not so, then cross out or alter accordingly, the part relating to order for transfer. The certificate to Recorder should issue even if the conditions of the will have not been complied with.

The State of Ohio, ... County, ss.

..... being first duly sworn says that the facts stated in the foregoing application are true as ....he verily believes.

.....

Sworn to before me and subscribed in my presence this ..... day of ....., 19...

....., Probate Judge.

By ....., Deputy Clerk.

[78] § 10530 G. C.

Persons are bound by the will as it appears on the record. If there is a mistake the probate judge might be responsible. Wolfe vs. Menger, 15 Dec. 128.

CERTIFICATE FOR TRANSFER AND RECORD OF REAL ESTATE DEVISED.

Probate Court.....County, Ohio.

To the Auditor and Recorder of said County:

I hereby certify that on the ..... day of ....., A. D. 190.., the last will and testament of ....., late of said county, was duly admitted to probate in this Court, and the same has been duly recorded in Vol. ....., page ....., of the Records of Wills in this office. That by the terms of said will certain real estate was devised to .....

That the following is a description of said real estate such as is contained in the will, to-wit:* (Here describe said real estate in the language of the will, and if not specific, such as would be necessary in making a deed, then after giving description, say "The following is a specific description of said real estate," and describe it accordingly.)

---

*If there are several parcels devised separately to different persons write the word "To" and give the name of the devisee of the first parcel before describing it. And then follow similarly with the next devisee and his parcel, and so on.

*And it appearing to the satisfaction of the Court that the terms of said will have been fully carried out on the part of the devisee hereinbefore named, it is ordered that such real estate be transferred upon the duplicates of the county to the name of the said devisee; and that this certificate then be presented to the said County Recorder for record.

Witness my hand and the seal of said Court this ..... day of ....., 190.

.....,
Probate Judge.

By .....,
Deputy Clerk.

---

*If not so, then cross out or alter accordingly, the part relating to order for transfer. The certificate to Recorder should issue even if the conditions of the will have not been complied with.

Probate Court, ... County, Ohio, A. D. 19...

In the Matter of the Estate of ..... Deceased.

Authority to Transfer and Record Real Estate Devised.

This day came ..... and filed herein h.... application duly verified, for an order to the County Auditor directing the transfer upon the tax duplicate of ..... County, of certain real estate devised by ..... deceased, and for a certificate to the County Recorder.

Upon consideration whereof, the Court finds that by the terms of the will of said decedent, said real estate was devised to ..... And that the description of said real estate such as is contained in said will, and the specific description of said real estate, are as set out in said application.

*And it appearing to the satisfaction of the Court that the terms of said will have been fully complied with on the part of said devisee hereinbefore named, it is ordered that said real estate be transferred upon the

duplicate of the county to the name of ....., and that a certificate of this order, together with the description contained in the application, issue to said Auditor and Recorder, as required by law.

....,
Judge.

*If not so, then cross out or alter accordingly, the part relating to order for transfer. The certificate to Recorder should issue even if the conditions of the will have not been complied with.

§ 1111a. Record of Title by descent.

The county recorder shall not record any deed of absolute conveyance of land until it has been presented to the county auditor, and by him indorsed "transferred," or "transfer not necessary." Before any real estate, the title to which shall have passed under the laws of descent shall be transferred as above provided, from the name of the ancestor to the heir at law or next of kin of such ancestor, or to any grantee of such heir at law or next of kin;

Affidavit of lien. And before any deed or conveyance of real estate made by any such heir at law or next of kin shall be presented to or filed for record by the recorder of any county, such heir at law or next of kin, or his or their grantee, his agent or attorney shall present to such auditor the affidavit of such heir or heirs at law or next of kin, or of two persons resident of the state of Ohio, each of whom has personal knowledge of the facts, which affidavit shall set forth the date of such ancestor's death, and the place of residence at the time or his or her death; the fact that he or she died intestate; the names, ages, and addresses, so far as the ages and addresses are known and can be ascertained of each of such ancestor's heirs at law and next of kin, who by his death inherited such real estate and the relationship of each to such ancestor and the part or portion of such real estate inherited by each, which such transfers shall be made by the auditor in accordance with the statement contained in such affidavit.

Indorsement of auditor. And such auditor shall indorse upon such deed or conveyance the fact that such transfer was made by affidavit. Such affidavit shall be filed with recorder of the county in which such real estate is situated at or before the time when such deed or conveyance shall be filed with such recorder for record and shall be by him recorded in the record of deeds, and such affidavit of descent shall be by him indexed in the general index of deeds, in his office, in the name of such ancestor as grantor and in the name of each of such heirs at law or next of kin as grantees in the same manner as if such names occurred in a deed of conveyance from such ancestor to said heirs at law and for such indexing and recording the recorder shall receive the same fees as are provided by law for the indexing and recording of deeds.

Prima facie evidence of title. The said record of the affidavit above mentioned, shall, in the trial of any cause, so far as competent, be *prima facie* evidence only, of the truth of the statements made therein in accordance with the foregoing provisions of this act, but the truth of such statements may be rebutted or overcome by any competent evidence.

Penalty for false statement. " * * * Any person or persons who shall, wilfully and fraudulently make affidavit to any statement above mentioned, which shall be false, knowing the same to be false or who shall, for the purpose above mentioned, deliver to any county auditor for the purpose of obtaining any such transfer, or deliver to the county recorder, for the purpose of having the same recorded, any such affidavit containing any such false statements, knowing the same to be a false statement, shall be guilty of a misdemeanor and on conviction thereof, be fined in any sum not exceeding five hundred dollars and be imprisoned in the county jail not to exceed six months, or both, and in addition, be liable in damages to any person who may be injured by the making, filing, recording or use as aforesaid of such affidavit." [R. S. § 1159; 108 v. 282.][78a]

AFFIDAVIT FOR TRANSFER AND RECORD OF REAL ESTATE INHERITED.

....., Deceased.
....., Heirs at Law.

State of Ohio,
.....County, ss.

..... and .....
.....
.....

being first duly sworn, says —he— is (are) heir— at law of....., deceased; that on the ..... day of ....., 19...., the said ..... died intestate, residing at .....; leaving the persons herein designated, all h— heirs at law and next of kin, with their age, address, relationship and portion inherited by them in the real estate hereinafter described:

Name	Age	Address	Relationship	Portion Inherited
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

That on the ..... day of ....., 19...., ... was duly appointed administrator of h.. estate by the Probate Court of ..... County, and thereafter filed his final account in execution of said trust.

That said ....., at the time of h.. decease, was seized of the following described real estate:.....
.....
.....
.....
.....

[78a] § 2768 G. C.

Sworn to and subscribed before me and in my presence this..... day of ....., 19..... .....,
.....

The object and purpose of the above provisions of our statute is to create a system of registration of title to land within each county which will show the true condition of the title to lands therein, or at least establish that the apparent owner of record is to be considered the true owner; that upon record so made innocent *bona fide* purchasers may rely, and be justified in acting upon the information thus acquired. And the same construction should be given to the above provision of the General Code as is given to the act requiring the record of deeds. While the will might be sufficient to transfer title, although it was not recorded in the county, as to a party who had knowledge of all the facts, yet if the heir-at-law would sell the land to an innocent purchaser before the will was left for record, a good title would be conveyed.[79]

§ 1112. **Uncontested probate after one year binding.** "If, within one year after probate had, no person interested appears and contests the validity of the will, the probate shall be forever binding, saving, however, to infants, and persons of unsound mind, or in captivity, the like period after the respective disabilities are removed." [R. S. § 5933; 103 v. 173.][80]

The above section is very much similar to sec. 12087 G. C. The statute of limitations in contest it is said differs from the ordinary statute in that it is jurisdictional in its nature, and cannot be waived by consent of the parties, since after the limit fixed by statute, the Court has no jurisdiction over the subject matter of the contest. And even where the ground of

[79] Eggleston vs. Harrison, 61 O. S. 397; Coe vs. Erb, 59 O. S. 259.

See § 28.

Upon the probate of a domestic will, the title of the devisee becomes vested immediately, and by relation, as of the date of the death of the testator, whether the lands devised be situate in the county wherein the will is probated or in another county of the State. It is true that provision is made for recording a copy of the will and the order of probate in other counties where lands devised by the will are situate; but the recording in such other counties is not made a condition upon which the estate of the devisee vests, nor does the failure to record such copy and order of probate in any case defeat the title of devisee. Carpenter vs. Denoon, 29 O. S. 395.

See §§ 1086a, 1113a.

[80] § 10531 G. C.

§ 12087 G. C. has been amended to require a contest to be commenced within one year instead of two years after the will has been probated. Vol. 102, p. 308.

contest is unknown to the heir, or was not discovered by him until the limit for contest has elapsed, it was held that such heir could not contest the will under the statute, and that equity would grant him no relief.[81]

The general principle of the statute of limitations, that disabilities cannot be tacked together to take the case out of the statute, applies in cases of contest.[82] But where a proceeding to contest a will is commenced within the limit of the statutory period, although only a part of the parties interested in the contest are made parties thereto, the right of action is saved to all who are ultimately made parties, notwithstanding that some of them are not brought in the case until after the period of limitation has expired.[83]

The action to contest a will is an original proceeding brought in the Court of Common Pleas. But, as a matter of course, cannot be brought until after the will has been admitted to probate, for until such is the case there is no will to contest.[84]

Where a will was set aside at the instance of one who is within the saving clause of the statute of limitations, it is wholly annulled, and the entire estate is to be distributed.[85]

§ 1112a. Contests, etc.

Only such persons as are interested in the will at the time it is probated can enter or maintain a suit to contest a will.[85a]

A person who has gone into possession of land devised to him and leased the same knowing the contents of the will, can not bring or maintain the action.[85b]

A legatee who has accepted a portion under the will can not bring an action to contest while he retains such portion.[85c] But he may, if it is personal property, tender it back and bring the action.[85d]

[81] Page on Wills, 372, § 321.

[82] Powell vs. Koehler, 52 O. S. 103.

[83] Bradford vs. Andrews, 20 O. S. 208.

[84] *Id.* 22.

[85] Meese vs. Keefe, 10 O. 362. As to proceedings in contest, see §§ 5858-5866 R. S. Kinkead's Pleadings, §§ 1207, 1208.

[85a] DeBow vs. Fifth Church, 23 Dec. 617.

[85b] Lesley vs. Cockley, 32 O. C. C. 299.

[85c] Zinn vs. Ferris, 27 Dec. 27.

A will contest can not take the place of an action to quiet title; a legatee is a necessary party.

In the contest of a will there is no appeal from the Court of Common Pleas; the case can only go up farther by error.[85e] The same as cases that are tried by jury as distinguished from those triable by a judge sitting as a Court of Equity.

The issue of the capacity of plaintiff to bring the action because not heir or next of kin may be tried as a preliminary issue.[85f] All persons interested in the will at the time of trial must be made parties; hence grandchildren born after the commencement of the action, but before trial, are not bound.[85g] But it is binding upon unborn remaindermen.[85h]

The grantee of a devisee is a necessary party.[85i]

A subscribing witness may testify in behalf of the will on contest, even though he was testator's attorney.[85j]

A three-fourths verdict of the jury is sufficient.[85k]

§ 1112b. Set aside by agreement.

It is an elementary proposition that a person has a right to dispose of his property as he may see fit; the only condition is that he must exercise a free will when he is so doing, and be capable of exercising it. Yet it is a notorious fact that if the disposition the testator has made of his property does not suit his heirs at law, a friendly contest is begun, only slight testimony for plaintiff is introduced, and the jury brings in a verdict setting aside the will, and at once the heirs divide up the property to suit themselves—according to a pre-arrangement between them. One court has recently condemned this kind of action and held that the law of Ohio forbids the setting aside of a will by consent or the collusion of those who are interested as beneficiaries and contestants, and the continued prosecution of the suit will

85d Spangler vs. Beall, 19 O. C. C. (N.S.) 512.

85e § 12086 G. C.

85f Arnold vs. Pease, 17 N. P. 228.

85g Wallace vs. Ludwig, 18 O. C. C. (N.S.) 422; affirmed no op., 91 O. S. 397.

85h Stewart vs. O'Neal, 14 O. L. R. 533.

85i Sears vs. Stinehelfer, 89 O. S. 163.

85j Baird vs. Detrick, 20 N. P. 207.

85k Slemmons vs. Toland, 25 O. C. C. (N.S.) 485.

not be permitted after the facts are brought to the attention of the court.[851]

In another and later decision the court questions the correctness of the holding of the court in the above case, and holds that a plaintiff in a suit to contest a will does not lose his right to maintain such action by reason of having entered into a contract with the beneficiaries under the will not to resist such contest.[85m] Yet in this case it is recognized that it is a matter of serious consideration whether court and jury may ratify an agreement of parties to set aside wills, by the formal rendition of a verdict and judgment, and there may be serious doubts concerning a practice which is becoming common, to have wills set aside by agreement and consent of all parties interested, and to have the rule of descent substituted for the law of the will, or other arrangements.

It is difficult to know just how to reach the matter, but if the courts are going to permit the heirs at law to enter into agreements whereby they will share in the estate as they may see fit and that the will may be set aside, certainly grave question is cast upon the power of anyone to dispose of property by will.[85n]

§ 1113. Duty of judge on notice of contest. "When the probate court receives from the clerk of the court of common pleas a certificate that a petition has been filed in that court to contest the validity of a will admitted to record or recorded in the probate court, that court forthwith shall transmit to the common pleas court the will, testimony, and all papers relating thereto, with a copy of the order of probate, attaching them together and certifying them under the seal of the court. A copy of the final judgment on such contest shall be certified by the clerk of the common pleas to the probate court. Such clerk also must transmit to the probate court the will and other papers transmitted as aforesaid to the common pleas court; and they shall be deposited and remain in the probate court." [R. S. § 5936.][86]

851 Walker & Hollister, 20 N. P. 225.

85m Rohr vs. Gatch, 21 N. P. 65.

85n See Wagner vs. Ziegler, 44 O. S. 59; Gugoltz vs. Gehrlaw, 130 Pac. R. 8.

In this last case the contestant agreed to give a devisee one-fourth of the estate if she would not oppose the setting aside of the will, etc., and it was not permitted.

86 § 10534 G. C.

The Court of Common Pleas can not appoint a receiver to take charge of real estate specifically devised during contest of will. Burgess vs. Sullivan, 2 N. P. (N.S.) 327; 14 Dec. 712.

Any person interested may contest a will. This would include the creditor of an heir who has obtained a lien by levy on the property which, in the absence of the will, would go

§ 1114. Error, etc.[86a]

Unless the cases in the Supreme Court are critically examined, considerable confusion will arise upon the question as to whether proceedings in error may be prosecuted in matters relating to the probate of a will. In the case of Moiser vs. Harmon,[87] it was directly held that error will not lie to review the action of the Probate Court made in admitting a will to probate. Yet in another case, where it was sought to admit to probate a lost or spoliated will, proceedings in error were entertained to set aside the admission of the will to probate on the ground that sufficient notice had not been given.[88]

In a more recent case,[89] it was held that an application to the Probate Court to admit an alleged will to probate is a special proceeding within the meaning of that clause in sec. 6007, R. S., "that an order affecting a substantial right made in a special proceeding is a final order, and therefore may be vacated, modified or refused in proceedings in error. This case, however, was decided where error was prosecuted from the Common Pleas to the Circuit Court, and the error alleged was a refusal of the Common Pleas to admit the will to probate. It therefore does not conflict with Moiser vs. Harmon,[90] for that case was upon the question of reviewing an order of the Probate Court refusing to admit a will to probate. The reason of the decision in Missionary Society vs. Ely,[91] was that it was the only way in which the Circuit Court could review such an order; and the reason of the decision in Moiser vs. Harmon,[92] was that the statute made ample provision by proceedings to contest a will, and therefore no proceeding in error was contemplated by the legislature from the Probate Court. These cases have been recently reviewed, and it was held that an order of the Probate Court admitting a paper to probate as a last

to the heir. The court, in the case, gives a pretty broad construction as to who may be an interested party. Bloom vs. Platt, 78 O. S. 46.

[86a] Error may be prosecuted on question of jurisdiction of the court under § 10521 G. C., § 1086a.

[87] 29 O. S. 220.

[88] Baugarth vs. Miller, 26 O. S. 541.

[89] Missionary Soc. vs. Ely, 56 O. S. 405.

[90] 29 O. S. 220.

[91] 56 O. S. 411.

[92] 29 O. S. 220.

The regularity of an order to probate a will can not be attacked in a trial to contest the will. Stacey vs. Cunningham, 48 Bull. 991; 69 O. S. 176.

will and testament is not reviewable on petition in error, though an order refusing to admit such paper to probate is reviewable.[93] It would therefore follow, where the Court refused to admit a will to probate, a party may either prosecute an appeal or repropound the will or have the same reviewed in proceedings in error.[94]

§ 1115. Repropounding a will.

It seemed formerly to be a doctrine laid down by our Courts that if the Probate Court refused to admit a will to probate, that any interested party might make an application again to probate the will.[95] At the time these earlier decisions were made, it was not required by statute that any person be given notice or made parties to the proceedings to probate the will. Afterwards it was required to make certain persons parties, and the law now seems to be that any person who is interested in a will, and has no notice of the proceedings to admit said will to probate until it is too late to perfect an appeal, to the Court of Common Pleas, may repropound the will, even though the former order of the refusal has not been vacated.[96]

The person interested in a will means not only the heirs of the testator, but legatees under the will. If a will should be probated and afterwards it was discovered that an heir had not been made a party and a motion is made to repropound the will, which is done, the acts of the person appointed executor when the will is first probated are valid, and unless for good cause shown, no new appointment need be made. The executor appointed can proceed and administer the trust.

§ 1115a. Probating second will.

When a will has been probated can the court probate another will before the will first probated is set aside in an action to contest the same, is a question not free from difficulty. I think it

[93] Hollrah vs. Lasance, 63 O. S. 58, 16 C. C. 187; 8 C. D. 788.

[94] See §§ 1153, 1086a, as to question of jurisdiction to entertain application.

[95] In the Matter of Chapman's Will, 6 O. 149; *In re* Hunter's Will, 6 O. 499; Swazer vs. Blackman, 8 O. 5.

[96] Feuchter vs. Keyle, 48 O. S. 357; Stacey's Will, 4 N. P. 143; 6 Dec. 142.

will be conceded that under the laws of this State that the Probate Court can not set aside an order it has made, and the only way that the will could directly be set aside is by an action to contest. But what is there to prevent the Probate Court from admitting the second will to probate, if it is shown to be entitled to probate, that is that the testator was of sound mind, etc., as provided in Sec. 1105. Sec. 10579 G. C.

If two wills are probated, then as a matter of law the one last *made* would be the one to prevail, irrespective of the priority of probate. It is a matter upon which there is a diversity of opinion. Page on Wills, § 322, thinks that the second will can not be probated until the will first probated is set aside. He says, however, that recently it has been held to the contrary. It seems to the writer that the prevailing opinion of the authorities is that the Probate Court may admit to probate a will of a deceased person, notwithstanding the fact that it has previously admitted a will of such person to probate.

In Bowen vs. Johnson, 5 R. I. 199, we find this language:

"Our statute nowhere recognizes in express terms the power of our courts of probate to revoke a probate once granted by them; leaving that just and necessary power implied from their general power 'to take the probate of wills and grant administration on the estates of deceased persons' * * * no one can suppose however that such power of revocation does not exist therein; that if probate of a will be granted and the time of appeal be passed inasmuch as their jurisdiction is exclusive, etc. Now it seems to be quite congruous with the statute mode of conferring this power of revoking the old probate, to-wit, as incidental to the power of taking probate of the later will when discovered, for the court to exercise this power of revocation as incidental to the new grant of probate, rather than to make it necessarily the subject of a preliminary and separate action."[96a]

[96a] See also Waters vs. Stickney, 12 Allen (Mass.), p. 1, where Justice Gray discusses the matter quite lengthily and comes to the same conclusion. As our probate law is largely taken from the Massachusetts law, this opinion is of more than ordinary weight in this state.

See also Vance vs. Upson, 64 Tex. 266; Besancon vs. Brownson, 39 Mich. 388; Gaines vs. Hennen, 24 How. (U. S.) 553; 16 L. Ed. 770; 40 Cyc. 1224, 1345, 1235.

§ 1116. Appeal from refusal to admit will to probate. "When the probate court decides not to admit a will to probate, a person thereby aggrieved may appeal from this decision to the next term of the common pleas court, by filing notice of an intention to do so within ten days after it is rendered." [R. S. § 5934.][97]

It is a well-settled principle that an appeal only lies for such cases as is provided for by statute; and it will be observed that the above section relating to appeals applies only to cases where the court refuses to admit the will to probate. It therefore follows that no appeal will lie where the will is admitted to probate. The proceedings providing for contest furnish the only remedy to review the proceedings to probate the will where the Probate Court allows the will to be probated. In order to have the right under the above section, the notice must be filed with the court within ten days from the time the order of probate is made. The statute does not seem to require that the person appealing the case shall give a bond, as is provided for generally in appeals from the Probate Court.[98] When such notice of appeal is given, the court should make an entry of that fact and order that a certified copy of the order of the Probate Court rejecting the will should be made out and given to the person who desires to appeal. It is the duty of the person appealing the case to file the same in the Court of Common Pleas, and while the above section does not say anything about a bond, the provisions of secs. 11207-8-9, G. C.,[99] may apply as to bond.

§ 1117. How appeal perfected and proceedings in common pleas. "The person appealing shall procure and file in the court of common pleas a certified copy of the order of the probate court rejecting the will, together with the will, and thereupon the appeal will be perfected. The court, on the hearing, shall take testimony touching the execution of such will and

97 § 10532 G. C.

98 §§ 11207-8-9, § 43, but no doubt bond should be required.

99 § 43.

have it reduced to writing. The final order of the common pleas court, together with the will and testimony so taken, shall be certified by the clerk to the probate court, and if by such order the will is admitted to probate, the will, order, and testimony shall be recorded in the probate court." [R. S. § 5935.][100]

[100] § 10533 G. C.

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IN THE

Probate Courts of Ohio

INCLUDING THE

Administration and Settlement of Estates of Deceased Persons—Including the Inheritance Tax and Administration of Estates by Trust Companies—The Guardianship of Infants, Imbeciles and Drunkards—The Assignments for Benefit of Creditors—The Law Relating to the Execution, Construction and Probate of Wills—The Statutes of Descent and Distribution—Dower—Trustees—Appropriation of Property—Adoption of Children—Juvenile Court Proceedings—Mothers' Pensions—Road and Ditch Appeals—Appeals in Condemnation of Road Material—Appeals in Allowance of Sheep Claims—Franchises—Proceedings in Aid of Execution Habeas Corpus—Contempt and other Miscellaneous Matters (other than Criminal) Within the Jurisdiction of the Probate Court.

WITH

COMPLETE AND PRACTICAL FORMS

BY

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CHAPTER LIX.

FOREIGN WILLS.

§ 1118 Introductory, definition, etc.
§ 1119 Will executed in other States admitted to record here and its effect. Foreign wills.
§ 1119a Record of foreign will.
§ 1120 Method and effect of such admission.
§ 1121 Application, etc.
§ 1122 Form of entry.
§ 1123 Appeal, error, etc.
§ 1124 Probate, etc., of will made out of the United States.
§ 1125 Proceedings to admit a will to record which has been probated without the State.
§ 1126 Application or motion to admit copy of will, etc.
§ 1127 Entry ordering notice, etc.
§ 1128 Form of notice.
§ 1129 Admission of such will to probate.
§ 1130 Admission and effect of admission to record.
§ 1131 Entry ordering admission of will made in foreign countries to probate.
§ 1131a Probate of foreign will of later date than one already admitted to probate in this State.
§ 1131b Effect of admitting later will to probate.
§ 1131c Contests.
§ 1132 Powers of executor or administrator under will made out of this State.
§ 1133 Rights of purchaser without knowledge of foreign will. No contest of foreign will. Effect, if set aside in foreign state.
§ 1133a Foreign will can not be contested here.

§ 1118. Introductory, definition, etc.

A will may be designated as a foreign will under several different conditions. First, it may be foreign, merely because the testator's domicile was in another State or country; second, it may be foreign because it was probated in another State; third, it may be foreign because it was probated in a country outside of the United States. Generally used, however, a foreign will is a will executed in another State or country by a testator there domiciled, and there, upon the death of such testator, admitted to probate, and subsequently offered for record in this State. A question might occur whether or not a will executed according to the laws of our State, but made by a person who lived and died in another State or country, could be offered for original probate in this State, or must the will be first probated in the place of the tes-

tator's domicile?[1] As a general rule, it is stated that the proper place to probate the will of a testator is in the Probate Court of the county where the testator was last domiciled, and this is the case irrespective of the place where the will was made or the country or State where the testator happened to die.[2] And so it is said that the law of one's last domicile not only decides what constitutes one's last will, but whether one died testate in point of fact, or intestate, and that all questions as to the forms and solemnities attending a due execution are therefor to be referred to the place of last domicile.[3]

Originally and without any law to the contrary, no property could pass by will in the jurisdiction of any State or country, unless the will was made and executed according to the laws of the country within which the property was situate. It therefore follows that although our statute allows authenticated copies of wills to be admitted to probate, it does not take away the right to submit the original will for probate in the country where there is an estate. However, if a will of a testator whose domicile is in another State, be admitted to probate, an authenticated copy of such record cannot be presented for record within the State of his domicile. In other words, where a testator dies having an estate in another country, two methods may be pursued in reference to the probate of the will in the other country. The first is, the original will may be presented, and if it is made in conformity to the laws of the State where presented, be admitted to probate. However, if the will is to be effective in the country or State where the testator has his domicile, it must be admitted to original probate in the State of the domicile.[4]

The second method is by presenting an authenticated copy of the will when admitted to probate in the place of domicile. In the matter of probating foreign wills, it should not be forgotten that the laws of the domicile of the testator, control

[1] See § 1086 and § 74.

[2] Converse vs. Starr, 23 O. S. 491; Carpenter vs. Denoon, 29 O. S. 379; 19 Am. & Eng. Ency. of Law, 173.

[3] Schoul. Ex. 17.

[4] Woerner on Admin. 495; Page on Wills, 423, § 355; McNeal vs. Ross, 39 Bull. 353.

as to the disposition of personal property, while the laws of the place where the property is situate, controls the disposition of real estate.[5]

For some purpose, perhaps to conform to the constitution of the United States, which requires one State to give full faith and credit to the judicial acts of another, our statute has made a distinction in reference to the admission of a will probated in another State of the union and those probated in some other country. The following section provides as to the admission of a will probated in other States.[6]

§ 1119. Will executed in other States admitted to record here and its effect. Foreign wills. "Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of such property is situated. Such authenticated copies, so recorded, shall have the same validity in law as wills duly made in this state are declared to have." [R. S. § 5937.][7]

§ 1119a. Record of a foreign will. "When such a will, or authenticated copy, is admitted to record, in the probate court of a county where a part of such property is situated, a copy thereof, with the copy of the order to record it annexed thereto, certified by the probate judge under the seal of his court, may be filed and recorded in the office of the probate judge of any other county where a part of such property is situated, and it

[5] In Brewster vs. Brewster, 14 O. S. 368, 382, a question arose as to the distribution of property under a clause in a will made in Connecticut, and it was said: "To a very considerable extent, the construction of the will must depend upon the law of Connecticut. But when it is considered that the devisees and legatees are all in Ohio, that the trustee in Ohio, that the property itself, so far as it can be done, is to be and actually has been transmitted to Ohio; when a question arises as to the distribution of that property thus transmitted, and where it is not controlled by the will, that question must be settled according to the laws of Ohio."

See §§ 1181, 1016 G. C.

[6] See § 1267, Trusts created by foreign wills.

A will made in another State, takes effect from the death of the testator and not from the date of its registry. Hall vs. Ashby, 9 O. 96.

[7] § 10535 G. C.

shall be as effectual as the authenticated copy of such will would be if proved and admitted to record by the court." [R. S. § 5937.][7*]

§ 1120. Method and effect of such admission.

By the provisions of the above section, the admission of a will probated in another State to record in this State becomes a very simple affair. It is purely *ex parte,* requiring no notice to be given to any parties interested, although the Court may in its discretion admit parties interested to appear, and it has been held that the Court admitting a will to record may hear testimony in opposition to such admission.[8]

There has been some discussion as to what must be shown when an authenticated copy of a will proved in a sister State is to be admitted to record. The general opinion seems to be that the Court must be satisfied that the will was executed and proved according to the laws of the State or territory of the United States in which it was originally offered for probate and at the domicile of the testator. If it was not so proved and executed, the Court should not admit it to probate and as to the fact whether or not it was so admitted to probate, testimony may be heard.[9]

And as to this question, the Probate Court is not bound by the facts represented from the authenticated record alone.[10] Whether or not if a foreign will be admitted to probate in one county and there is an estate in another county, the admission of the will in one county will carry the title to the lands in the other, presents some questions. The effect of such action probably is, so far as the devisee and the heirs at law are concerned, to convey the title; but generally according to our registration acts, unless a copy be filed in the county in which the land is situate, it would not protect the devisee against an innocent purchaser from an heir-at-law.[11]

7* § 10536 G. C.
A deed made before a foreign will is registered, conveys title in preference to the will. Hall vs. Ashby, 9 O. 99.

8 Barr vs. Closterman, 2 C. C. 387; 1 C. D. 546.

9 Barr vs. Closterman, 2 C. C. 387; 1 C. D. 546.

10 See Matter of Will of Barr, 15 Bull. 319.

11 §§ 10576-7 G. C., § 1133, Rights of purchaser. A foreign will must be admitted to record within four years from time of original probate.

§ 1121. Application, etc.

As a general rule I think it may be said that Probate Courts do not require a formal application to be made in admitting an authenticated copy of a will for record, yet as a protection to the Court, it seems that such an application would be advisable. It may be in the following form:

(Title.)

Now comes A. B. and represents to the Court that C. D. died an inhabitant of the county of....., State of..... leaving a last will and testament, and thereafter said last will and testament was duly admitted to probate in the said county of..... and State of....., and that said C. D., deceased, left an estate in this county. Said A. B. represents that the following persons, living in the State of Ohio, are interested in said will. (Here state names of persons and how interested.)

Wherefore he presents to the Probate Court of this county, a duly authenticated copy of said will and asks that the same be admitted to probate in this county and placed upon record.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

§ 1122. Form of entry.

The Court having examined the papers presented and ascertaining whether from the recitals therein contained that such will was duly executed and proved according to the laws of the State where it was originally offered for probate, should admit the will to record. The following may serve as an entry:

(Title.)

This day came A. B. and presented to this Court a duly authenticated copy of the will of C. D., which was originally admitted to probate in the county of....., and State of....., and the Court finding that said will of said C. D. was duly executed and proved according to the laws of State of....., and that said C. D. died leaving an estate in this county, it is ordered that the same be admitted to record in the Probate Court of this county.[12]

§ 1123. Appeal, error, etc.

It is generally held that an appeal will not lie to the common pleas from the judgment of the probate, refusing to admit an authenticated copy of a will to probate under sec. 10535 G. C.

[12] In Barr vs. Closterman, 2 C. C. 389; 2 C. D. 222, the syllabus seems to be that it is not necessary to show that there is an estate in the county, but the opinion of the Court does not sustain the syllabus. Id., p. 401.

[13] Barr vs. Closterman, 2 C. C. 387; 1 C. D. 546; 30 Bull. 264.

(§ 1119).[13] The remedy afforded to a person where the Court refuses to admit a will, is to repropound or reoffer the authenticated copy for record.[14] If an order admitting the will to probate be made inadvertently or by reason of misrepresentation, the Court may set such order aside.[15]

While the statute is not specific on the subject, yet in analogy to the remedy provided on the original probate of a will, where the authenticated copy is admitted to record, the remedy of an aggrieved party is not by error nor appeal, but by contest. Although the subsequent section of the General Code,[16] says "there shall be no contest," that means there shall be no contest if the will has been proved and executed according to the laws of the other State, if not so proven and executed, there may be a contest.[17]

If the will itself is to be contested and not the order of probate, such a contest must be made where the original will was probated, it cannot be made in this State.

§ 1124. Probate, etc., of will made out of the United States. "A will executed, proved, and allowed in a country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state in the manner and for the purpose mentioned in the following sections." [R. S. § 5938.][18]

§ 1125. Proceedings to admit will to record which has been probated without the State. "A copy of the will and probate thereof, duly authenticated, must be produced by the executor, or by a person interested therein, to the probate judge of the county in which there is any estate upon which the will may operate, whereupon such judge shall continue the motion to admit it to probate for two months. Notice of the filing of such application must be given to all persons interested, in some

[13] Barr vs. Closterman, 3 C. C. 441; 2 C. D. 251.

[14] Barr vs. Closterman, 7 C. C. 371; 4 C. D. 641.

[15] §§ 10576-7 G. C., § 1133. See § 1086a and § 1131a.

[16] See remarks of Court in 3 C. C. 391; 2 C. D. 216; Jones vs. Robinson, 17 O. S. 171; Manuel vs. Manuel, 13 O. S. 458; Bailey vs. Bailey, 8 O. 239; Meese vs. Keefe, 10 O. S. 362.

[17] § 10537 G. C.

public newspaper printed or in general circulation in the county where the motion is made, at least three weeks consecutively. The first publication shall be at least forty days before the time set for the final hearing of the motion." [R. S. § 5939.][19]

§ 1126. Application or motion to admit copy of will, etc.

It will be observed that sec. 10538, G. C., differs from sec. 10535 G. C. (§ 1119), in that it requires that the proceedings shall be begun by motion, and that such action shall be continued for the term of two months after the filing of such application, and that notice of such application is to be given, etc. The application to admit a will for probate made outside of the United States should set forth the fact that the will was duly authenticated and probated in some foreign Court, that the person making the application has an interest therein, and that the testator died with an estate in the county in which the application was made. Such application should also state the names of all persons residing in the State or elsewhere if known, so that they might be mentioned in the notice that is required to be given. Their postoffice address should also be given. It may be in the following form:

FORM OF APPLICATION.

(*Title.*)

A. B. respectfully represents that on the.....day of..... 190...the last will and testament of C. D. was duly probated in the Court of..... at..... in.....country.

He further represents that he is interested in said will, in this, to-wit, (here state how interested) and that the said C. D. died leaving an estate in this county of.....which will be operated upon by said will.

He further represents that the following persons are interested in the fact whether said will be probated or not, to-wit. (Here state names of persons, with postoffice addresses.)

He herewith presents a copy of said last will and testament, and the probate thereof duly authenticated of the said C. D., and asks that the same may be admitted to record in this said county.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

§ 1127. Entry ordering notice, etc.

The will having been presented, the Court should then order notice to be given as required by statute, and must make a

[19] § 10538 G. C. See § 1119.

continuance of at least two months between the time the order to give notice is made and the order admitting to record is made. The entry may be in the following form:

(*Title.*)

This day came A. B. and filed herein his motion or application to admit to record the last will and testament of C. D. and presented with his said application, a copy of the said will and the probate thereof duly authenticated. Wherefore it is ordered that notice thereof be given to (here mention the names and postoffice address of the persons who appear to be interested in said will), and that said notice shall be given in..... paper, the same being a public newspaper printed (or of general circulation) in this county, and that the same be published once a week therein for three successive weeks, and that the first publication be made forty days before the.....day of....., which is the time set by this Court for the final hearing of said motion.

§ 1128. Form of notice.

To.....(Here give the names and residence of all persons known to be interested in the probate of said will.)

You will take notice that on the.....day of....., A. B. produced to the Probate Court of.....county, Ohio, a copy of the last will and testament of C. D., late of.....City of .....country, deceased, and has applied to have said will probated and recorded in said county of Ohio. Said A. B. representing to said Court that he is interested in said will as.....(here state how) and there is some estate in said county upon which said will operates. The hearing of said application has been set by said Probate Court of.....County, Ohio, for the.....day of..... .....at.....o'clock, 1901.

§ 1129. Admission of such will to probate.

Upon the day set for final hearing which must not be less than two months from the day the application is filed, and there having been filed in the Court the proof of publication in conformity to the former order of the Court, which shows that it was made in a public newspaper printed or of general circulation in the county for at least three weeks successively and that the first was forty days before said date of final hearing, the Court should proceed to a hearing of the fact whether or not said will should be admitted to probate. The same fact comes up here for adjudication as if the will was originally proved in another State, that is whether the will has been executed, proved and allowed according to the laws of the domicile of the testator. If it has been it should be admitted probate. The statute does not say that it must be, but it may

be allowed, and it seems to vest a discretion whether it should be admitted or not. The proceedings from the fact that notice is required to be given, differ somewhat from the proceedings to admit a will proven in another State, and seem to partake more of an adversary character. There are no adjudications in our State upon this question. It undoubtedly means from the fact that notice is required, and that the Court *may* admit a will to probate that the proceedings is somewhat different, just to what extent I am not able to say. However, before the Court admits such a will to probate, it should be satisfied that the will was properly admitted in the domicile of the testator, and that the same is not contrary to the laws of our State. It must also be shown that the will is valid by the laws of the State where made.

§ 1130. Admission and effect of admission to record. "If, on such hearing, it appears to the court that the instrument ought to be allowed in this state, it shall order the copy to be filed and recorded. The will, and the probate and record thereof, then shall have the same force and effect as if the will originally had been proved and allowed in that court, in the usual manner. Nothing herein contained shall give any operation or effect to the will of an alien, different from what it would have had if originally proved and allowed in this state." [R. S. § 5940.][20]

§ 1131. Entry ordering admission of will made in foreign country to probate.

(Title.)

This day this matter came on to be heard upon the application of A. B. to have the will of C. D., late of.....City of..... country, admitted to probate in this Court, and having presented a copy of said will with the probate thereof and duly authenticated, and having given notice to all the interested persons as required by a former order of this Court and by the statutes in such cases made and provided, and it appearing to the Court that said C. D. left an estate in this county upon which said will operates, and it further appearing to the Court that said will was duly executed, proved and allowed in said city of..... of.....country, the same being the domicile of the said C. D. and it further appearing to the Court that said will ought to be allowed in this county, it is ordered that a copy thereof be filed and recorded in the records of wills in this Court.

[20] § 10539 G. C.

§ 1131a. Probate of foreign will of later date than one already admitted to probate in this State. "When a will, or authenticated copy of one has been admitted to probate or to record in this state, and a will of later date, or authenticated copy of one, executed and proved as required by the law of any other state or territory in the United States, which relates to property in this state, is presented to the same court for probate or record, upon giving notice to the widow or husband, the next of kin to the testator, and his personal representative, with the will annexed, of such will earlier in date, and the beneficiaries therein, the mode and for the time such court directs, it shall have the same authority to admit the later will to probate or to record that it would possess if no earlier will or copy of one had been so admitted. In such case, the proceedings shall be the same as if no other will of the party ever had been proved or recorded." [R. S. § 5929b.][21]

§ 1131b. Effect of admitting later will to probate. "Should the probate court, as a result of such hearing, admit the later will or authenticated copy to probate or to record, its order also shall operate as a revocation of the order admitting the instrument earliest in date to probate or record." [R. S. § 5929b.][21*]

§ 1131c. Contests. "The provisions of law relating to the contest of wills originally admitted to probate or to record apply in all respects to later wills so admitted." [R. S. § 5929b.][21†]

§ 1132. Powers of executor or administrator under will made out of this State. "After allowing and admitting to record a will, pursuant to either of the next four preceding sections, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and must proceed in the settlement of the estate found in this state. The executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real or personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed." [R. S. § 5941.][22]

[21] § 10522 G. C.

[21*] § 10523 G. C.

[21†] 10524 G. C.

[22] § 10540 G. C.

It is a matter so elementary that perhaps it does not need mentioning that no foreign will has any effect upon the lands or estate of a deceased person in this State, unless the same are admitted to record as provided by the provisions referred to in this chapter. This would apply more strictly to real estate than to personal property, as our statute recognizes the authority of executors and administrators appointed in foreign States to sue and be sued in this State. See § 186 *et seq.*

§ 1133. Rights of purchaser without knowledge of foreign will. No contest of foreign will. Effect, if set aside in foreign State. "The title of a bona fide purchaser, without knowledge of a will, to land situated in this state derived from the heir or heirs of a person not a resident of the state at the time of his or her death, shall not be defeated by the production of the will of such decedent, unless it is offered for record in this state within four years from its final probate and establishment in the state or territory in which it was admitted to probate. But the rights of infants, or persons of insane mind and memory, shall not be concluded by delay or failure to record such will in this state, until two years after their respective disabilities are removed." [R. S. § 5967.][23]

§ 1133a. Foreign will can not be contested here. "No proceeding shall be had in this state to contest a will executed and proved according to the law of a state or territory of the United States, or of a foreign country, relative to property in this state; but if such will be set aside in the state, territory, or country in which it is executed and proved, it shall be of no validity in this state as to persons claiming under it, with notice of its being set aside, and as to all other persons, from the time an authenticated copy of the final order or decree setting it aside, is filed in the office of the probate judge, of the county in which the will is recorded." [R. S. § 5967.][23*]

[23] § 10576 G. C.

[23*] § 10577 G. C.

A will made in a sister state must be recorded in Ohio before title to land vests in devisee. Abraham vs. Tappan, 6 O. 172.

CHAPTER LX.

SPOLIATED WILLS.

§ 1134 Definition, etc.
§ 1135 Wills when lost or destroyed may be admitted to probate.
§ 1136 There must have been a will.
§ 1137 Duly executed.
§ 1138 Not revoked at death of testator.
§ 1139 Lost, spoliated or destroyed.
§ 1140 Lost, etc., subsequent to death of testator.
§ 1141 After testator is incapable, etc.
§ 1142 Application.
§ 1143 Form of application.
§ 1144 Notice of application.
§ 1145 Ordering notice, etc.
§ 1146 Examination of witnesses.
§ 1147 Nature of proceedings.
§ 1148 On what proofs will established. How lost or spoliated will may be probated.
§ 1148a Notice.
§ 1149 Degree of proof.
§ 1150 Proof of contents.
§ 1151 Order establishing wills.
§ 1152 Effect of will so established.
§ 1153 Error and appeal, etc.
§ 1154 When record of will destroyed, authenticated copy of the will and probate thereof may be admitted to record.
§ 1155 An original will may again be admitted to probate.
§ 1156 Or an authenticated copy of the will alone may be admitted to record.
§ 1156a Limitation as to contests.
§ 1157 Notice that copy has been admitted to record to be published, contest of same, and effect if not set aside.
§ 1157a Appeal from order supplying record of will to the common pleas.

§ 1134. Definition, etc.

A spoliated will is a will that for some reason cannot be produced in the form that it was made by the testator. A will may become spoliated within the meaning of the statute in several different ways. That is, it may be lost or it may be destroyed. The proceedings authorizing such a will to be probated are strictly statutory and before a Probate Court can establish such a will the requirements of the statute must have been complied with. Considering the dangers that surround such a proceeding, the Court should proceed with great caution.[1]

[1] Davis vs. Sigourney, 8 Metc. (Mass.) 487; Matter of Johnson, 40 Conn. 587. See *In re* Murray Estate, 63 Bull. 81; 20 N. P. 305.

In many respects a spoliated and revoked will are similar, but they differ vitally in this, that a revoked will is a destruction or annulling of the instrument by the testator. While a spoliated will is one that in the mind of the testator exists as it did when it was finally executed. Our statute has some marked characteristics in reference to the probating of such wills, which must be closely observed in such proceedings.[2]

§ 1135. Wills when lost or destroyed may be admitted to probate. "The probate court may admit to probate a last will and testament which it is satisfied was executed according to the provisions of law in force at the time of its execution, and not revoked at the death of the testator, when such original will was lost, spoliated, or destroyed, subsequent to the death of such testator, or after he became incapable of making a will by reason of insanity, and it can not be produced in court in as full, ample, and complete a manner as the court now admits to probate last wills and testaments, the originals of which are actually produced therein for probate." [R. S. § 5944.][3]

§ 1136. Must have been a will.

The first essential feature in the establishment of a spoliated will is proof that there was a will, and that it had a legal existence at the time of the death of the testator. "The existence will not be presumed from the fact that it was seen shortly before testator's death, nor is it proved by a declaration of the testator, made seven months before his death, that he had made a will, for this does not suffice to rebut the presumption of destruction with intent to revoke, which arises from the fact that no will could be found after diligent search, made soon after death."[4] The burden of proof is on the proponent to show either the existence of the will at testator's death or its subsequent

[2] Page on Wills, § 347, p. 420.

[3] § 10543 G. C.

Chancery Courts never had jurisdiction in Ohio. Morningstar vs-Selby, 15 O. 345.

[4] Collyer vs. Collyer, 4 Dem. 53, aff. 110 N. Y. 481. See Matter of Marsh, 45 Hun, 107.

The Probate Court has exclusive jurisdiction.

destruction.[5] Either fact may be proved by circumstantial evidence. Thus when it appears that the will, at the time of its execution, was placed by the testator in the hands of another person as custodian, who took charge of it, and locked it up in a trunk, and supposed it was there at the time of the testator's death, but, upon search after his death, it could not be found, its legal existence, at the time of the testator's death, is sufficiently shown.[6]

But a lost will, not traced out of testator's possession, is presumed to have been revoked by him by destruction.[7] And when a will once known to exist and to have been in the custody of the testator, cannot be found after his death, the legal presumption is that it was destroyed by the testator with the intention of revoking it.

§ 1137. Duly executed.

Another essential of a spoliated will is that the will which is sought to be probated as a spoliated will was at one time duly executed as the statute provides. These requisites must be proved as if the will were present. It cannot be done, it is true, by the same description of evidence in all respects, but some evidence sufficient to show a compliance with the statute, in all its provisions, must be given.[8]

These facts are to be proved in the usual way, as other facts are required to be proved, to make them evidence in a Court of justice. The fact of testator's mental capacity must be shown; if not, although the existence of the will is proved, probate will be refused.[9]

While the statute requires rules to be observed in the execution and publication of wills, which it does not prescribe in regard to the execution and delivery of other written instruments, the proof of the several acts so prescribed is the same as the proof

[5] Perry vs. Perry, 21 N. Y. Supp. 133; McNally vs. Brown, 5 Redf. 372; *In re* Estate of Murray, 63 Bull. 81; 20 N. P. 305.

[6] Schultz vs. Schultz, 35 N. Y. 653. See Cahill vs. Owens, 2 Gaz. 89.

[6a] Behrens vs. Behrens, 47 O. S. 323.

[7] Idley vs. Bowen, 11 Wend. 227, aff. Edw. 148; Bulkley vs. Redmond, 2 Bradf. 281; Holland vs. Ferris, Id. 334; Redf. Law and Prac. 207.

[8] Grant vs. Grant, 1 Sandf. Ch. 235; 343; Voorhees vs. Voorhees, 39 N. Y. 463.

[9] Matter of Paine, 6 Dem. 361.

required to establish any other fact. The law lays down no stubborn, inflexible rules in such cases, but accepts the best evidence that can be procured, adapted to the nature of human affairs, human infirmities and casualties, which tends with reasonable certainty to establish the facts in controversy.[10]

§ 1138. Not revoked at death of testator.

It will be observed that one of the essential conditions of the establishment of a will as a spoliated will is that the original will was not revoked at the time of the testator's death. From this follows what has been heretofore stated that the will must exist as a will at the time of testator's death,[11] if he has destroyed it, then, as a matter of course, it can never be established as his will.[12]

§ 1139. Lost, spoliated or destroyed.

These are three terms which are used to describe the condition that the original instrument must be in, in order that secondary evidence may be given to establish the instrument itself or its contents. They are in a certain sense synonymous, but there might be a discrimination between them. A lost will would be one that can not be found, and no explanation can be given as to its whereabouts. A destroyed will would be one for which a reason could be given for its non-production, and for its non-existence, by describing how it was put out of existence. A spoliated will might be a will which has been partly lost or partly destroyed by some agency other than the testator's.[12a] As to this fact of the will being lost, spoliated or destroyed, proof must be given of the exercise of reasonable diligence in the effort to procure the original. Generally it has been a sufficient excuse for the non-production of a document to trace it to the

[10] Redf. Prob. Law and Prac. 207; Page on Wills, § 438, p. 518.

[11] § 1136.

See Cahill vs. Owens, 2 Gaz. 89, where it was shown that three days before the death of testator, that it was in his chest, that the keys were in possession of another, etc., it was admitted.

[12] As to what will constitute revocation, § 1048 *et seq.*

The word "lost" means nonexistent, and must be given some of the signification of "spoliated" or "destroyed," although as a general rule it means when a thing has been duly searched for and can not be found. Gibson vs. Gibson, 6 C. C. (N.S.) 269; 25 O. C. 698; affirmed 72 O. S. 677.

Where a will has been lost or destroyed before the death of the testator the law presumes he revoked it, and when he became insane after he made the will, the evidence to overcome this presumption must be certain, satisfactory and conclusive that it was unrevoked and in existence after he became incapable by reason of insanity, to make a will. Cole vs. McClune, 88 O. S. 7.

No presumption arises that testator destroyed a will by failure to find it after her death, if her husband had the custody of it. *In re* Thompson, 59 Bull. 344; 16 N. P. 121.

[12a] Followed *In re* Murray's Est., 63 Bull. 33; 20 N. P. 305.

possession of one interested in retaining it, and who were he subpœnaed to produce it, would refuse to do so, on the ground that it would tend to criminate him.[13]

In civil cases it has been repeatedly held that where the paper or document wanted in evidence has been traced to the possession of a certain party, that party must be produced to prove its loss, and if beyond the jurisdiction of the Court, his testimony must be taken by deposition, or a reasonable excuse given for the failure. It must also appear that the party offering secondary evidence shows that he has exercised good faith and reasonable diligence in seeking for the primary evidence, and that he has explored with reasonable fidelity all sources of information the case would naturally suggest.[14]

But there is no universal rule as to the necessary foundation for the introduction of secondary evidence; but the judge must be reasonably satisfied that the document is lost, destroyed, or beyond the jurisdiction of the Court. When no probable motive appears for withholding the document, less evidence is required than under suspicious circumstances.[15]

§ 1140. Lost, etc., subsequent to death of testator.*

Our statute has made an essential fact to be that the will must be in existence, not merely in contemplation of law, but actual, tangible existence at the time of the death of the testator. This question came before our Supreme Court shortly after the passage of the present wills act,[16] and there it was said: "If all this legislative machinery was to establish a will lost after the death of the testator, why is it that all provision whatever is omitted for the establishment of proof and record of a will lost before the decease of the testator? The answer is obvious.

[13] Abbott's Trial Brief, § 452, citing United States vs. Reyburn, 31 U. S. (6 Pet.) 353, 366; 8 L. Ed. 424, 429; State vs. Kimbrough, 2 Dev. L. 431.

[14] Simpson vs. Dall, 70 U. S. (3 Wall.) 460, 475; 18 L. Ed. 265, 267; Deaver vs. Rice, 2 Ire. L. 280; Parkins vs. Cobbet, 1 Car. & P. 282; Dickinson vs. Breeden, 25 Ill. 186; Turner vs. Yates, 57 U. S. (16 How.) 14; 14 L. Ed. 824; Bunch vs. Hurst, 3 Desaus, Eq. 273; 5 Am. Dec. 551.

[15] Jernigan vs. State, 81 Ala. 58; Haun vs. State, 13 Tex. App. 383; 44 Am. Rep. 706; Rice Am. Pro. Law, 254.

[16] In the Matter of Sinclair's Will, 5 O. S. 291.

*Cited, Gibson vs. Gibson, 14 Dec. 331; affirmed 25 O. C. C. 698; 72 O. S. 677.

The General Assembly deemed it either impolitic, as opening the door to imposition and perjury, or unnecessary, to permit wills lost or destroyed before the decease of the testator to be established. This Court can not, by construction, enlarge the terms of a statute so studiously limited and circumscribed." [17]

Other States make an exception to where wills were destroyed without the knowledge or consent of the testator during his lifetime. But for reasons which the Legislature alone determined sufficient, such a will can not be probated in this State, even though the testator died in the full belief of the fact that the will he had made was still in existence.[18*]

§ 1141. After testator is incapable, etc.

The only instance in which a will may be probated as a spoliated will which was lost or destroyed during the lifetime of the testator is when it is shown that the will was lost or destroyed at a time when the testator was incapable of making a will by reason of insanity. This is a provision which was not in the original wills act when the same was before the Supreme Court for construction in the 5 O. S. 290. It was subsequently added to the statute as it now appears, but the limitation is specific in its application, and two things must be necessary in order to be within its provision. First, the testator must have become incapable of making a will, and such incapacity must have been the result of insanity. If these facts are not shown, in no case can a will be admitted to probate as a spoliated will, unless it be first shown that the will was in existence after the death of the testator.

§ 1142. Application.

It is a singular fact that the statute does not in some manner provide for a written application to be made. It is certain that such a method of procedure is contemplated, and it has been said by a distinguished author that " the statute and the peculiarities

[17] *Id.*
See Behrens vs. Behrens, 47 O. S. 323.

[18*] As to admissibility of declarations of testator as to his having destroyed same, see Gurley vs. Armentrout, 6 C. C. (N.S.) 156; 27 C. C. 199 (1905).

of the case make a petition in an action to establish a lost will far more necessary than in an ordinary probate proceeding, where the will can be offered and an oral motion to admit to probate can be made. Accordingly, it is usually required that a lost will be admitted to probate only on petition, and this petition must allege all necessary facts to entitle the will to be admitted to probate as a lost will. Thus, where it is required that the will, in order to be admitted to probate, shall be in existence after the death of testator, the petition must allege that fact, and, unless the statute requires it, an answer need not be verified." [18]

Neither does the statute say who may offer such a will for probate, but it may be presumed that the same rule should be followed as in the probating of an ordinary will.[19]

Our Courts have held that the devisees and legatees under a will are proper persons to present the same for the purpose of having it established.[20]

It is generally said that any interested person may have a will admitted to probate.[21]

The petition ought therefore to show, first, that the testator is dead; second, that he was a resident of the county in which the will is offered for probate; third, that he died leaving a last will and testament, and that said will was properly executed, unrevoked and in existence at the time of the testator's death; fourth, that the will was lost or destroyed after the death of the testator; fifth, it should set out in full the contents of the lost or destroyed will; sixth, it should give the names of the widow and next of kin, as well as the persons who have an interest to resist the probate of said will, and their place of residence; seventh, the petitioner should show in what manner he is interested.

[18] Page on Wills, 422, § 352.

[19] § 1085.

[20] Taylor vs. Bennett, 1 C. C. 95; 1 C. D. 57.

[21] It is said that a person interested is a person pecuniarily interested, materially interested in the subject-matter of the probate of the will, or in the having the will probated; that it is not a question of disposition; it is not a question of emotion; it is not a question of wish or desire, but that it is merely a question of whether the person is interested in the establishment of the will and is to be affected by it in

§ 1143. Form of application.

In the Matter of the Probate of the Last Will of John Jones, deceased.	Probate Court, Clark County, Ohio. Application for Probate of Spoliated Wills.

The undersigned respectfully represents that on the 2nd day of January, 1895, John Jones, then an inhabitant of said Clark County (or leaving an estate in said county) died. That on or about the 10th day of October, 1894, said John Jones made, subscribed, acknowledged and published his last will and testament, which said will was duly signed and attested at the request of said John Jones, as witnessed by Sam Smith and Jack Brown. That said will was in existence and unrevoked at the death of said John Jones. But that subsequent to his death the same has become lost and cannot be found although strict search has been made for the same (or if the facts are known to be otherwise, allege how the will became destroyed or lost). That your petitioners cannot give a copy of said will, but the substance of the same was as follows: That said testator bequeathed to Anna Jones a fee simple of lot 2,500 in the City of Springfield. That he bequeathed and gave Susan Smith $1,000 in cash. That he appointed your petitioner the executor of said will (or state in what manner the person making the application is interested in having the will probated). Your petitioner further represents that said John Jones died leaving Mary Jones, his widow, and the following named persons his next of kin: (Here state names and age of minors if any, and postoffice address of all, just as if it was an application to probate an ordinary will.) Your petitioner further represents that the following named persons may be interested to resist the probate of said will: (Here give names of parties who have in any way interest in said will.)

Wherefore your petitioner prays that said will may be established and admitted to probate.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

.....

§ 1144. Notice of application. "When application is made to the probate court to admit to probate a will duly executed, and lost, spoliated, or destroyed, the party seeking to prove it must give a written notice to all persons whose interest it may be to resist the probate, and who reside in the county where the testator resided at the time of his death, or to their agent or attorney, five days before the day on which such proof is to be made, or give notice, by publication in a newspaper printed

his interest; and that if he is, then he has a right to appear, either ostensibly as a proponent of the will, or has a right to appear and introduce or call witnesses in that proceeding to probate the will. The application ought to state the domicile of deceased.

In Matter of Jones. 2 N. P. 209; 2 Dec. 404.

[22] Not every variance between a spoliated will as made, and the will as admitted to probate, will avoid the latter. Banning vs. Banning, 12 O. S. 437.

in the county, thirty days before the day set for hearing such proof. [R. S. § 5945.][23]

§ 1145. Ordering notice, etc.

The provision as to the giving of notice provided for in the above section is peculiar to the proceedings to establish a spoliated will, in that it requires that written notice be given to all persons whose interest it may be to resist the probate. It does not say that notice must also be given to the widow and next of kin as provided in the section relating to the probate of an ordinary will, yet I apprehend that the section relating to probate of an ordinary will applies to this kind of a proceeding, and that it would be an illegal proceeding where such notice was not given.[24] There is certainly no reason why the next of kin should not be notified in the proceedings to probate a spoliated will, as well as where an ordinary will is probated, even though they had no interest to resist the probate. If there is no person residing in the county who is interested to resist the will, then notice must be given by publication.[25]

The statute seems to contemplate that notice must be given before the application to admit to probate is filed. But the more logical way is to have the petition first filed, then the Court may set the same down for hearing and order the notice to be given as provided by the statute. The entry for such notice may be as follows:

[23] § 10544 G. C.

[24] §§ 10506-7 G. C., § 1067.

[25] Whatsoever may have been the reasons that induced the General Assembly to apply a different mode of proceeding in applications to admit lost, spoliated or destroyed wills to probate, from that applied to wills actually produced in Court and verbal wills, it is quite clear that under § 5945 R. S., § 1144, it would be error in the Probate Court, upon application to find and establish the contents of a spoliated will, or admit the same to probate, until notice, in one or the other of the modes required, of the day set for hearing the proof has been given and we are are of the opinion that the section reasonably construes that where there is no person residing in the county in which the application is made, who is interested in resisting the probate of the will, to whom written notice of the day set for hearing the proof can be given, notice must be given by publication. Baugarth vs. Miller, 26 O. S. 541; Miller vs. Baugarth, I Bull. 126.

ENTRY.

(*Title.*)

This day came A. B. and filed herein his petition for the probate and establishment of a spoliated will of John Jones, deceased, and the same is set for hearing on the.....day of.....; and it is ordered that written notice be given to the widow and all the next of kin resident of the State of Ohio, and to all other persons who are interested in resisting the probate of said will who reside in this county, and if there be any others interested in resisting the probate of said will who are non-residents of this county, it is ordered as to them notice be given by publication as required by statute. That the written notice be given at least five days before the day of hearing and that the printed notices be given 30 days before the day set for hearing, by inserting once a week for four weeks in a newspaper of general circulation in this county.[26]

§ 1146. Examination of witnesses. "In such cases, the court shall cause the witnesses to such will and such other witnesses as any person interested in having it admitted to probate desire, to come before the court. They shall be examined by the probate judge, and their testimony reduced to writing and filed by him in his court. When necessary so to do, because witnesses reside out of its jurisdiction, or who, though within such jurisdiction are infirm or unable to attend, the court may order their testimony to be taken and reduced to writing by some competent person, which testimony shall be filed in such court." [R. S. § 5946.][27]

§ 1147. Nature of proceedings.

There has been considerable discussion as to the nature of a proceeding to establish a spoliated will, whether it was an adversary one or *ex parte;* and if adversary, it has been claimed that witnesses might be introduced to resist the probate of a will. It seems, however, from a careful reading of the above section, that it was not the intention of the legislature to change the character of the proceedings from that where an ordinary will was admitted to probate. From the fact that the document itself is not in being and before the court, the legislature has deemed it wise that a greater degree of notice be given than where the will itself is in Court. But the language of the above section is "that the Court shall cause witnesses to such will," etc., "and such other witnesses as any person interested.

[26] The form of notice provided for in the application of an ordinary will can easily be changed to answer a notice required for a spoliated will. See § 1093.

[27] § 10545 G. C.

in having such will admitted to probate may desire," etc., and it has therefore been very properly held that no testimony may be heard in opposition to the probate of such will.[28]

The proper rule in such cases seems to be that a person interested in the probate of a will may submit any testimony he desires, and that such witnesses may be cross-examined by any person who desires to resist the probate of the will — this being necessary in order to enable the Court to know what weight should be given to such testimony. It might not be error to allow other testimony, but it is certainly not within the meaning of the statute. Like in the probate of an original will, the testimony must be reduced to writing, and infirm or nonresident witnesses must be examined by commissioners.

§ 1148. On what proofs, will established. How lost or spoliated wills may be probated. "If upon such proof, the court is satisfied that such last will and testament was executed in the mode provided by the law in force at the time of its execution, that its contents are substantially proved, that it was unrevoked at the death of the testator, and has been lost, spoliated or destroyed since his death, or his becoming incapable as aforesaid, such court shall find and establish the contents of such will as near as can be ascertained, and cause them and the testimony taken in the case to be recorded in such court." [R. S. § 5947.][29]

§ 1148a. Notice. If a will has been lost, spoliated, destroyed, mislaid, or stolen, after it was admitted to probate but before it had been recorded, upon notice being given, as hereinbefore provided, to persons whose interest it may be to resist the probate and record of such will, the court may hear testimony, and if satisfied that the contents of the will have been substantially proved, record it as thus proven, which record shall have all the force and effect of a record of the original will." [R. S. § 5947.][29*]

[28] In the matter of the estate of William Jones, the able Probate Judge of Cuyahoga County, has discussed in an exhaustive manner, various question that arise in probating a spoliated will. Matter of Jones, 2 N. P. 191, 224; 2 Dec. 409.

[29] § 10546 G. C.

[29*] 10547 G. C.

§ 1149. Degree of proof.[29a]

If the court upon such proof shall be satisfied, etc., then the will shall be admitted to probate. Just what degree of evidence it should require to satisfy the court is difficult to determine. In the probate of an ordinary will the question is, "if it appear to the court, etc.," it shall be admitted to probate. Evidently the legislature intended, by the use of the word *satisfy*, to require a greater degree of proof than in the probate of an ordinary will. Satisfy means to convince, and satisfactory evidence of a matter has been sometimes called sufficient evidence, and is intended to be that amount of proof which ordinarily satisfies an unprejudiced mind, beyond a reasonable doubt.[30]

Upon this subject a recent author on wills says: "It is clearly settled that the burden of proof in probate of lost wills is upon the parties offering such lost will for probate. To what degree this burden of proof extends is not so well settled. The courts exact a greater amount of evidence than a preponderance. In some cases it is said that the evidence must be "clear"; in others it is said that the evidence must be "full and satisfactory"; in still other cases it is put in the superlative degree, and it is said that the proof must be "very clear"; or the "clearest, most conclusive and satisfactory." In other cases it is said that the proof must be "beyond all reasonable doubt." This degree has been held too high in Alabama. In other cases it is said that it should be "free from all doubts." But while exacting a high degree of proof, the courts hold that upon the facts of the destruction, circumstantial evidence alone may be sufficient to justify a finding for the will.[31]

In a case before referred to, the court comes to the conclusion that in order to be judicially satisfied, the mind, after fairly considering all the evidence, must rest quiescent and satisfied with its conclusion as being the best supported by the overbalancing weight of evidence.[32]

[29a] Cited Cole vs. McClune, 88 O. S. 7.

To establish a lost or destroyed will the evidence of its execution and its contents must be clear, strong and positive, free from bias and convincing beyond a reasonable doubt. Cole vs. McClune, 88 O. S. 7.

Declarations by testatrix and her husband as to the existence and custody of her will devising certain real estate in her name to the purchase of which each had contributed, that such real estate was to be divided equally upon the death of the wife, one half to her nephews and one half to his nephews, but not stating whether the estate went to the husband in fee or for life are not so strong, clear and positive and unbiased evidence of its contents as will admit such will to probate as a spoliated will. *In re* Thompson, 59 Bull. 344; 16 N. P. 121.

[30] 21 Am. & Eng. Ency. of Law, 715.

[31] Page on Wills, 516, § 434.

Gibson vs. Gibson, 25 O. C. C. 698; affirmed 72 O. S. 677.

[32] The court must be "satisfied" of the existence of every one of these material conditions in the premises. Evidently this expression means satisfied as a judge, or "judicially satisfied." It does not mean that the evidence shall remove all doubts. In

It has been held that where it was endeavored to establish a lost deed that the unsupported parol evidence of one person is not sufficient, and that the evidence sufficient to establish an alleged deed must be clear and convincing — it must produce in the mind of the Court a conviction that a valid deed once existed, and that " conviction " means a state of mind free from doubt.[33]

There is no reason why a less strict rule should be applied to a will than to a deed.

§ 1150. Proof of contents.

In logical order, after the existence and execution of the lost will have been proven, then it would be proper to establish what its contents were. As to this matter the statute provides that the " Court shall find and establish the contents of such will as near as the same can be ascertained." The evidence by which the same can be established would be such, as is generally applicable to establish the contents of any lost instrument, following the general rule that the best evidence that can be had is always required. Thus, if a copy of a will was in existence and it could be shown that it was an exact copy, the Court would require a production of such copy before other testimony to be introduced as showing the contents of a will.[34]

A person who had read over the original will would be a very

civil causes to be judicially satisfied of the existence of a fact, or the truth of a proposition, is the result of the weighing and balancing of evidence. The effect of a fair preponderance of the evidence must be to cause the mind and the judgment to rest content with a certain conclusion, while there may still linger remnants of doubts unremoved; yet the mind, after fairly considering all the evidence must rest quiescent and satisfied with its conclusion, as being the best supported by the overbalancing weight of the evidence. To be in this frame of mind and condition of judgment, is to be judicially satisfied, or judicially convinced, which is the same thing. But to produce such judicial satisfaction of the existence of a fact or the truth of a proposition of law, the quality and quantity of the evidence necessarily depends upon the nature of the facts or proposition to be established or maintained. In Matter of Jones, 2 N. P. 210; 2 Dec. 409.

[33] Smith vs. Neff, 5 N. P. 495; 5 Dec. 449.

[34] *In re* Estate of Lasance, 5 N. P. 20; 7 Dec. 246.

If lost before death of testator it cannot be probated. Gibson vs. Gibson, 25 O. C. C. 698; affirmed 72 O S. 677.

proper witness, and he might use a certified copy to refresh his memory, but it has been held that a person to whom the deceased read over his will could not testify as to its contents, unless the declarations of testator were competent.[35]

As a general rule it may be said that the declarations of a testator are admissible to establish the contents of a lost will wholly or in part, but such declarations alone are not sufficient.[36]

Under the wording of a previous statute, it was held that the contents of a spoliated will need only be substantially proven,[37] and such is the probable intention of the present law, although the wording is slightly changed. It has also been held that the lost or destroyed will may be admitted in part, and that the executor named in the will may be appointed an executor to the will.[38]

§ 1151. Order establishing will.

The Court being satisfied, as provided in sec. 10546-7, G. C.,[39] that the will was in existence, etc., and was lost and destroyed, and having ascertained the contents as near as the same could be, should make its finding and enter it upon record. The following may serve as an entry:

(*Title.*)

This day this cause came on to be heard upon the application of A. B. to admit to probate and establish a spoliated will of C. D., deceased; and the same was submitted to the Court upon the papers in the case, and the testimony of witnesses. Whereupon the Court finds that said C. D. was an inhabitant of this county at the time of his death (or had an estate therein), and that all the persons who were entitled by law to notice of this proceedings have been duly notified as provided by law, and the former orders of this Court; and the Court having caused E. F. and G. H., witnesses to said will, and other witnesses, to-wit: I. J. and K. L., to appear in open Court and testify touching the execution and contents of said will, and their testimony thereof having been reduced to writing and filed; and the Court being satisfied from the testimony so taken that the said C. D. did on the.....day of.....duly execute his last will and testament, in the mode provided by the law in force at the time of its execution, and that the said C. D. was of sound mind and memory, and not under any restraint when the same was executed by him, and that the said will was signed and witnessed as provided by law, and that the same was unrevoked at the death of the said C. D. and that it became lost, spoliated or destroyed subsequent to the death of such testator, and the Court finds and does hereby establish the contents of such will, as near as the same can be ascertained, as follows: (Here set out the will

[35] Page on Wills, 519, § 440.

[36] Page on Wills says that this matter has been discussed, but not decided by the Courts. 521, § 441.

[37] Banning vs. Banning, 12 O. S. 437.

[38] Cahill vs. Owens, 2 Gaz. 89.

[39] § 1148.

in full.) And the Court further orders that said wil and testament be recorded as in the case of other wills admitted to probate.

§ 1152. Effect of will so established. "The contents of such a last will and testament found, established, and admitted to probate as aforesaid, shall be as effectual to pass real and personal estate, and for all other purposes, as if the original will had been admitted to probate and record according to the provisions of this title. Such wills shall be governed by the laws in force relating to other wills, not only with respect to their contest, but in all other matters." [R. S. § 5948.][40]

§ 1153. Error and appeal, etc.

It is settled by a recent decision of our Supreme Court that neither error nor appeal will lie from an order of the Probate Court admitting a spoliated will to probate, and that the only way of revoking such order is by contest, as provided by sec. 10560 of the General Code.[41]

The same case seems to hold, quoting the language of the above section, that the same rule is to apply to appeal and error as applies to the probate of an original will, and therefore it would follow that an aggrieved party might appeal from an order of the Probate Court refusing to admit a spoliated will to probate, or the will might be repropounded. It is very questionable whether there could be proceedings in error to an order refusing to admit a spoliated will to probate.[42]

§ 1154. When record of will destroyed, authenticated copy of the will and probate thereof may be admitted to record. "When the record of a will is destroyed, a copy of it and the probate thereof may be recorded by the probate court of the proper county, whenever it is made to appear to its satisfaction that such record has been destroyed, and, by a certificate under the hand and seal of the probate judge, or clerk of the common pleas court of the proper county, that such copy is a true copy of the original will and of its probate." [R. S. § 5949.][43]

[40] § 10548 G. C.

[41] Hollrah vs. Lasance, 63 O. S. 58; Banning vs. Banning, 12 O. S. 437.

[42] S. C., 16 C. C. 187; 8 C. D. 788; 5 N. P. 20; 7 Dec. 246. See § 1114, Error.

[43] § 10549 G. C.

The Supreme Court has now held that there is an appeal from the order of the Probate Court overruling an application to establish a lost will. Roth vs. Siefert, 77 O. S. 417.

But there is no right if error to Circuit Court from Common Pleas, where the Common Pleas establishes the will. *Id.*

See Brewing vs. Hardware Co., 17 C. C. (N.S.) 475.

§ 1155. An original will may again be admitted to probate. "When the record of a will has been destroyed, the original will may again be admitted to probate and record." [R. S. § 5950.][44]

§ 1156. Or an authenticated copy of the will alone may be admitted to record. "The probate court of a county where the record of a will has been destroyed, may admit to record a copy of such will whenever it appears that the copy for record bears the certificate of a probate judge, or clerk of the common pleas court, setting forth that it is a true copy of the will, the record of which has been destroyed." [R. S. § 5951.][45]

§ 1156a. Limitations as to contests. "Nothing in the next three preceding sections shall affect the proceedings or extend the time for contesting the validity of any will, or for asserting rights thereunder. The record provided for in such preceding sections must show that the original record was destroyed, and the time, as near as may be, when the will was originally admitted to probate and record." [R. S. § 5951.][45*]

§ 1157. Notice that copy has been admitted to record to be published, contest of same, and effect if not set aside. "Every probate judge who admits to record a will or copy of one under either of the next four preceding sections, immediately thereafter shall give notice for three consecutive weeks, in two weekly newspapers of his county, if so many be published therein, or if not, in one newspaper published and of general circulation in the county, stating the name of the person the record of whose will has been destroyed, and the day when such record was supplied. All persons interested in the record, at any time within five years from the making of it, may come into the probate court of the proper county, and contest the question whether the record thus supplied is the same as the record destroyed." [R. S. § 5952.][46]

§ 1157a. Appeal from order supplying record of will to the common pleas. "When, by order of a probate court, the lost record of a will has been supplied, and such action is contested by a person interested, from all final orders or decrees in such contest, either party may appeal to the court of common pleas, in the manner as appeals are now or hereafter may be provided for from the probate court; and if any person interested in such record shall, at the time such record is supplied, be under

[44] § 10550 G. C.
[45] § 10551 G. C.
[45*] § 10552 G. C.
[46] § 10553 G. C.

any legal disability, such person may contest the record within two years from the removal of the disability, and the new record supplied, according to either of the next five preceding sections, shall, unless set aside in proceedings provided for in this section, have the same force, effect, and validity, as the original record." [R. S. § 5952.][46*]

[46*] § 10554 G. C.

CHAPTER LXI.

NUNCUPATIVE WILLS.

§ 1158 Definition.
§ 1159 Nuncupative will, how made and proved.
§ 1160 Last sickness.
§ 1161 Personal estate.
§ 1162 Reduced to writing.
§ 1163 Subscribed by competent witnesses.
§ 1164 Called upon person present.
§ 1165 Testamentary words.
§ 1166 Must be admitted to probate within six months.
§ 1167 Matter pertaining to probate.
§ 1168 Proof required, etc.
§ 1169 Form of will.

§ 1158. Definition.

A nuncupative will is defined to be "an oral will declared by testator *in extremis* before witness, and afterwards reduced to writing." [1] It should not be forgotten here that nuncupative, like written wills, must in every respect conform to the statutory provisions of our law; and this law is strictly construed, for the power to make a disposition of one's property by an oral or verbal will is one which gives great temptation for fraud. Formerly, when but a comparatively few of the people could write, there was a much greater reason than now for allowing this kind of a will. By reason of soldiers and sailors often meeting death at a place where it was impossible, or at least very

[1] Bouv. Law Dic.

Nuncupative wills or testaments (which have a place in the Roman civil law) are so called from *nuncupare*, to name, declare or make a solemn declaration because the testator declares his will *in extremis* before a sufficient number of witnesses whose oral proof must afterwards establish it. These verbal wills offer great temptation to fraud and perjury, besides occasioning much honest error, and the need of them lessens as the art of penmanship becomes more universal and writing materials abound. The Statute of Frauds, 29 Car. 11, chapt 3, laid them under various restrictions; and the tenor of legislation, English and American, at the present day is to invalidate them altogether, except as to soldiers in actual military service and mariners at sea. Schoul. on Wills, § 6.

inconvenient, to reduce their desires in reference to the disposition of their property to writing, they were made a favorite class who retained the right to make a verbal disposition of their property after it had been taken away from the people generally. Our statute makes no provision for any favorite class—every one alike must come within its strict provisions.[2]

§ 1159. Nuncupative will, how made and proved. "A verbal will, made in the last sickness, shall be valid in respect to personal estate, if reduced to writing, and subscribed by two competent disinterested witnesses, within ten days after the speaking of the testamentary words, if it also be proved by such witnesses, that the testator was of sound mind and memory, not under restraint, and that he called upon some person present, at the time the testamentary words were spoken, to bear testimony to such disposition as his will." [R. S. § 5991.][3]

§ 1160. Last sickness.

One of the most important provisions of our statute in reference to the power to make a verbal will is that it must be made during the last sickness of the deceased. It is a matter of no little difficulty to determine just when a person comes within this provision. I believe the term is not defined in any of the reported decisions of our State. A text writer says: "In the majority of States it is held that the term 'last illness' means an illness so violent that testator had not the time, opportunity and means at hand, after making his oral will, to make a written will in legal form."[4] And in other States, he says, it is held that a will made during the last illness, as already defined, is a

[2] See Page on Wills, 354, § 322. See § 1044, Effect of person being legatee.

[3] § 10601 G. C.

[4] Page on Wills, § 234, p. 260, citing the following: Johnston vs. Glasscock, 2 Ala. 218; Scaife vs. Emmons, 84 Ga. 619; Ellington vs. Dillard, 42 Ga. 361; Bellamy vs. Peeler, 96 Ga. 467; O'Neill vs. Smith, 33 Md. 569; Donald vs. Unger, 75 Miss. 294; Lucas vs. Goff, 33 Miss. 629; Parkison vs. Parkison, 12 Smed. & M. (Miss.) 672; Carroll vs. Bonham, 42 N. J. Eq. 625; Dockum vs. Robison, 26 N. H. 372; Prince vs. Hazelton, 20 Johns. (N. Y.) 502 (the leading American case upon this point); Jones vs. Norton, 10 Tex. 120; Reese vs. Hawthorne, 10 Gratt. (Va.) 548.

A nuncupative will can not revoke a written will. McCune vs. House, 8 O. 144.

The fact that a nuncupative will attempts to dispose of real property will not affect it as to personal property therein disposed of. Parsons vs. Wass, 16 C. C. (N.S.) 404.

valid nuncupative will, even though testator had opportunity, after making such will before his death, to make a written will.[5]

It will be observed that our statute uses the words "last sickness" instead of "last illness." These words, however, are synonymous. The probability is that, following the rule of a strict construction that our Courts will hold, with the majority, that if a testator has the time and opportunity and means at hand, after he has made an oral will, to have reduced it to writing, that it cannot be admitted as a valid nuncupative will.[6]

It is probable that no definite rule can be given on this subject, but each case will be governed largely by the circumstances surrounding it.[7]

It is said that it is not apparently necessary to the validity of the will that the testator believe that he was about to die.[8] But this does not dispense with the idea that the deceased must have an intention to make a will when the words are uttered. This matter will come up for discussion further along.[9]

§ 1161. Personal estate.

The statute distinctly provides that such a will "shall be valid in respect to personal estate," and it therefore follows that no nuncupative will could be made that would affect the testator's real estate. Under the act of 1824, it was held that a nuncupative will was valid to pass real estate.[10]

It has been held, however, that where a person who is the owner of both real estate and personal property, makes a nuncupative will, that the Court will change the ordinary rule that personal property shall first be applied in payment of the debts

[5] Bradford vs. Clower, 60 Ill. App. 55; Harrington vs. Stees, 82 Ill. 50, qualifying Morgan vs. Stevens, 78 Ill. 287; Wiley's Estate, 187 Pa. St. 82; Nolan vs. Gardner, 7 Heisk. (Tenn.) 215; Gwin vs. Wright, 8 Hump. (Tenn.) 639.

[6] Schou. Wills, § 371; 2 Blackst. Comm. 501.

[7] Sadler vs. Sadler, 60 Miss. 251.

[8] Page on Wills, § 234, p. 261.

[9] See § 652, Last sickness.

[10] See case of Gillis vs. Weller, 10 O. 462.

In a previous case, however, it had been held that realty would not pass by a nuncupative will. Williams vs. Pope, Wright, 406.

of a testator and require that the proceeds of the real estate be first applied to the payment of the debts of the testator.[11]

§ 1162. Reduced to writing.

In order for a will to be a valid one the words of the testator must be reduced to writing, and this must be done within ten days after they were spoken. Omission to comply with this provision renders the will a nullity.[12] Whether this condition, as well as the others required by the statute, have been complied with, are questions of fact which can be submitted to a jury in an action to contest or establish the validity of a will.[13]

In view of the necessities of the case, it is held that the exact words used by the testator need not be reduced to writing. It is sufficient if their substance can thus be reduced.

§ 1163. Subscribed by competent witnesses.

The testamentary words must not only be reduced to writing, but they must be subscribed by two competent disinterested witnesses. It will be observed that the language used in reference to witnesses of nuncupative will is different from that used in reference to a written will — in this, that they must not only be competent, but they must be *disinterested* witnesses. These witnesses, in addition to being competent and disinterested, must have heard the testator utter the testamentary words; and in addition, they should be able to testify that the testator was of full age and of sound mind and memory, and not under any legal restraint. A beneficiary under the will is not a competent disinterested witness.[14]

Our Court has also held that the witnesses must be competent and disinterested at the time of their attestation, and that their disqualification as witnesses by reason of interest under the will cannot be removed by a renunciation of such interest at the time the will is admitted to probate, or at the trial of an issue to contest the validity of the will; and further that sec.

[11] Skinner vs. Blackburn, 4 C. C. 325; 2 C. D. 574.

[12] Page on Wills, §§ 329, 266.

[13] Bolles vs. Harris, 34 O. S. 38.

[14] Vrooman vs. Powers, 47 O. S. 191. They are not disinterested if at the time they believe they are beneficiaries. Wass vs. Trust Co., 15 Dec. 677.

10515, G. C. (§ 1044), to the effect of a witness being a devisee or legatee under the will, is not applicable to verbal wills.[15]

The statute does not seem to require any request on the part of the testator that the witnesses should act as witnesses to his will. However, he must call upon some one to bear testimony to his disposition, and this would generally include the witnesses.[16]

§ 1164. Called upon person present.

A further requisite of the validity of a nuncupative will is that the testator at the time that the words are spoken called upon some person present to bear testimony to his said disposition. This formal calling upon witnesses to bear witness to this fact is known as *rogatio testium,* and is a necessary element of a nuncupative will. Without this the will is invalid, and no matter how clear the testamentary intent. No set phrase is necessary, says a recent text writer,[17] for a valid *rogatio testium.* While it is desirable that the testator should in clear and unmistakable language formally ask the witness to bear witness that his words are his last will, this request may be made informally. If a person gives a mere direction as to how his property should be disposed of, without any request either formally or informally, to any person present to bear witness that it is a testamentary disposition, the instrument would fail for want of this fact.[18]

The following was held to be a sufficient request of witness: A party present said to the deceased, " If you tell us as witnesses what disposition you want to make of your property, we

[15] Vrooman vs. Powers, 47 O. S. 191.

See Wass vs. Trust Co., 15 Dec. 677 (1905), where this matter is discussed by the Court and it is held that the fact whether the bequest is valid or not, will not change the rule.

§ 10575 G. C., § 1044, provides that where a witness is a devisee he may renounce such devise and then he would take the share allowed to him by law as if no will had been made.

[16] See Page on Wills, §§ 238, 266.

[17] Page on Wills, §§ 237, 264.

[18] Seever vs. Seever, 2 C. C. 298; 1 C. D. 496.

In this case the testator was run over by a train. A physician was called, who, after examining the wounds, said to the deceased, "your time is short, if you have any word to leave, you had better say it now." The deceased then uttered these words: "I was to be married next Thursday, tell my folks to give Martha Jane Wade, my intended, $1,000 of my money." Nothing more was said either by Seever or those around him. About 15 minutes afterwards he died. It was *held* here that there was no proper *rogatio testium.*

will testify to that fact in the Probate Court, and it will do as if it were a written will." The testator then spoke of his intended wife, and said: "It has been my intention all along that she should have everything I have, real and personal, and that is my will now." Another person then said: "This is your last will and testament made in our presence as witnesses?" Testator said, "Yes," and then, after a pause added, "I want my life insurance policy to go direct to her without going through a course of administration." [19]

It has been held that a look is not sufficient, and that there must be some words spoken to indicate a calling upon those present.[20]

§ 1165. Testamentary words.

The same rule applies in a nuncupative will as in a written will. The testator must have spoken the words with the intention of making a testamentary disposition. If they are not such words that indicate a testamentary disposition, the will would fail. It must also appear that the words were spoken with the intention of making a nuncupative will. Thus in the case before cited [21] it was held that the words there spoken were not such words as would support a testamentary bequest. Likewise it has been held that the mere fact of the testator figuring up how much he desired each child to receive, and entering it into an account book, could not be a valid nuncupative will.[22]

A recent text writer gives the following as an instance in which it was held that there was no intention manifested to make a nuncupative will: A physician was called, who assured the testator that there would be no danger of death for twenty-four hours. The testator's brother asked him if he wished to make any disposition of his property. The testator said, "All right; you can take a statement of how I want it fixed." And the brother took down the instructions, and said: "I will make a memorandum, and fix it up in shape. If you think it is proper you can sign it and make a kind of will of it."

[19] Page on Wills, §§ 237, 264; Harrington vs. Stees, 82 Ill. 50.

[20] Woerner on Admin. 82. See § 1165, Testamentary words.

[21] § 1164.

Seever vs. Seever, 2 C. C. 298; 1 C. D. 496.

[22] Williams vs. Pope, Wright 406.

The testator assented. The next morning the brother received a telephone message that A. was sinking fast. He at once wrote out the will and hurried to the hospital, arriving there after A.'s death. This was held not to be a sufficient declaration to support a nuncupative will.[23]

§ 1166. Must be admitted to probate within six months. No nuncupative will shall be admitted to record unless it be offered for probate within six months after the death of the testator." [R. S. § 5992.][24]

§ 1167. Matter pertaining to probate.

The law applicable to the probate of a written will is in all respects applicable to the probate of a nuncupative will. An application should be made for probate and all the next of kin resident in the State of Ohio, and the widow or widower of the deceased, must be notified.[25] It is the same kind of a proceeding in Probate Court — that is, *ex parte,* and the will may be contested in the Common Pleas Court just the same as a written will could be. In addition to the facts required by sec. 10691, G. C. (§ 1159), the testimony of witnesses must show that the testator was of sound mind and memory, and not under any restraint. The will must be probated in the county in which the testator had his domicile. The forms and directions given for probating a written will can be used for probating a nuncupative will. The same law would apply as to appeals and error and the repropounding of the will.[26]

§ 1168. Proof required, etc.

From the nature of a nuncupative will in that it affords great temptation to the establishment of a will other than that desired by the testator, courts have been inclined to require strict proof of all the essentials requisite to the establishment of such a will. Some courts have held that the evidence must be of the clearest and most convincing character.[27] Our own courts have said that the statute in reference to nuncupative wills must be strictly complied with, and that it must appear that all the requirements

[23] Page on Wills, §§ 236, 262.
[24] § 10602 G. C.
[25] § 5917 R. S., § 1067.
[26] § 1159.
[27] Page on Wills, §§ 447, 524.
That a nuncupative will attempts to devise real estate to the witnesses thereto does not disqualify them, for they are presumed to know the law. Until it is shown that they expected a benefit from the will it is error to direct a verdict annulling the will. That a nuncupative will attempts to dispose of real as well as personal property does not make it invalid as to the personal property. Parsons vs. Wass, 16 O. C. C. (N.S.) 404.

of the law have been fully followed, that such wills are not favorites of the law, and that the factum of such a will should be strictly proved to conform to the legal requirements for such a will; testamentary capacity and the *animus testandi* at the time of the alleged nuncupation, must be shown by the clearest and most indisputable testimony.[28]

In consequence of the disfavor with which this class of wills is looked upon by the Courts, says Woerner,[29] it is necessary to observe the utmost strictness in fulfilling the statutory requirements with reference to them, and to prove the testamentary capacity and *animus testandi* by the clearest evidence; and deviation therefrom will, according to the unvarying current of authorities, prove fatal.

§ 1169. Form of will.

LAST WILL AND TESTAMENT OF A. B., DECEASED.

On the 6th day of October, A. D. 1890, A. B., being in his last sickness at his residence (here state place), in the presence of the subscribers, did declare his last will concerning the disposition of his property, as follows: (Here insert the testamentary words as near as they can be remembered as they were uttered by the testator.) That at the time the above testamentary words were spoken, the said A. B. called upon the undersigned, who were then present to bear testimony of his disposition thereby made of his property; and that at the time the said A. B. made the above statements to be and for his will, he was of sound mind and memory and not under any restraint.

Reduced to writing this.....day of.....and subscribed by us as witnesses thereto. .....

.....

The following may be used as a form for taking the testimony of the witnesses to a nuncupative will:

State of Ohio,.....County, ss.

Before me....., Judge (or deputy clerk) of the Probate Court of.....county, personally appeared I. J. and K. L., who being duly sworn, say that they were present on the sixth day of October, 1888, at the residence of A. B., number.....street in Cincinnati, Hamilton county, Ohio, and did hear A. B. utter what is specified in the foregoing writing; that he was at that time of sound mind and memory, and not under any restraint, and that he, at the time the testamentary words were spoken called upon them to bear testimony to said disposition, as his will, and that said A. B. was then in his last sickness to the best of their knowledge and belief.

.....

Sworn and subscribed before me this 16th day of October, A. D. 1888.

.....

Judge (or Deputy Clerk) Probate Court.....County, Ohio.

[28] Seever vs. Seever, 2 C. C. 302; 1 C. D. 496. Woerner on Admin. 489.

CHAPTER LXII.

JOINT AND MUTUAL WILLS.

§ 1170 Definition and classification.
§ 1171 Ohio decisions.
§ 1172 When admissible to probate.
§ 1173 Revocability of joint and mutual wills.

§ 1170. Definition and classification.

There seems to have been a great deal of confusion among Courts in reference to the law to be applied to joint, mutual or reciprocal wills, and while the atmosphere is yet full of judicial fog, it seems to be clearing, and it may not be long until definite rules may be laid down as to this class of wills. If the common intention is expressed in one instrument, which is signed and executed by both the testators, this will may be classed as a *joint will.* If the testators have executed two separate instruments to manifest their common intention, this may be called a *mutual will.* If this common intention is that the property of the one dying first shall go to the survivor, it may be termed a *mutual or reciprocal will.* "This classification," says Page, "is not adequate," and as to the substance of these wills, he gives the following classification:

1. "The will by which the one dying first leaves his property to the survivor or survivors, whether this is done by one will executed by all the testators or by separate wills executed separately. Some of the Courts have termed this a double will, and other Courts, while applying the same legal principles, refuse to recognize such will as even a mutual will, but prefer to style it the separate will of each. When such an intention manifests itself in separate wills they are sometimes spoken of as concurrent or reciprocal wills.

2. "The will by which the testators, in separate clauses, dispose of their several interests in the execution of a common intention.

Where a husband and wife make the same testamentary disposition of their property so their respective estates may take the same course and be distributed in the same way after death, the validity of a trust under one will not be defeated by reason of a faulty execution of the will of the other. Coghlan vs. Coghlan, 26 O. C. C. 18.

A joint will is not created when the wills are separate, executed at different times although they may make the same disposition of the property. *Id.*

Mutual wills concurrently made in compliance with a contract between two parties who are competent and free to act, which wills are supported by both mutually, and a sufficient consideration are valid; and an oral agreement to execute such will is proved by same kind of evidence as other contracts, etc. Such an agreement, when executed by the making of such will is irrevocable after the death of one. Minor vs. Minor, 2 N. P. (N.S.) 439; 15 Dec. 204.

3. "The will by which the testators jointly devise their joint interests to third persons, or by which they treat their separate property as a common fund out of which they provide for third persons. A will of this kind is often termed a joint will.[1]

4. "The will which is a composite of the foregoing types; that is, which provides in part for third persons and in part provides for the survivor.

5. "The will which differs from the third class only in that it specifically directs that it shall not take effect till the death of the survivor of the testators." [2]

§ 1171. Ohio decisions.

This method of disposing of property is not a very common one. In Ohio but two cases have reached the Supreme Court, and these are not in accord; and three cases are reported in inferior reports. The first case in the Supreme Court is that of Walker vs. Walker.[3] In this case it is held, "A joint will is unknown to the testamentary law of this State, and is inconsistent with the policy of its legislation; and where a husband and wife, each being the separate owner of property, join in the execution of an instrument in the form of a will, and treating the separate property of each as a joint fund, bequeathed legacies and devised lands to divers persons, the same can not be admitted to probate as the joint will of both parties, nor as the separate will of either. Although some of the provisions contained in the body of such a will may be, in form and effect, several; yet, inasmuch as the provisions of such a will partake of the nature of a compact, in which such provision is influenced by all the rest, all the provisions of the will must stand or fall together."

There is quite an extended opinion in this case, and the Court seems to arrive at its conclusion, giving as one reason the fact that the statute in relation to wills does not apply to a *plural number*. This reason is exploded in the later case of Betts vs. Harper,[4] and the Court further relies very much on the case of

[1] Betts vs. Harper, 39 O. S. 639.
[2] Page on Wills, § 66, p. 70.
[3] 14 O. S. 157.
[4] 39 O. S. 639.

Clayton vs. Liverman, decided by the Supreme Court of North Carolina in 1837.[5] This North Carolina case has been repudiated by a recent case in the same State.[6]

In the case of Betts vs. Harper, in speaking of the case of Walker vs. Walker, the Court says: "Assuming as we should — more than twenty years having elapsed since the case was decided — that the instrument received the proper consideration, we are not disposed to question the decision." Then the Court goes on and does question the decision, and seems to avoid directly overruling it, for the reason that the case before it is not exactly like the case of Walker vs. Walker. It seems to me that the authorities at this time are not in accord with the decision in Walker vs. Walker.

In the case of Kunnen vs. Zurline,[7] the Superior Court of Cincinnati attempted to follow Walker vs. Walker, but held that although the will was joint in form, yet from the fact that one person owned all the property, and the other person, who was the wife, owned none, that such a will was not the joint will of both, but merely the valid will of the husband and could be probated.

In another case,[8] where wills were mutually made by husband and wife, who each owned property, at the same time they entered into a contract in writing provided that the provisions of each will should be *unalterable* and *irrevocable*. The husband, however, after the death of the wife, changed his will. The Court did not question his right to do so, neither was the right to make a mutual will questioned, nor the power of the Court to admit to probate the will of the person who first died. The decision turned upon the question as to the power of changing the contract and the effect of the will.

The case of Alberry et al. vs. Session [9] was a case in which the direction of the Court was sought upon the provisions of what it termed *twin wills*. In this case the right of each person to make such a will is not questioned, but the question before the

[5] 2 Dev. & Bat. L. Rep. 558.

[6] *In re* Davis, 120 N. C. 9; 38 L. R. A. 289.

[7] 2 C. S. C. R. 440.

[8] Trustees, etc., vs. Wise, 17 C. C. 659; 6 C. D. 703.

[9] 2 N. P. 237; 3 Dec. 330.

Court was as to the enforcement of what is termed a testamentary contract, and in defining what constitutes a testamentary contract. The Court says:

1. "The mind of both parties must meet in regard to the same thing.

2. "They must be competent and free to act.

3. "There must be a consideration. The execution of each of the mutual wills must be the consideration for the execution of the other.

4. "There must be a mutuality. The mutuality must run through the whole of both wills, and through every part of each will. A reciprocity must pervade both wills. 'The property of both is put into a common fund, and every devise is the joint devise of both,' so says judicial precept.[10]

5. "The two must be concurrently executed. They could not be twins unless they were executed at the same time, or within a reasonably short time of each other.

6. "Each testator, at the time the wills were executed, or before that time, must have known what were the provisions of both wills.

7. "Both testators must have intended that the wills should not be revoked without the consent of both of them."

8. The existence and terms of the contract must be established by the most clear and satisfactory evidence. The same kind of evidence by which other contracts are proved may be used.[11]

§ 1172. When admissible to probate.

The same author from which we have before quoted, says: "There is no dispute as to the admissibility to probate of wills of the first and second types, by which (*a*) the survivor is to take the property of the one dying first, or (*b*) by which separate interests are disposed of in separate clauses. Such wills are to be admitted to probate, if in other respects regular, upon the death of the first testator, as his will.

[10] Defour vs. Peraro, 1 Dicken's Chancery Rep. 419.

[11] 2 N. P. 240; 3 Dec. 330.

In the recent case of Ballard vs. Ballard, 37 O. C. C. 562; 26 O. C. C. (N.S.) 490; 5 O. App. 469, the court holds that tenants in common of real estate may by single will dispose of real estate and personalty without designating the proportion of legacy paid by each testator. The court in this case refrains from overruling the case of Walker vs. Walker, 14 O. S. 639, because it thinks that should be done by the Supreme Court, but the Walker case is not followed, because the court is able to distinguish a difference between the case under consideration and the Walker case. One thing is clear, the power to make a joint will is upheld.

"As to wills of the third type — those by which the testators jointly devise their joint interests to third persons, or treat their separate property as a common fund out of which they provide for third persons — there has been more diversity of opinion. The great weight of authority is that the will of this type is to be probated on the death of each testator as the separate will of decedent,[12] and that, as said before, if this can not be done, the instrument should be refused probate as a will altogether. This last rule seems to rest upon sound policy. The funeral expenses and debts of the decedent should be paid as soon as is practicable, and the estate settled. To delay such payment until the death of some one other than testator — an event which may not occur for years — would make the prompt and orderly settlement of decedent's estate impossible.

"It must, however, be admitted that there are some early cases which recognize the validity of the joint will, in which it is intimated that such will could not be probated until the death of both testators." [13]

§ 1173. Revocability of joint and mutual wills.

We have seen in a previous discussion upon the subject of wills that one of the distinguishing features between a will and a contract was the fact of its revocability,[14] and it would necessarily seem to follow that the rule should be applied to joint and mutual wills. Confusion arises in this matter from the fact that the contract is enforced, even though the will has been revoked. In this sense it may be stated to have been held that the will can be revoked. But the rights remain fixed, not by virtue of the will, but by virtue of the contract.[15]

[12] *In re* Davis Will, 120 N. Car. 9; Betts vs. Harper, 39 O. S. 639.

[13] Page on Wills, §§ 68, 74.

[14] § 1014.

[15] Alberry vs. Session, 2 N. P. 237; 3 Dec. 330; Reformed Church vs. Wise, 17 C. C. 659; 6 C. D. 703; Cawley's Estate, 162 Pa. St. 520.

In an extended note where the case of *in re* Davis is reported in 38 L. R. A. 239, the reporter says, "A review of the authorities shows it to to be well established now that a single instrument may include the wills of several persons if its provisions are such as to constitute or include a separate will for each of them. As to instruments which attempt to make a joint disposition of property there is more difficulty.

As to certain kinds of wills, a recent author recognizes the unsettled condition when he says of the law: "The difficulties presented by the joint will of the type that treats the property of both testators as a common fund are great, and the adjudicated cases give but little indication as to their solution. We may ignore the point made, that the statute of wills refers entirely to a will executed by one only; for, as has been well said, the statute of conveyances refers entirely to conveyances by one only, but no doubt has ever been entertained of the validity of a joint deed. The difficulties are deeper than this. One of the greatest of them is the method of settling the estate of the first decedent. Inasmuch as the will disposes of the property of both testators, the legacies and devises can not be paid entirely out of the estate of the decedent; but what proportion of them to pay, what distinction, if any, between specific and pecuniary legacies, and what effect the possible ultimate insolvency of the estate of the surviving testator should have, are questions which will sooner or later be presented for judicial consideration whenever such type of will is treated as valid." [16]

But a majority of the cases seems to agree in holding that a will cannot be made by two or more persons unless it can be regarded as the separate will of each of them so that it may be probated separately for each without regard to the fact that another maker is still living.

[16] Page on Wills, § 69, p. 77.

A recent *nisi prius* case has held that mutual wills are valid. One is a good consideration for the other. An oral agreement to that effect is not within the statute of frauds. The statute of limitations does not begin to run until the death of the survivor. The agreement is irrevocable after the death of either party. The will may be revoked, but the compact or agreement will be enforced. It is not annulled because the will of the survivor cannot be found after his death, where the execution of such wills, their contents and a sufficient consideration therefor is conclusively shown by oral evidence. Minor vs. Minor, 2 N. P. (N.S.) 439; 15 Dec. 264.

CHAPTER LXIII.

CODICILS.

§ 1174 Definition.
§ 1175 Execution. Revocation, etc.
1176 Construction of will and codicil.
§ 1177 Republication of will by a codicil.
§ 1178 Probate of codicil.
§ 1179 Form of codicil.

§ 1174. Definition.

The term "codicil" in the sense in which it is now universally used in the English and American law, may be defined to be some addition to or qualification of one's last will and testament. It may add to or subtract from, alter, explain, confirm, revive, or republish any will with which it can be incorporated. There may be many codicils, but there can be but one will.[1]

One of our Courts has said that "the word codicil has a definite legal signification. Its signification is 'a supplement to a will.' The province of a codicil is not to revoke a will, but to change, add to, or subtract from a will." [2]

Our statute says, in the title relating to wills, the term "will" shall be construed to include codicils.[3] The codicil is *prima facie* dependent upon the will. The destruction or mutilation of the will is an implied revocation of the codicil.[4]

[1] 3 Am. & Eng. Ency. of Law 291. Codicils owe their origin to the following circumstances: Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation in a will of former date, and in these codicils, requested the Emperor Augustus, by way of *fidei commissum* or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa*, and then the emperor, by the advice of learned men, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 225; Bouv. L. Dict. tit. Codicil.

[2] Giffen vs. Brooks, 3 C. C. 118; 2 C. D. 64.

[3] §§ 10215-10502 G. C., § 1033.

[4] § 1052.

Woerner on Admin. 86, 87.

Where a suit to contest a will was brought to which there were three codicils and in the petition only the first and second codicils were referred to, it was held that on trial the issue is made up by the court, and the will with all the codicils will be submitted to the jury—Clark, Common Pleas

§ 1175. Execution. Revocation, etc.

A codicil, in order to be effective, must be executed with the same formality, and the testator must exercise the same powers and capacities as is requisite in the execution of a valid will. Likewise a codicil can be revoked only in the same method that a will is revoked. Of course, if the will is revoked, the codicil being a supplement to the will, the revocation of the will would work a revocation of the codicil. In order to enable what purports to be a codicil to be effective when the will is destroyed, the codicil must be of such a character as to constitute a new or independent will. It is common practice to attach the codicil to the original will, but this is not essential. The same effect can be accomplished by reference as by attachment or writing upon the same sheet of paper. If it is not annexed to the will, the codicil, where no expressed date is mentioned, refers to the will latest in date.[5]

§ 1176. Construction of will and codicil.

It is a well settled rule of construction that a will and codicil are to be taken and construed together as parts of one and the same instrument, and the intent of the testator gathered from the whole; and that a codicil will not be held to revoke the disposition of the will further than is clearly expressed or necessarily to be inferred from it.[6]

If the will gives an estate, in order to revoke the same by codicil, the terms used must be equally clear and a later codicil will not revoke an earlier codicil, unless such result is absolutely necessary to give effect to the later codicil. "Where a second instrument is a will as distinguished from a codicil," says Page,[7] "the Courts do not make so great an effort to reconcile it with the former will as they do in the case of a codicil. The reason for this distinction lies in the fact that a codicil is ordinarily intended merely to effect some alteration in the will, leaving the rest of it in force; while a later will may quite as well be in-

[5] See § 1052. Revocation of codicil.

[6] Collier vs. Collier, 3 O. S. 369.

[7] Page on Wills, §§ 269, 300.

tended to dispose of testator's property in disregard of the former will." [8]

§ 1177. Republication of will by a codicil.

From the fact that a codicil is a part of the will to which it is attached or made part by reference, the execution of the codicil *per se* operates as a republication of the will, and the two are to be regarded as but one instrument, speaking from the date of the codicil.[9] And therefore it may operate to establish a will which would be void for want of compliance with the law regulating its execution and attestation, because the codicil, speaking and operating from the time of its execution, brings the will to it and makes it a will from the date of the codicil.[10]

§ 1178. Probate of codicil.

Ordinarily a codicil is so connected with the will to which it refers that it cannot be probated apart from such will. If it can be probated apart from the will, it would lose its character of a codicil, and would become an independent will. In reference to the formalities surrounding the probating of a codicil, the same law applies as to the probating of a will, and for all such

[8] W., on February 17th, 1886, made his will, by the second item of which he gave all the property to his daughter, Margaret, and all his grandchildren, share and share alike; and also, by it provided that "if at the time of my death, my daughter Margaret or any of my grandchildren shall have deceased, then my estate shall go to the survivors, their heirs and assigns, share and share alike." January 3rd, 1890, W. made a second codicil to his will, in which he recites that, since the making of his will, he had given his grand-daughter, Emma Campbell, certain real estate which he considered fully equal to her full proportion of his estate and then says: "I hereby revoke so much of item second of my said will as would include said Emma, and I hereby give and devise to my daughter, Margaret Jackson, and all my other grandchildren, not including said Emma, all my estate of every kind, share and alike."

"With the change above made, I hereby approve and confirm all will and codicil as my last will." Decided that the second codicil abrogated the provision of survivorship contained in the second item of the will. Jackson vs. Shinnick, 3 N. P. 211; 6 Dec. 37. See § 1184 *et seq.*, Construction of wills.

[9] 3 Am. & Eng. Ency. of Law, 301; Page on Wills, §§ 307, 347.

[10] Woerner on Admin. 87.

purposes a codicil is a will.[11] It may be contested in the same manner as a will, and the same right exists for error and appeal and a repropounding. While a codicil can not be probated without the will, yet the will may be probated even though the codicil can not be found.[11]

§ 1179. Form of codicil.

I, A. B., make this codicil to my last will and testament which was dated Sept. 1, 1894. I cancel and revoke the legacy of one thousand dollars given to G. H.

I give to my son, C. D., executor of my will, in addition to the portion given him under my will, one thousand dollars.

In all other respects I confirm my will.

Witness my hand this first day of October, in the year one thousand eight hundred and ninety-four. A. B.

Signed, published and declared by the above named A. B. as and for a codicil to his last will and testament in presence of us who in his presence (and in the presence of each other) and at his request have hereto subscribed our names as witnesses.

L. B.
G. F.

This form of attestation is more full than the law requires. Under our statute the witnesses need not sign in each others presence. See *infra*.[12]

[11] Page on Wills, §§ 314, 359.

[12] Whittaker's Code Forms, 181.

CHAPTER LXIV.

CONSTRUCTION OF WILLS.

§ 1180 Definition, etc.
§ 1181 General rules of construction.
§ 1182 Rules as to intention.
§ 1183 Rules as to repugnancy.
§ 1184 Rules for supplying words.
§ 1185 When extrinsic evidence admissible.
§ 1186 Parol evidence.
§ 1187 Declarations of the testator.
§ 1188 Devise for life, remainder to heir in fee.
§ 1189 Rule in Shelley's case.
§ 1190 Vesting of estates.
§ 1191 Property acquired subsequent to making of will passes.
§ 1192 When whole estate of devisor in land to pass by the devise.
§ 1193 Life estate with power of disposal.
§ 1194 Devise or bequest not to lapse by the death of devisee or legatee.
§ 1195 Lapsed bequest.
§ 1196 "Heirs," how construed.
§ 1197 "Issue" construed.
§ 1198 "Children" construed.
§ 1199 "Next of kin" construed.
§ 1200 "Relation" construed.
§ 1201 "Descendants" construed.
§ 1202 Disinheriting heirs.
§ 1203 Provisions against contesting.
§ 1204 Restraints of alienation.
§ 1205 Restraint of marriage.
§ 1206 When real estate undevised shall be applied to pay debts instead of personalty.
§ 1207 Contribution when devised or bequeathed property taken to pay debts.
§ 1208 Except when will otherwise provides.
§ 1209 But whole estate liable for debts.
§ 1210 Portion of child born after execution of will or supposed to be dead, or of witness subject to contribution.
§ 1211 If any liable to contribute are insolvent, etc., how others to make up deficiency.
§ 1212 How contribution enforced.
§ 1213 Order to sell land to pay debts. Not affected, etc.[1]

§ 1180. Definition, etc.

Construction in the law of wills is the ascertaining and determining of testator's intention as expressed in his will, and its application to existing facts and circumstances with which such

[1] See § 1031 as to perpetuities.

§ 907 *et seq.*, Descent and distribution.

§ 804, Devise to sell.

§ 674 *et seq.*, As to payment of legacies.

Where the parties agree on a construction in good faith it will be upheld, although it is not the construction that the court would have placed on the will. Poland vs. St. Joseph, 9 C. C. (N.S.) 535; 29 O. C. C. 649.

A will is to be interpreted by its express provisions when no ambiguity exists in such provisions; the mere fact that we cannot understand why testator so provided, or such provision is contrary to what we might expect, does not justify putting a construction on said will different from its plain words. Robbins vs. Smith, 5 C. C. (N.S.) 545; 27 O. C. C. 91; affirmed 72 O. S. 1.

A Court of Equity will not reform a will. Younce vs. Flory, 77 O. S. 71.

Where the provisions of a will are clear and unambiguous there is nothing for the court to construe. Rein-

intention deals.[2] Rules of construction are used to aid in ascertaining the intention, but are not adhered to against an obvious intent; hence one case may not be the standard for another, as no two wills are apt to be exactly alike.[3] And where a will is open to two constructions, one of which gives effect to the whole instrument, while the other destroys a part, the former construction must be adopted.[4] And the rule is well settled that all parts of a will are to be construed in relation to each other, so as, if possible to form one consistent whole, and thus uphold and give effect to all the provisions of the will.[4*] And if two clauses of the will are irreconcilable, the last controls the first.[5]

Words in a will are to be construed in their common and ordinary sense, and no word can be rejected and another substituted in its place without the clearest certainty that such was the intention of the testator.[6]

In treating of this matter in a work of this kind a difficulty is experienced in what to omit as well as that which should be inserted. The subject of construction is a very extensive one, and can only be properly treated in a treatise on the subject of wills. It is thought, however, that some service may be rendered by the insertion at least of rules laid down by recognized authors. The following several sections are largely taken from a valuable work on the probate law of our sister State,[7] which, in turn, says that they are taken from the treatises of Redfield, Jarman, Williams and Wigrams.[8]

hard vs. Reinhard, 3 N. P. (N.S.) 280; 15 Dec. 741.

When executors are to sell real estate after the death of the wife of the testator, and divide the proceeds among certain children, a quit claim deed made by one of the children during the life of the wife, conveys no estate. Knisely vs. Young, 33 O. C. C. 439.

[2] Page on Wills, §§ 457, 533.

The sole object in view in giving a construction to a will is the ascertainment of the intention of the testator and give the will such construction as will carry this intention into effect. See §§ 1181, 1182. Decker vs. Decker, 3 O. 157; King vs. Beck, 15 O. 559; Brasher vs. Marsh, 15 O. S. 103; Townsend vs. Townsend, 25 O. S. 477; Linton vs. Laycock, 33 O. S. 128.

[3] Brasher vs. Marsh, 15 O. S. 103; Williams vs. Veach, 17 O. 171.

[4] Pruden vs. Pruden, 14 O. S. 251.

[4*] Worman vs. Teagarden, 2 O. S. 380; Parker vs. Parker, 13 O. S. 95; Baxter vs. Bowyer, 19 O. S. 490.

[5] Coonrod vs. Coonrod, 6 O. 114; Young vs. McIntire, 3 O. 498; Parker vs. Parker, 13 O. S. 95. Sch. on Wills, 474.

[6] See Page on Wills, §§ 462, 539.

[7] Henry Pro. Law. (Ind.) 677.

[8] See §§ 10213 G. C., 10502, G. C., § 1033, for statutory construction. Parties interested may file a petition and have a judicial construction, §§ 10857-8 G. C., § 33.

§ 1181. General rules of construction.

The following general rules are given: [9]

1. A will of real estate, wherever made, and in whatever language written, is construed according to the law of the place or country in which the property is situate, but a will of personalty is governed by the law of the domicile.

2. Technical words are not necessary to give effect to any species of disposition in a will.[10]

3. The construction of a will is the same at law as in equity, the jurisdiction of each being governed by the nature of the subject, though consequences may differ.

4. A will speaks for some purposes, from the period of its execution, and for others, from the death of the testator, but never operates until the latter period.[11]

5. The heir is not to be disinherited without an express devise, or necessary implication, such implication importing not natural necessity, but so strong a probability that an intention to the contrary can not be supposed.[12]

6. Merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object.[13]

7. All parts of a will are to be construed in relation to each

[9] Jarman's 24 Rules; Jennings vs. Jennings, 21 O. S. 56; McCune vs. House, 8 O. 144; Brewster vs. Benedict, 14 O. S. 368; Hartshorne vs. Ross, 2 Disney, 444; Craighead vs. Pike, 4 Rec. 199; Sch. on Wills, 491.

See § 1016, § 1118 G. C., Law governing.

[10] The rule for construing the language of the will is less rigid than it is in regard to any other instrument. It is not, necessarily, to be viewed technically, and with strict grammatical accuracy, but sensibly and liberally, in order to give effect to intention. 15 O. S. 103; Brasher vs. Marsh; Sch. on Wills 470.

[11] Smith vs. Block, 29 O. S. 488; Hosmer vs. Sturges, 31 O. S. 657; Baker vs. McGrew, 41 O. S. 113; Woerner on Admin. § 419; Cinton vs. Boyd, 19 O. S. 30; Farrar vs. Fallestine, 4 C. C. 235; 2 C. D. 519; McCall vs. Jones, 4 W. L. M. 627.

[12] See § 1202.

Crane vs. Doty, 1 O. S. 279; Smith vs. Jones, 4 O. 115; Bane vs. Wick, 19 O. 328.

The statute of descents operates upon all intestate property, and the course which it indicates can be changed only by a testamentary disposition. Mathews vs. Krisher, 59 O. S. 562; Page on Wills, §§ 467, 548.

[13] Woerner on Admin. § 418.

Words of survivorship in a will refer to the time of the testator's death. Renner vs. Williams, 71 O. S. 340.

other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.[14]

8. Extrinsic evidence is not admissible to alter, detract from, or add to the terms of a will.[15]

9. Nor is it admissible to vary the meaning of words, and therefore to attach a strained and extraordinary sense to a particular word, in an instrument executed by the testator, in which the same word occurs in that sense.[16]

10. But the Court will look at the circumstances under which the devisor made his will, as the state of his property, his family, and the like.[17]

11. In general, implication is admissible only in the absence of, and not to control, an express disposition.[18]

12. An express and positive devise can not be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will.[19]

13. The inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous, nor is the fact that the testator did not foresee all the consequences of his disposition a reason for varying it. But where the intention is obscured by conflicting expressions, it is to be sought rather in a rational and consistent, than an irrational and insistent purpose.

14. The rules of construction can not be strained to bring a devise within the rules of law, but it seems that where the will

[14] Parker vs. Parker, 13 O. S. 105; Decker vs. Decker, 3 O. 157; Williams vs. Veach, 17 O. 171; Starling vs. Price, 16 O. S. 29; Edwards vs. Ranier, 17 O. S. 597; Townsend vs. Townsend, 25 O. S. 477; Carter vs. Reddish, 32 O. S. 1; Sch. on Wills, 473.

[15] Collins vs. Hope, 20 O. 492; Townsend vs. Townsend, 25 O. S. 477; Worman vs. Teagarden, 2 O. S. 380; Charch vs. Charch, 57 O. S. 561.

[16] Thompson vs. Thompson, 4 O. S. 333; Edwards vs. Ranier, 17 O. S. 597.

[17] Sch. on Wills 469; Jones vs. Lloyd, 33 O. S. 572; Parker vs. Parker, 13 O. S. 105; Charch vs. Charch, 57 O. S. 561; Townsend vs. Townsend, 25 O. S. 490.

It must appear, however, that the testator knew the circumstances. Jones vs. Lloyd, 33 O. S. 572.

[18] Parker vs. Parker, 13 O. S. 105.

[19] Parker vs. Parker, 13 O. S. 105, 109.

See Reinhard vs. Reinhard, 15 Dec. 741.

A will must be construed as an entirety, and the intention of the testator ascertained and carried into effect. Huber vs. Carew, 7 C. C. (N.S.) 609; 2 N. P. (N.S.) 81; 14 Dec. 656; affirmed 26 O. C. C. 389.

Evidence tending to show circumstances of the testator, his character, objects of his bounty, his ties of affection and his instructions to the scrivener who drew the will, rightfully rejected. Foster vs. Clifford, 87 O. S. 306.

admits of two constructions, that is to be preferred which will render it valid.[20]

15. Favor or disfavor to the object ought not to influence the construction.

16. Words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained; and they are in all cases to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction that is to be preferred which will prevent a total or even partial intestacy.[21]

17. Where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary.

More recent decisions have so relaxed this rule that technical language is now given a more reasonable construction, and will receive either a technical or popular construction, according to circumstances.[22]

18. Words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appear from the context, or unless the words be applied to a different subject.[23]

19. Words and limitations may be transposed, supplied or rejected where warranted by the immediate context, or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition

[20] Pruden vs. Pruden, 14 O. S. 251.

[21] Carter vs. Reddish, 32 O. S. 1; Bowen vs. Bowen, 34 O. S. 164; Zanesville vs. Zanesville, 20 O. 483; Collier vs. Collier, 3 O. S. 369; Page on Wills, §§ 471, 556; Colston vs. Bishop, 1 C. C. 486; Sch. on Wills 472.

[22] Townsend vs. Townsend, 25 O. S. 477; Richey vs. Johnson, 30 O. S. 288; Thompson vs. Thompson, 4 O. S. 33.

Strict technical meaning may be given to such words as "heirs" unless it appears that they were used in the will as meaning something else. Weston vs. Weston, 38 O. S. 473; Jamieson vs. Knights Templar, 12 Bull. 272; Y. M. L. Ass'n vs. Pollard, 3 C. C. 577; 2 C. D. 333.

[23] Sch. on Wills 471.

to the plain and obvious sense of the language of the instrument.[24]

20. Words which it is obvious are miswritten may be corrected.[24*]

21. The construction is not to be varied by events subsequent to the execution, but the Court, in determining the meaning of particular expressions, will look to possible circumstances in which they might have been called upon to affix a signification to them.

22. Several independent devises, not grammatically connected or united by the expression of a common purpose, must be construed separately and without relation to each other. There must be an apparent design to connect them.

23. Where a testator's intention can not operate to its full extent, it shall take effect as far as possible.

24. A testator is rather to be presumed to calculate on the disposition of his will taking effect than the contrary, and accordingly a provision for the death of devisee will not be considered as intended to provide exclusively for lapse, if it admits of any other construction.[25]

§ 1182. Rules as to intention.

It may be remarked that the rules for construction of wills are less rigid than those in regard to other instruments, the principle being to ascertain the most obvious intent of the testator. The intention of the testator is the object of all construction, but this general proposition is subject to the following qualifications:[26]

1. The intention must be expressed in the words of the will.[27]

[24] Woerner on Admin. 880; Page on Wills, §§ 462, 539.

[24*] Merrick vs. Merrick, 37 O. S. 126.

[25] Henry Pro. Law 678.

See Redf. Sur. Prac. 234; Alexander vs. Mendenhall, 32 Bull. 1181; Gilpin vs. Williams, 17 O. S. 396; 25 O. S. 283; Pendleton vs. Bowler, 27 Bull. 313.

[26] All rules of construction must bend to and conform to the rule that nothing shall stand in the way of the expressed intention of the testator unless it be contrary to law. Woodruff vs. Woodruff, 23 C. C. 498.

Swerer vs. University, 27 O. C. C. 144.

[27] Collins vs. Hope, 20 O. 492; Townsend vs. Townsend, 25 O. S. 477; Shaw vs. Hoard, 18 O. S. 227.

Where there are doubtful clauses in a will the court determining the meaning the testator intended they should have will not be controlled by general rules or judicial decisions in cases apparently similar but will interpret them reasonably in particular cases. Moon vs. Stewart, 87 O. S. 349.

2. The general intent, if clear, will control particular terms.[28]

3. Words are to have that force which authority gives them, unless the contrary is clear.[29]

4. Clearly expressed intention controls doubtful construction[30]

5. Punctuation is not authoritative in fixing construction.[31]

6. The will should be upheld and made reasonable as far as practicable.

7. Courts will give some meaning to a will, unless absolutely impossible.

The rule is universal in American Courts that the plain and unambiguous words of the will must prevail, and are not to be controlled or qualified by any conjectural or doubtful construc-

It is, therefore, a cardinal principle in expounding wills, announced by so many authorities that it would be tedious, and is unnecessary to attempt to mention them, that the intention of the testator must be found in his expressed words. The grammatical and ordinary popular sense of the words should be adhered to, unless it would lead to some absurdity, or repugnance, or inconsistency with the rest of the instrument. Woerner on Admin. 870; Worman vs. Teagerden, 2 O. S. 380.

But that which is plainly implied in the language of a statute is as much a part of it as that which is expressed. Doyle vs. Doyle, 50 O. S. 330; Gates vs. Pond, 12 C. C. 59; 5 C. D. 297.

[28] Pruden vs. Pruden, 14 O. S. 259; Davis vs. Davis, 62 O. S. 411; Page on Wills, §§ 463, 541.

[29] Moore vs. Moore 12 B. Mon. 651, 656.

"The testator's understanding of the meaning of the words used in the will, will be adopted without resorting to lexicographers, to determine what the same may mean in the abstract." Reinders vs. Koppelman, 94 Mo. 338, 343; Garth vs. Garth, 139 Mo. 456; Woerner on Admin. 870.

[30] To this end, the will as a whole must be considered.

In construing a will, the great object is to ascertain the intention of the testator, and this is to be gathered from the phraseology of the will itself and in order to arrive at this intention, it is necessary to look at the whole instrument. It will not do to seize upon an isolated passage and give it a controlling effect. Williams vs. Veach, 17 O. 171; Townsend vs. Townsend, 25 O. S. 477; Carter vs. Reddish, 32 O. S. 1; Charch vs. Charch, 57 O. S. 561.

[31] Jackson vs. Shinnick, 3 N. P. 211; 6 Dec. 37.

If, in so considering the language of the testator, an intelligible intention may be elicited therefrom, neither technical informality, nor grammatical or orthographical errors, nor confusion in the arrangement of words arising from unskilfulness, can be permitted to defeat it. Woerner on Admin. 870.

Words deliberately used are presumed to have been placed there for a specific purpose, and cannot be arbitrarily ignored; and they must be given the meaning to effect the intention of the testator, if such intention can be ascertained and no rule of law is violated. McDaniel vs. Hayes, 6 N. P. (N.S.) 435; 15 Dec. 661; affirmed 74 O. S. 515.

tions growing out of the situation, incumbrances or condition of the testator, his property or family. Extraneous facts may aid but can not control the construction of words.

Children and their issue should not be disinherited on any doubtful construction.

All the papers constituting the testamentary act are to be considered; and the technical meaning of words are to be followed only where it reaches the intent.[32]

§ 1183. Rules as to repugnancy.

The following rules in reference to repugnancy in wills are fully established:[33]

1. Directing a legacy to be made a charge on land is not repugnant to a subsequent direction for the sale of the same land; but a devise in fee with a provision never to sell is repugnant.

2. No portion of a will is to be rejected for repugnancy except from necessity; but every portion will be upheld, if possible; and to effect this, the order of the bequests will be reversed.

3. General words are controlled by those more specific, and words are not to be rejected for repugnancy except from necessity. But if there are repugnant words contravening the general sense or intent of the will, such words must be rejected.

[32] When a devise was made of 208 acres "and also" 83 acres, the same words of limitation applied to both tracts. Noble vs. Ayers, 61 O. S. 491.

Henry Pro. Law 682.

See Page on Wills, §§ 475, 563.

Where the provisions of a will in each and all of its items are, when considered as an entirety, so obscure that, with the aid of all the light that can be shed on it by the extraneous circumstances, no definite idea can be formed of the intention of the testator in any of the dispositions he has attempted to make, it should be held void for uncertainty, and the property left to descend and be distributed according to law. Cope vs. Cope, 45 O. S. 464.

[33] Repugnancy must arise on the face of the will to justify rejection of a word or clause, and can not be created by extraneous proof. But the repugnancy need not be with some other distinct word or clause but may be a conflict with the general tenor or scope of the will and its implications. Davis vs. Boggs, 20 O. S. 550.

4. In case of irreconcilable repugnancy, the latest portion of the will must stand.[34]

§ 1184. Rules for supplying words.

The following general rules are applicable for supplying words:

1. Words omitted may be supplied by intendment; but this is not done where there is ground for doubt in regard to the words.[35]

2. Words omitted may be supplied by reference to the correlative part of the will.

3. The name of a devisee may be supplied by clear intendment. Even the name and the devise itself may be so supplied.

4. The terms of one devise can not be drawn into the construction of another wholly distinct. The correspondence must amount to identity. The Court will not cut down a devise in a codicil by a resort to the will.[36]

5. When the sections of a will are numerically arranged, each section is distinct.

6. In our Courts almost any latitude of construction is allowed to meet the clear intent of the will. "Die without is-

[34] If an instrument is open to two constructions, one consistent with and the other repugnant to law, or one which will effectuate the whole instrument and the other will destroy part, the former is always adopted. Pruden vs. Pruden, 14 O. S. 251; Page on Wills, §§ 503, 589; Schoul. on Wills 478.

[35] Boggs vs. Taylor, 26 O. S. 604.

Where property is devised by two descriptions, either of which is sufficient in form, but it is shown that one of them is erroneous and the other correct, the former should be rejected, and the property will pass by the latter description, according to the maxim, *Falsa demonstratio non nocet*. Merrick vs. Merrick, 37 O. S. 126.

[36] See § 1177.

Where a will gives the wife the personalty absolutely, and the realty during life and widowhood, and a codicil gives her all realty and personalty "to be disposed of by her as seems best," the intent is to give her a fee in both and her mortgage of the realty is valid. MacClement vs. MacClement, 1 Dayton Term Reps. 101.

A testator having left to his wife several items for life, left to her a farm without words of limitation, but in another clause required that after her death all the remainder of his estate be equally divided, etc. *Held*, she took a life estate only in the farm. Hull vs. Hull, 9 Cir. D. 19; 16 C. C. 688.

sue" has been construed to mean "without issue living," and what seems a life estate in terms may be construed a remainder in fee.[37]

§ 1185. When extrinsic evidence admissible.

The rules heretofore given show that the intention of the testator is the object to be striven for. But this intention must be shown in some way by the will itself, and not by facts outside.[38] Extrinsic evidence is not admitted in any case with a view of reforming or adding anything to the will, but for the purpose of arriving at the real intent of the testator, by identifying the person or thing generally described, and to remove the ambiguity resulting from the erroneous particular description.[39]

No evidence is necessary where there is no ambiguity, as then the will must speak entirely for itself.[40]

The following propositions on the subject of the admissibility of extrinsic evidence to aid in the construction of wills are taken from Wigram's work on "Extrinsic Evidence," and are of great value and importance:

[37] Words of a will may be transposed when such transposition will render the will clear without changing its natural import; and the Court may reach the obvious intent of the testator by transposition. Words of local description applying to one devise may be referred to another, and *vice versa;* but no liberty of transposition or supplying of words is allowed, unless in furtherance of the most unquestionable purpose of the testator.

[38] § 1186, Parol evidence.
§ 1187, Declaration of testator.

[39] Page on Wills, §§ 816, 972.

Extrinsic and parol evidence seem to be almost synonymous words when used in reference to the construction of a will. The one literally meaning any evidence outside of the will itself, and the other meaning evidence not in writing.

[40] Page on Wills, §§ 818, 974.

A distinction is drawn between a patent and latent ambiguity. A patent ambiguity is defined as one which is apparent upon the face of the instrument, as where in wills the same tract is disposed of in different clauses to different individuals. A latent ambiguity is defined as one which is not discoverable until extrinsic evidence is introduced to identify the beneficiaries or the property disposed of by will. The general rule being that extrinsic evidence is only admissible to explain a latent ambiguity. This doctrine is criticised in Page on Wills as not being founded upon sound principle, and that extrinsic or parol evidence is admissible to explain a patent ambiguity.

The intention of the testator cannot be shown by parol when he is silent on the subject. Reinhard vs. Reinhard, 3 N. P. (N.S.) 280; 15 Dec. 741.

The rule of extrinsic evidence is admissible in aid of the construction of a will permits of introduction of evidence, as to blood relationship existing between devisees, and also of a previous will after which the one in hand was copied. Taylor vs. Taylor, 19 Dec. 829.

Testimony of the scrivener who

1. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense, in which case the sense in which he thus appears to use them will be the sense in which they are to be construed.

2. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

3. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are insensible with reference to extrinsic circumstances, a Court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense of which, with reference to these circumstances, they are capable.

4. Where the characters in which the will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, to inform the Court of the proper meaning of the words.

5. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property claimed as the subject of disposition, and to the circumstances of the testator and of the family and affairs, for the purpose of enabling the Court to iden-

drew the will as to instructions given him by testator incompetent. Zaskman vs. Dick, 34 O. C. C. 450; 1 O. App. 36.

tify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

6. Where the words of the will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will will be void for uncertainty.

7. Notwithstanding the above rule of law which makes a will void for uncertainty, Courts of law in certain special cases admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.[41]

§ 1186. Parol evidence.

Parol evidence is not admissible to alter, detract from or add to the terms of a will, nor to correct supposed mistakes therein. It is admissible, in order to place the Court in the position of the testator, but not to render any extrinsic fact part of the will. Such evidence can not supply any defect, or accident, or omission, but it may be shown that part of the instrument is not the testator's will.[42]

The following are instances in which parol evidence is not admissible in construing wills:[43]

1. Filling up a total blank in a will.
2. Inserting a devise omitted by mistake.
3. Proving what was intended by an unintelligible word.
4. Proving that a thing in substance different from that described in the will was intended.
5. Changing the person described.

[41] Henry Pro. Law 687.

[42] Painter vs. Painter, 18 O. 247; Thompson vs. Thompson, 4 O. S. 333; Worman vs. Teagarden, 2 O. S. 380.

[43] Taken from Henry Probate Law and Prac.

Where words in a will are fairly and legitimately applicable to one thing as its name, and are equally applicable to another thing as words of description, parol evidence is admissible to show in which of the two senses the testator was in the habit of using the words. Boggs vs. Taylor, 26 O. S. 604; Black vs. Hill, 32 O. S. 313.

Parol evidence may be received for the purpose of counteracting fraud in the devisee, and in some peculiar cases to attach a trust to the estate devised. But in such cases the court will act with the extremest caution. Collins vs. Hope, 20 O. 492; Vance vs. Park, 15 C. C. 713; 7 N. P. 138.

The evidence must be clear and convincing. Boughman vs. Boughman, 69 O. S. —.

6. Reconciling conflicting clauses in a will.

7. Proving to which of two antecedents a given relative was intended to refer.

8. Explaining or altering the estate.

9. Proving which of several testamentary guardians was intended to have the actual care of the children.

10. Proving what was to be done with the interest of a legacy until the time of payment.

11. Proving that by a bequest of the residue a particular sum was intended.

12. Construing a will with reference to the instructions given for preparing it.

13. Proving that an executor was to be a trustee of the residue for the next of kin.

14. Proving that an executor was intended to take beneficially where, on the face of the will, it was conclusively apparent that he was intended to be a trustee.

15. Controlling a technical rule of verbal construction.

16. Explaining the sense in which the word " relations " was intended to be used.

17. What a testator intended to give by the word " plate."

18. What a testator intended to devise by the words " lands out of settlement."

19. Proving that a portion was intended to be a satisfaction of a bequest of the residue.

20. That a legacy in a codicil was intended to be a substitution for a legacy in the will.

21. Proving that a devise to a wife was intended to be in bar of dower.

22. Supplying a use or trust.

23. Ascertaining whether the real estate was charged with the payment of debts in aid only, or in exoneration of the personal estate.

24. That the intention in appointing a debtor to be executor was a release of the debt.

25. Rebutting a presumption which arises from the construction of words simply *qua* words.

26. Raising a presumption.

27. Increasing a legacy.

28. Increasing that which is defective.

29. Adding a legacy to a will.

30. Proving what interest a legatee was intended to take in a legacy.

31. Ascertaining an intention which, on the face of the will was indeterminate.

32. Proving that words of limitation were intended to be construed as words of purchase.

33. Proving that executors, who had acted in part and then renounced, were intended by the testator to act only to that extent to which they acted.

34. Proving that the testator meant to use general words in this or that particular sense.

Parol evidence is always admissible to show fraud, deception, or undue influence in obtaining a will, and cases allow a very extensive range of testimony in support of, and in reply to, evidence tending to show fraud, undue influence and weakness of mind as the moving and proximate causes of a will.[44]

§ 1187. Declarations of the testator.

A testator's declarations are not admissible to effect the construction of a will. They are admissible on question of fraud and undue influence.[44a] They are admissible to show the state of a testator's mind.[45]

Where a testator devised all of his "home farm" to his

[44] Henry Pro. Law 690.

Our courts hold that they are not admissible, Chaney vs. Coulter, 29 O. C. A. 188, quoting: The law is that declarations of the testatrix made before or after the making of the will if near such time are admissible to prove state of mind of the testatrix, but are not admissible to prove the fact of undue influence. If the declarations tend to prove both the fact of undue influence and the state of mind of the testatrix, then the court must admit the testimony and instruct the jury that it can consider the declarations only so far as they tend to prove the state of mind of testatrix. Boepple vs. Mellert, 24 O. C. C. (N.S.) 410.

[45] Redf. on Wills 553, after a careful consideration of the numerous authorities, states that the declarations of a testator near the time of making a will, so as to be regarded as part of the transaction, should be received upon the principle of evidence, as part of the *res gestae*. On the other hand, mere naked declarations of the testator, made so remote from the time of execution as not to form part of the *res gestaem*, to the effect that attempts at fraud or undue influence had been made, or had compelled him to make a will contrary to his real purpose and intent, seem wholly inadmissible upon recognized principles of evidence. See 46 Bull. 161.

As to presumption of having destroyed will, see Gurley vs. Armentrout, 6 C. C. (N.S.) 156; 27 C. C. 199 (1905).

Plaintiff in a will contest is a competent witness to testify as to acts of the testator and the manner in which these acts were performed, although he is a devisee and son of decedent. Wilson vs. Wilson, 19 Dec. 188.

widow in an action by a residuary devisee to recover land which the defendant claimed under the devise, as part of the home farm, declarations of the testator that he had received a large part of his means from the ancestor of the plaintiff, and that, in consequence of such aid, he intended to will the premises in question to them, cannot be given in evidence as showing the extent or boundaries of the farm.[46]

In another Ohio case it is said "True, the trustee alleges in his answer that he knows from conversations held with the deceased that he contemplated a remote period as the time of distribution, but we are not to regard any such averment. We are to find the intention of the testator in the will itself, and are not at liberty to allow its terms to be varied or contradicted by conversation or parol statements made either before or after its execution.[47]

The declarations by a testator to the scrivener of the will, with proof of the provisions of a will of the testator, from which the will in question was copied, are not admissible to explain conflicting provisions of the will itself.[48] While declarations of a testator are not admissible generally to aid in construing the will, yet they are admissible to show the condition of his mind at the time he made his will when the question of his mental capacity is at issue.[49] Likewise declarations may be sometimes admitted to show undue influence and show the motive which actuated him in the disposition of his property.[50]

[46] Taylor vs. Boggs, 20 O. S. 516.

[47] Hamilton vs. Rodgers, 38 O. S. 257; Banning vs. Banning, 12 O. S. 437.

[48] Clark vs. Trustees, 3 C. C. 152; 2 C. D. 87; Page on Wills, §§ 820, 983.

[49] Page on Wills, §§ 400, 474.

[50] Page on Wills, §§ 423, 500.

Thus in the case of Waterman vs. Whitney, 11 N. Y. 157, which presents a careful analysis of this matter, Mr. Justice Seldon says: "The difference is certainly very obvious between receiving the declarations of the testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while, in the latter, it is the most direct and appropriate species of evidence." Questions of mental competency and of undue influence belong, in this respect, to the same class; because, as is said by Jarman, in his work on Wills: "The amount of undue influence which will be sufficient to invalidate a will must, of course, vary with the strength of weakness of the testator." 1 Jarm. 36. So the mental strength or weakness of the testa-

§ 1188. **Devise for life, remainder to heirs in fee.** "When lands, tenements, or hereditaments are given by will to a person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall vest an estate for life only in such first taker, and a remainder in fee simple in his heirs." [R. S. § 5968.][51]

§ 1189. Rule in Shelley's case.

The above statute is the section which abolishes what is known as the rule in Shelley's case. This rule means that "When a person takes an estate of freehold, legal or equitable, under a deed, will, or other writing, and afterwards, in the same deed, will, or writing, there is a limitation, by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally, or the heirs of his body, by that name in deeds of writing or conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by the limitation." [52]

Before the act of 1840, the rule was in force in this State.[52*] But the Court would never strain a point to bring a case within this rule, which is at least a mere artificial technicality.[53] And it is said that it is not a rule of construction but a rule of property not designed to give meaning to words, but to fix the nature and quantity of an estate, and an express intent controls it.[54] The rule in Shelley's case is forbidden to apply to wills

tor is directly in issue in every case of alleged undue influence, and the same evidence is admissible in every such case, as in cases where insanity or absolute incompetency is alleged. Rice Pro. Law and Prac. 163.

[51] § 10578 G. C.

When lands are conveyed by deed "to the heirs of his body and assigns forever" the grantee takes an estate tail. Pollock vs. Speidel, 17 O. S. 439.

[52] 22 Am. & Eng. Ency. of Law 493; Page on Wills, § 564, p. 606.

[52*] McFelly vs. Moore, 5 O. 464. And it still applies to deeds. Mack vs. Champion, 26 Bull. 113.

[53] King vs. Beck, 15 O. S. 562.

[54] King vs. Beck, 15 O. S. 562; Kiertsed vs. Smith, 8 N. P. 378; Kepler vs. Reeves, 1 Bull. 58.

See Williams vs. Haller, 27 Dec. 343, for holding when rule does not apply and construction given.

only when such application would defeat the manifest intention.[55]

This section is not intended to prevent the creation of a fee tail, that is, an estate of inheritance, descending on the death of the owner to the heirs of his body and not to his heirs generally. Thus a devise to A, his heirs and assigns, provided that if he should die leaving no heirs it should go to another, is held to create an estate tail. A devise to A and her issue and their heirs, passes an estate tail to A.[56]

The law, however, prefers to construe a will so as to create an estate in fee instead of an estate in fee tail where the language in the will is ambiguous.[57]

§ 1190. Vesting of estates.

The law favors the vesting of estates, and in the construction of devises of real estate, the estate will be held to be vested in the devisee at the death of the testator, unless a condition precedent to such vesting is so clearly expressed that the estate can not be regarded as so vested, without directly opposing the terms of the will. To this end, words of seeming condition will, if they can bear that construction, be held to have the effect of postponing the right of possession only, and not the present right to the estate.

[55] Carter vs. Reddish, 32 O. S. 1.

Before abolition of the rule in Shelley's case a devise to sons in fee, but with a later clause stating that the devise was for life only so that they could only sell a life estate, and after their deaths, to their respective heirs at law in fee, gives the sons a life estate only. The intent governs and prevents application of the rule in Shelley's case, Archer vs. Brockschmidt, 5 D. 348; 5 N. P. 349.

Words of perpetuity are not necessary in a will to carry a fee—"I devise my lands" is sufficient. Smith vs. Berry, 8 O. 365.

See Page on Wills, §§ 565, 658.

[56] Harkness vs. Horning, 24 O. S. 416.

[57] Collins vs. Collins, 40 O. S. 353; Kepler vs. Reeves, 1 Bull. 58.

A will bequeathing an estate to A. and his heirs forever, in trust for B., a *feme covert*, for life and to such uses as she shall appoint, is an equitable fee simple in B. Armstrong vs. Zane, 12 O. 287.

A devise to two devisees to be equally divided between them and their heirs at their death conveys a fee. Halley vs. Hengster, 23 C. C. 504.

It may vest, although it is in the control of a trustee. Swerer vs. University, 6 C. C. (N.S.) 105; 27 C. C. 144.

Words of survivorship in a will *prima facie* refer to the time of the death of the testator, because that is the time at which the property to be divided usually comes into enjoyment, but it may be a later period if the words of survivorship relate to such later period. Renner vs. Williams, 71 O. S. 340.

Where a testator devises his residuary estate to his lawful heirs, share and share alike, all persons who at the time of testator's death answer the description of his lawful heirs, are entitled to share in distribution *per capita* regardless of the degree of their relationship. Mooney vs. Purpre, 70 O. S. 57.

If real estate is devised to A. generally without qualification or condition, but with a proviso that

A devise to one when he arrives at a given age — the intermediate estate being devised to another — vests on the death of the testator, and is not defeated by the death of the devisee before the specified age. The words of futurity importing contingency, are not necessarily inconsistent with the immediate vesting of the estate, but may be regarded as merely postponing the possession.[58]

Equitable estates vest and descend as legal estates. A devise of real estate to trustees in trust to collect the rents and pay a definite sum annually to the widow of the testator during her life, and to divide the residue equally among his children "or their heirs," and at the death of his widow, to convey an equal part of his lands to each of his children "or their heirs," vests an equitable estate in each of his children at the death of the testator, in the absence of a clear intention to postpone the vesting to some later time.[58*]

A rule of construction favoring vesting of estate at the time of testator's death, like all other rules of construction will be

in case of his death without will the property shall go to B., the limitation over is void, and A. takes the entire estate. Findlay Brewing Co. vs. Dick, 1 N. P. (N.S.) 592; 13 Dec. 581; affirming O. C. C.

[58] Linton vs. Laycock, 33 O. S. 128.

A devise, though not otherwise expressed, is implied in a direction in the will to divide an estate among devisees; and the rule vesting legacies—bequeathed only by a direction to pay or divide—at the time fixed for the payment or division, does not apply to devises of real estate. *Id.*

A construction of a will that ties up an estate is not favored. Pendleton vs. Pendleton, 27 Bull. 313.

See Williams vs. First Presbyterian Soc., etc., 1 O. S. 479, where a trust is held to be a fee, etc.

[58*] Bolton vs. Bank, 50 O. S. 290.

A devise to the widow for life without disposing of the remainder, leaves the remainder to descend at once as a vested interest. Groppengeister vs. Walter, 19 C. C. 579; 10 C. D. 673.

A devise of a farm for twelve years, afterwards the executors should sell and divide the proceeds among children equally, gives the executor but a mere naked power and vests the fee in the children at once. Barkman vs. Hain, 5 N. P. 508; 5 Dec. 474; Weymouth vs. Irwin, 5 N. P. 248; 7 Dec. 91; Lawton vs. Lawton, 5 N. P. 441; 7 Dec. 493.

A devise of real estate to executors to sell within fifteen years and divide the proceeds when sold among children, but if one died without issue, his interest to go to the survivors, does not vest in such child's estate any interest in proceeds of sales made after such child's death. Union Sav. Co. vs. Darr, 19 C. C. 497; 10 C. D. 554; Faulkner vs. Clevenger, 35 Bull. 125.

A devise to A. generally, with no power expressed but followed by a devise to B. of what shall remain undisposed of, or A's death creates a fee in A. Steiver vs. Steiver, 8 C. C. (N.S.) 71; 28 O. C. C. 145.

Personalty will vest in devisee if condition precedent made impossible by testator before death. Mosley vs. Calhoun, 7 C. C. (N.S.) 285, 28 O. C. C. 163.

controlled by the intention as gathered from the whole will.[59] If the only words of gift in a devise are in the direction to distribute at a future period, the interests of the distributees do not vest until then, if the distributees cannot be ascertained until then.[60] A devise of one-half of all testator's real estate is a devise of a fee, but may be limited by other provisions of the will.[61]

§ 1191. Property acquired subsequent to making of will passes. "Any estate, right or interest, in lands or personal estate or other property acquired by the testator after making his will, shall pass thereby, as if held or possessed at the time it was made, if such manifestly appears by the will to have been his intention." [R. S. § 5969.][62]

The only question involved under the above section of the General Code is one of construction, as to whether the testator manifests his intention to dispose of after-acquired real estate with sufficient clearness. At common law the testator had no power to devise land, acquired after the making of the will.[63]

This sectoin was construed in Pruden vs. Pruden,[64] and it is there said that this matter should be construed liberally. It very seldom happens that a man who goes to the trouble of making a will, intends to die intestate, as to any of the property that he may own at the time of his death. And when it clearly appears that the testator intends all the property he owns at his death to be used and applied for specified purposes, and the changes between the will and his death, have simply consisted in converting it from one description of property into another, there can be no danger of interfering with his intentions, by holding it all subservient to the accomplishment of

The words "are deceased" as used in an item of a will reading "if my wife should marry or at her natural death I devise and bequeath my property to be equally divided among my children, except those children who are deceased" limit the devise to the children living at the time of the death of the widow, she not having remarried. Burdsell vs. Burdsell, 33 C. C. 434.

[59] Hamilton vs. Rogers, 38 O. S. 242; Kierstel vs. Smith, 8 N. P. 378. See Hudson vs. Kellerman, 12 O. App. 424.

[60] Richey vs. Johnson, 30 O. S. 288; Hamilton vs. Rodgers, 38 O. S. 255; Page on Wills, §§ 658, 769.

As to vesting fee in executor, see § 804. Cited and followed. Barr vs. Denny, 79 O. S. 36.

[61] Howe vs. Fuller, 19 O. 51.

As to what will constitute an interest that may be sold. Jeffers vs. Lampson, 10 O. S. 102.

[62] § 10579 G. C. After-acquired real estate passes under a residuary clause. Strock vs. Strock, 38 C. C. 147; Newton vs. McKinstry, 38 C. C. 536.

[63] Page on Wills, § 142, p. 163.

[64] 14 O. S. 251.

The words "clearly" and "manifestly" should receive but little consideration in construing a will, and where it reasonably appears from the will that testator intended to devise after-acquired property the intention should be given effect, notwithstanding these intensives. Carroll vs. Carroll, 24 O. C. C. 416.

See Wright vs. McMasters, 81 O. S. 304, where property did not pass.

Where the proposed benefit, rejected by a refractory donee, is a devise of land by operation of law, the land may pass to a disappointed donee. Bebout vs. Quick, 81 O. S. 196.

such purposes. Indeed every line of his will looks to his death and the situation of his property at that time, as the starting point in his disposition. It is then that his debts are to be paid, and it is then that his wife is to take the property. This would be held to include property, although the clause by which he devised the residuum of the lands contains a definite description of the residuum of the land which he owns at the time of his making his will.[65]

While the statute provides that only after-acquired property shall pass if such shall clearly and manifestly appear by the will to be the intention of the testator, from the fact that the law presumes that a person who makes a will means to dispose of all his property, the presumption is, that all the property will pass by a will. However, if there is such a condition of affairs and it is shown that the testator did not realize that he would have such property for disposition it may be held otherwise. Thus where a wife made a will five years before the death of her husband, but her husband by his will made shortly before his death devised to her all his property to be disposed of by her as she sees fit. In such a case it was held that the former will could not act on the property received from her husband.[66]

§ 1192. **When whole estate of devisor in land to pass by the devise.** "Every devise in a will of lands, tenements, or hereditaments, shall convey all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate." [R. S. § 5970.][67]

[65] Farrar vs. Fallestine, 4 C. C. 235; 2 C. D. 519; Page on Wills, § 489, p. 577.

[66] Lepley vs. Smith, 13 C. C. 189; 7 C. D. 264.

This case rather turns upon the question of the exercise of a power and not the question whether such after-acquired real estate could be disposed of by will. If in this case the testator had devised the property to his wife without a limitation requiring her to dispose of it as she saw fit, it no doubt would have passed by the will previously made.

The Common Pleas Court has held that a gift of "all my property" was held insufficient to pass after-acquired realty. McCall vs. Jones, 4 W. L. M. 627.

While considerable learning is manifested in the opinion in this case, it seems that the construction given by the learned judge is narrow.

Includes real estate acquired by descent, after execution of will, but before testator's death. McClaskey vs. Barr, 7 O. F. D. 556; 54 Fed. 781.

[67] § 10580 G. C.

A testator who devises "all the remainder of my estate shall pass and descend according to the laws of Ohio, intends that the residue of his estate shall be distributed the same as the property of an intestate. Elliott vs. Shaw, 23 Dec. 662.

Devise of all my property carries proceeds of life insurance policy. Tupen vs. Schlachter, 28 Dec. 545.

It is a rule of common law, resulting perhaps from the manner in which real estate was held in feudal times, that where property was devised only a life estate passed, unless the will expressly otherwise provided.[68] This common law rule acted very unjustly, for as our Supreme Court has said it is the presumption when a man makes a will that he intends to dispose of his entire estate[69]

The purpose of the above section of the General Code is to do away with this common law rule and carry into effect that which is usually the intention of the testator, and therefore the rule now is, that when a devise is made it will carry a fee to the estate, although no expressed words to that effect are contained in the will.[70] Where an estate is given for life only, the devisee takes only an estate for life even though a power of disposition be given.[71]

Where a testator used this language " I give and bequeath to my youngest daughter, Margaret Harper, the remaining part of my real property," it was held that a fee simple was devised to Margaret.[72] And where a devise was made of a " plantation upon which I now live," it was held that a fee passed, as no words of inheritance or perpetuity are essential in a will to pass an estate in fee.[73]

[68] Schoul. on Wills, § 483, p. 549.

[69] Collier vs. Collier, 3 O. S. 373.

[70] Page on Wills, § 562, p. 653, § 570, p. 662; Sch. on Wills, § 594.

[71] See § 804, Construction of power.

In 4 Kent. Com. 319, it says: "A devise of an estate generally, or indefinitely, with a power of disposition over it, carries a fee. But where the estate is given for life only, the devisee takes only on estate for life, though a power of disposition, or to appoint the fee by deed or will, be annexed; unless there should be some manifest general intent of the testator, which would be defeated by adhering to this particular intent." "The authorities, both English and American, seem generally agreed in the position that an express estate for life, given by will, negatives the intention to give the absolute property, and converts words conferring a right of disposition into words of mere power." Denson vs. Mitchel, 26 Ala. 360; Henry Pro. Prac. 699.

[72] Niles vs. Gray, 12 O. S. 320.

[73] Thompson vs. Hoop, 6 O. S. 481.

Where there is a devise to a son, and if he dies without lineal descendants, living at the time of his decease then over these, words are not, by themselves without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants, but the son takes in fee simple defeasible upon his death, without lineal descendants, living at the time of his death; and in case there are no lineal descendants living at his death, his fee becomes absolute, and if he has disposed of his estate during his lifetime his grantee has a good title. Anderson vs. Realty, 79 O. S. 23.

Statutory rule of construction under this section is not a rule of property. Gilles vs. Long, 19 Dec. 252.

Where a testator devised all of his property of every description, whether real or personal or mixed, after paying all his just debts, it was held that a fee passed without aid of a statute declaring such to be the effect of the devise.[74]

§ 1193. Life estate with power of disposal.

If testator devises an estate which is clearly a life estate, and adds to such devise limited powers of disposition and alienation, the authorities are nearly unanimous in holding that such a power of disposition does not enlarge the life estate into a fee, but that the estate created is exactly what it purports to be; that is to say, a life interest with power to devisee under certain conditions and in certain methods to dispose of the fee.[75]

A very common method of giving a life estate with power of disposal is a provision made in a will for the wife that she may have the property during her natural life with power to dispose of the same for her use and support. The phraseology of wills in this respect sometimes makes it very difficult to ascertain whether the estate conveyed is a life estate or a fee. Where a testator, after providing for the payment of his debts, used the following language in his will "Second — I give and devise unto my beloved wife and her assigns all of the remainder of my property, both real and personal, however the same may be known, or wheresoever the same may be situate, with full power to bargain, sell, convey, exchange or dispose of the same as she may think proper; but, if at the time of her decease, and if my said property shall remain unconsumed, my will is that the same be equally divided between my brothers and

[74] Platt vs. Sinton, 37 O. S. 353; Giles vs. Williams, 17 O. S. 397; 9 C. D. 19.

See Hull vs. Hull, 16 C. C. 688.

A devisee of all the proceeds of [illegible] real estate carries the fee to the real estate itself. Isherwood vs. Isherwood, 16 C. C. 279; 8 C. D. 409; 57 O. S. 560.

It does not follow from the use of the word "receive" that the devisees receive the entire estate. Kreisted vs. Smith, 8 N. P. 378.

No one is permitted to claim under and adverse to a will. If the testator assume to dispose of property belonging to the devisee, the latter accepting, must make good the testator's disposition. White vs. Brokaw, 14 O. S. 339.

[75] Page on Wills, § 576, p. 669.

Where the will gives the widow power to sell for her support, etc., she is not bound to exhaust her separate estate before selling the property. Moore vs. Idlon, 6 C. C. (N.S.) 19; 26 O. C. C. 502.

See Widows' Home vs. Lippardt, 70 O. S. —, as to power of widow to sell.

"To her, her lifetime and to her heirs forever, or whomsoever she pleases to will it at her death, held to give a life estate. Kimball vs. Kimball, 13 Dec. 555; affirmed C. C.

If the will gives the estate to his

sisters, and their children, if deceased, the children to have the same amount the parent would be entitled to if living." It was held that under this will the widow took only a life estate in the property, both real and personal, with power to bargain, sell, convey, exchange or dispose of the same as she might think proper for consumption in her life support, and that what remained at the time of her death, unconsumed in supporting her, belongs to the remaindermen designated in the will.

The widow under this will was, by implication, a *quasi trustee* for those in remainder, and the interest of the brother and sisters of the testator, in the unconsumed property, was a vested right which could not be destroyed by the act of the widow in disposing of the property by gift to a third party, or otherwise than for her support or the benefit of the estate.

A third party acquiring said estate from her by gift or fraud, or by collusion with her, to the injury of the vested rights of those in remainder, and with knowledge of the will, holds the same, and the fruits thereof, as a trustee for the remaindermen, and liable as such trustee, to account to them in equity.[75*]

Upon the authority of Johnson vs. Johnson,[76] it was held that a devise to a woman of all the property, both real and personal, with power to sell and enjoy and sell or dispose of it, but if she dies before her husband, then the property remaining undisposed of shall go to certain named persons; that the woman's husband was not entitled to dower therein.[77]

wife, etc., as long as she remains his widow, and she elects to take under the will and then remarries, the children get all the property. McCartney vs. Mason, 18 Dec. 629.

Where the will gave to the wife all testator's property "For the term of her natural life, and with full power to hold and dispose of part or all of same for her use and benefit as she may see fit. Upon the death of my said wife, if there should be any residue of said estate it is my will that the same be divided equally between my four children," the widow is a *quasi* trustee, and if she wastes or dissipates the funds will be compelled to give bond. Hobson vs. Lower, 30 O. C. C. 225; following Johnson vs. Johnson, 51 O. S. 446.

[75*] Johnson vs. Johnson, 51 O. S. 446.

[76] 51 O. S. 446.

[77] Thyart vs. Keever, 32 Bull. 401.

A will gave to the wife of the testator all his property, real and personal, to use, sell and dispose of as she might see fit, "for her own comfort and convenience," with power to convey the real estate in fee simple if her necessities or comfort require it. A subsequent clause directed that the residue of his "property or moneys, if any should be left after her death and full payment of her funeral expenses, be equally divided between" his children, of whom there were two only, the fruit of a former marriage. It was held that any of the property undisposed of and not consumed by the wife went, at her death, to the children, save enough to discharge her funeral expenses, and that she could not dispose of the property by will. John vs. Bradbury, 97 Ind. 263.

A testator devised all his property

The power of sale intended to be exercised for the support of the widow and children does not authorize the donee of a power to transfer the property to some of the children to the exclusion of the others.[78] Where the testator devises land for life, and confers upon the life tenant an absolute and unlimited power of disposition of the property thus devised, there is very serious conflict of authorities, says Page,[79] caused in part by peculiarities of statute law in some States, as to whether such a devise gives a life estate with power of disposition, or a fee simple. There can be no question that the real intent of testator in such cases is merely to give a life interest, power of disposition being added, generally, to provide for the maintenance of life tenant, but no restriction of any sort being imposed upon the method of disposition. The weight of authority upon this point is that such a devise gives only a life estate [80]

to his wife, the interest given being described as follows: "All my real estate and personal property, to settle all debts, and expenses and claims, collect all debts; to have and to hold for her life, and to dispose of at her death at her pleasure." It was held that the will gave to the devisee an estate for life only, with power of disposition of the fee. Whether such power of disposition could be executed by deed, or whether it must be by will, not decided; but it was held that an ordinary warranty deed, in fee-simple, executed by the devisee, which made no reference to the will by which the power of disposition was given, and contained no evidence of an intention to execute the power, conveyed only the life-estate of the devisee. Dunning vs. Vandusen, 47 Ind. 423.

See Stapleton vs. Ellison, 21 O. S. 527, where widow was given a limited power to dispose by will.

[78] Huston vs. Craighead, 23 O. S. 198; Cassidy vs. Hynton, 44 O. S. 530.

A provision in a will, by which the testator gives to his wife, her heirs and assigns, his whole estate, to use, enjoy and dispose of as she shall deem best, any remainder thereof at her death to be divided between the children, share and share alike, gives a life estate to the widow only, without the power of testamentary disposition of the estate on her death. Greene vs. Greene, 38 Bull. 205.

[79] Page on Wills, § 576, p. 670.

[80] A devise to a wife of all my property "to do with as she pleases and at her death what remains shall go to my niece," gives the wife a fee-simple. Will *in re* 5 Dec. 584; 7 N. P. 574.

If there is no remainder or devise over, a power of disposition given to the life tenant converts her life estate into a fee. Lepley vs. Smith, 13 C. C. 189; 7 C. D. 264.

Where one B. devised all his property to his wife, with full power of disposition, and in another clause makes devises in remainder, the wife takes only a life estate and the remainders are valid. Baxter vs. Bowyer, 19 O. S. 490.

See Fetter vs. Rettig, 98 O. S. 428.

Devise to widow during widowhood, how long continued. Hummel vs. Gould, 37 O. C. C. 70.

Where authority is given to use the principal for the support of the beneficiary, if the income is insufficient, the power may be exercised after the support is furnished as well as before. So where the life tenant, in pursuance of a power of sale of the principal for her maintenance, had directed such and died before completing it, it was held that one who had furnished her with support upon credit had a right to have such property sold for the payment of his claim. But where the donee of the power has not ordered such sale in her lifetime a sale can not be had at the instance of her creditors, the power being purely a personal one.[81]

§ 1194. Devise or bequest not to lapse by the death of devisee or legatee. "When a devise of real or personal estate is made to a child or other relative of the testator, if such child or other relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised as the devisee would have done, if he had survived the testator. If such devisee leaves no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to, and vest in such residuary devisee surviving the testator, unless a different disposition be made or required by the will." [R. S. § 5971.][82]

§ 1195. Lapsed bequest.

At common law, if the beneficiary died before the testator the gift lapsed. It is for the purpose of changing this common law

[81] Page on Wills, § 697, p. 837.

Where a will gives to the wife property for use during life remainder to children, she has only a life estate in property purchased by her with rents, etc. Esman vs. Esman, 18 C. C. 603; 10 C. C. 257; aff. 9 L. New. 36.

The will in this case was construed to mean that the widow only had a right to use what she needed, etc., for support.

"I give, devise and bequeath to my wife the use of all my real and personal property which I may own, to be used by her during her lifetime," is a life estate and the wife may devise the accumulations. Schwartz vs. Gehring, 7 C. C. 426; 4 C. D. 662.

See § 804 *et seq.*, Devise to sell.

[82] § 10581 G. C.

See Shumaker vs. Pearson, 48 Bull. 147.

A husband is not a relation of the wife within § 10581 G. C., and property devised by her to him does not, in the event of his death prior to her's, go to his children by a former marriage, but to her children by blood. Bernhardt vs. Bernhardt, 28 O. C. C. 686; affirming 76 O. S. 448.

Under this section, if the deceased person was indebted to the testator the debt must be deducted from his share. Baker vs. Carpenter, 69 O. S. 15.

Child or relative does not include children of an illegitimate child. Owens vs. Hunter, 37 O. C. C. 307. See § 1081, Bequests to charitable institutions.

rule to one which would more nearly accord, generally, to the intention of the testator that the above statute was passed.[83]

The statute is limited to the fact that the devise must be made to any child or other relative of the testator. This would not include legal representatives.[84]

An adopted child is neither a child nor the issue of a deceased legatee, and hence not within the statute.[85] A devise to one whom the testator's daughter had adopted under sec. 8030 G. C. (§ 1898), and also had designated as heir under sec. 8598 G. C. (§ 1902), does not lapse by the death, leaving issue, of such person before testator.[86] If the child was dead before the will was made, yet the devise would not lapse.[86*] The sur-

[83] See § 683, Lapsed legacies.

The rule as to the lapsing of devises and legacies that prevailed before the statute, defeated, in most cases, the intention of the testator. He generally made his will with reference to the objects of his bounty as they existed at the time and as though his will took effect at the date of its execution—not apprehending that a lapse would occur in case any of them should die before himself, unless some express disposition should be made in anticipation of such event. The statute was passed to remedy such disappointments, and should receive a liberal construction, so as to advance the remedy and suppress the mischief. It, among other things, provides that where a devisee is made to a child or other relative of the testator, who dies before the testator, the issue of such object of his bounty shall take the portion devised to such child or relative. Nothing is more just and conformable to the probate intention of the testator in every instance. The fact that the child or relative is not mentioned by name should not defeat the application of the statute, where the language applied to the facts, as they were at the execution of the will, designates a child or relative as an object of the testator's bounty, with as much certainty as if it were mentioned by name. Wooley vs. Paxson, 46 O. S. 307.

[84] Norwood vs. Wills, 1 N. P. 314; 3 Dec. 356.

[85] Phillips vs. McConica, 59 O. S. 1.

[86] White vs. Agnew, 38 B. 47.

[86*] C devised the residue of his real and personal estate to be equally divided among the children of his brothers and sisters. Eleven of the children were dead at the time of the making of the will, but each left issue surviving the testator. *Held:* That the devise included all the children living and dead, of testator's brothers and sisters, and that under the provisions of § 5971 Rev. Stat., the surviving issue (legal representatives) of each of the eleven dead children take the share of the devise to the children of testator's brothers and sisters, which the deceased child would have taken if alive and that such was the intention of the testator. Mather vs. Copeland, 5 N. P. 151; 7 Dec. 257; See Stamp vs. Cooper, 34 Bull. 318.

Legacy to pay a debt does not lapse by death of legatee before testator. McNeal vs. Pierce, 73 O. S. 13.

An adopted child would take as an heir at law if a beneficiary for life even though not adopted when the will was executed. Smith vs. Hunter, 86 O. S. 106.

viving husband is not a relative within the meaning of this section, although he may be next of kin.[87]

A bequest of a fund in trust to pay the income to S for life and at her death to divide the principal among her surviving children. S died leaving children, and also children of a deceased child. It was held that even under the statute the latter could not take.[88]

§ 1196. "Heirs" how construed.

The original common law meaning of "heir" is, that it is he who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor.[89]

In the civil law it had a wider meaning and was applied to all persons who are called to the succession, whether by the act of the party or by operation of law. The word "heirs" is a flexible one and when used in the will should be so construed as to give effect to the manifest intention of the testator and the sense in which it is used is always open to inquiry.[90] The term is used to indicate various persons under a will. It may mean adopted children, next of kin, heirs of a particular class, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the decease of the testator, or heirs at even a later date.[91]

[87] Norwood vs. Mills, 1 N. P. 314; 3 Dec. 356.

[88] Stamp vs. Cooper, 34 Bull. 318.

See Page on Wills, §§ 550, 551, p. 638.

See Woerner on Admin. 895.

§ 683.

[89] Bouv. Law Dic.

See § 908, as to Ancestors.

See § 912, as to Legal representative.

See § 913, as to Next of kin.

[90] Jones vs. Lloyd, 33 O. S. 572.

The word "heir" may be construed to mean legatee and devisee. Todd vs. Todd, 27 O. C. 224.

It may mean children; ordinarily used, is a word of limitation, but may be used as a word of purchase. McDaniel vs. Hays, 6 N. P. (N.S.) 435; 15 Dec. 661.

"Legal heirs" mean those upon whom the law would cast the estate if the testator died intestate. Youngblood vs. Youngblood, 30 O. C. C. 482.

Heirs at law in will include an adopted child. Smith vs. Hunter, 86 O. S. 107.

Step-brother may be included in the term brother. Griffith vs, Wetzel, 17 N. P. 49.

[91] "It is well known that persons unskilled in the law use the word 'heirs' as descriptive of a class of persons who can not, in fact, take as heirs. In recognition of this doctrine, the words 'heirs at law' have been construed to mean adopted children; next of kin, heirs of a particular class or description, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the decease of the testator, or heirs at even a later date, the construction resting in each particular case upon an ascertainment of the testator's intention from the words used, from the context of the instrument and

The common law definition would largely exclude the idea that it could be applied to personal property. But where personal property is devised and the word "heirs" is used, it means distributees under the statutes of descent and distribution.[92] Likewise the common law definition of "heir" would defeat a wife or husband, yet there may be cases when the term would include them.[93] And there might be other cases which would exclude the husband or wife.[94] Then the term might be used to include those who might have been "heirs."[95] The term may mean legatees if the intention is manifest.[96] And a devise to "the heirs of C, my brother-in-law" C having survived the testator, means C's children.[97] The word "heirs" may be so used as to show an intention to restrict its meaning to "heirs of the body," or lineal descendants or issue living at his decease.[98]

The word may also include grandchildren.[99] The primary meaning of the word "heir" excludes illegitimate children. But where the statute authorizes parents to afterwards marry and legitimatize the child, then the child would be included, and the rule now adopted is that the word "heirs" includes such illegitimate descendants as would inherit from the ancestor under the statute of descent and distribution.[100]

from the surrounding circumstances." Furenes vs. Severtson, 102 Ia. 322.

"Heirs of her body," held to mean children. Moore vs. Lewis, 4 C. C. 284; 2 C. D. 548.

See Holly vs. Hengsler, 23 C. C. 504.

92 Life Asso. vs. Pollard, 3 C. C. 577; 2 C. D. 333; *In re* Estate of Andress, 5 N. P. 253; 6 Dec. 174.

93 Weston vs. Weston, 38 O. S. 473.

94 Stewart vs. Powers, 9 C. C. 143; 6 C. D. 101.

A devise of land to two and "if either die without heirs capable of inheriting" gives the survivor, on death of one without childr n a fee by executory devise to the exclusion of a surviving husband. Durfee vs. MacNeil, 58 O. S. 238.

95 McKelvey vs. McKelvey, 43 O. S. 213.

96 Collier vs. Collier, 3 O. S. 369.

97 Cosbey vs. Lee, 3 Gaz. 173; 2 Dis. 460.

See Hoagland vs. Marsh, 4 C. C. 31; 2 C. D. 402.

98 Page on Wills, § 518, p. 605

99 Page on Wills, § 159, p. 606.

100 Ives vs. McNicoll, 59 O. S. 402; Page on Wills, § 520, p. 607; Schoul. on Wills, § 542, p. 547; Woerner on Admin. 902.

Where testator devises real estate to his son for life with remainder to his lawful heirs, and the son marries after the death of the ancestor, upon his son's death the wife would take as to the son's heir. Miller vs. Miller, 9 C. C. (N.S.) 242; 29 O. C. C. 451; affirmed 77 O. S. 643.

When heirs may mean children, see Lodge vs. Darrow, 16 Dec. 120.

See Miller vs. Miller, 29 O. C. C. 457. See Cultice vs. Mills, 97 O. S. 112.

A testator may use the word "heir" without its usual legal sense if the plain legal intention shows that it was not so employed.[101]

§ 1197. "Issue" construed.

The primary meaning of the word issue is that of legitimate lineal descendants indefinitely.[102] The rule therefore is, that the word "issue" in its general sense, in the absence of any indication of intention to the contrary, includes in its meaning descendants generally. But this general sense may be modified by surrounding circumstances. It is conceded that "issue" is an ambiguous term.[103] The term issue may be used as either a word of purchase or of limitation, but it is generally used by the testator as synonymous with "child" or "children."[104] It includes descendants as generally understood.[105]

[101] Kreisted vs. Smith, 8 N. P. 378.

Where the heirs apparent of a testator consisted of several children and their grandchildren by a deceased daughter and he gave to each by name a specific amount, and by a residuary clause directed that certain other property should "be divided equally share and share alike between all my aforesaid heirs," it was held that each grandchild took equally with the children. Huston vs. Crook, 38 O. S. 328.

[102] The general meaning applicable to the word "issue" is that it includes grandchildren — that it is as broad as "heirs of the body," including lineal descendants indefinitely. 2 Jarman on Wills 636; Holland vs. Adams, 3 Gray, 193; Hall vs. Hall, 140 Mass. 267-269; 2 Williams' Exrs. 1198 and note; 2 Wigram on Wills 307. Adjudged Words and Phrases 324; 11 Ency. 869 an notes. Moon vs. Hepford, 2 N. P. 365.

[103] Judge Earl, in expressing the opinion of the Court, says: "The word 'issue' is an ambiguous term. It may mean descendants generally, or merely children, and whether in a will it should be held to mean the one or the other depends on the intention of the testator, as derived from the context or the entire will, or such extrinsic circumstances as can be considered. In the latter case there is a strong tendency, unless restrained by the context, to hold that it has the meaning of children." See also Kent's Com. 278, note. Rice Pro. Law 195.

[104] 3 Kent's Com. 278; Palmer vs. Horn, 84 N. Y. 516, 519; Taft vs. Taft, 3 Dem. 86; Ralph vs. Carrick, L. R. 11 Ch. Div. 873; Palmer vs. Dunham, 125 N. Y. 68; Murray vs. Bronson, 1 Dem. 217.

[105] In Leigh vs. Norbury, 13 Ves. 340, the Court said: "It is clearly settled that the word 'issue,' unconfined by any indication of contrary intention, includes all descendants. Intention is required for the

Generally it may be said that *prima facie* it means the same as heirs of the body, lineal descendants indefinitely.[106] In our State illegitimate children are excluded even though the devise is to their mother from whom they could inherit under our statute.[107] Likewise an adopted illegitimate child is not issue of the adopting parent. The rule might be different if the person was designated as heir under sec. 8598, G. C. (§ 1903). "Offspring" is said to be synonymous with issue. It includes lineal descendants, however remote in degree.[108] Distribution to the issue is made *per capita* unless otherwise directed by the testator.[109]

§ 1198. "Children" construed.

The primary meaning of child is the immediate legitimate offspring of a person indicated as parent,[110] and a bequest to a child includes children when there is more than one. A child *en ventre sa mere* is considered in law as a child *in esse*, and is included in a devise to the "children" of its parents generally.[111]

purpose of limiting the sense of that word, and restraining it to children."

[106] The word "issue" in a will, *prima facie*, means the same as heirs of the body, lineal descendants indefinitely, and is to be construed as a word of limitation; but the *prima facie* construction gives way if there is anything on the face of the will to show that the word was intended to have a less extended meaning, and to be applied to children only, or, as in this case, to lineal descendants of a particular class in being at a specified time. Slater vs. Dangerfield, 15 M. & W. 263.

[107] Gibson vs. McNelly, 11 O. S. 131.

[108] Page on Wills, § 526, p. 613.

[109] See § 925.

See § 928, Advancements.

Woerner on Admin. 903.

Where a will points to a period of distribution of the estate the words "die without issue" are to be restricted to death without issue prior to the period of distribution. Pendleton vs. Bowler, 27 Bull. 313.

[110] Page on Wills, § 522, p. 608.

[111] Starling vs. Price, 16 O. S. 29.

In Jarm. on Wills, 690, it is said: "The legal construction of the word "children" accords with its proper signification; namely, as designating the immediate offspring; for, in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import, as "issue." It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child." And in 2 Redf. on Wills (2d ed.) 15, it is said: "The word 'children,' as well as all other sim-

The term does not ordinarily include stepchildren, nor does it include illegitimate children.[112] Neither does it include grandchildren unless it appears from the will that the testator so intended.[113] But these restricted meanings of the term "child" or "children" may be extended to include grandchildren or illegitimate children, or even adopted children provided the context of the will clearly indicates that such was the intention of the testator.[114]

§ 1199. "Next of Kin" construed.*

The words "next of kin" in a will mean the nearest blood relations, and not all those who would take under the Statute of Distribution. Thus "next of kin" means a brother in preference to nephews, sons of a deceased brother, and nieces, in preference to grandnieces.[115] The words "next of kin" do not legally include a widow; it means relatives in blood.[116] The

ilar descriptive terms of classes or relations, it will be borne in mind, must always be understood in wills in its primary and simple signification, where that can be done; in short, where there are any persons in existence at the date of the will, or before the devise or legacy takes effect, answering the meaning of the term. And where the term 'children' has received a larger and more extended construction, as synonymous with issue, it has generally been based upon something in the will, unless it resulted as already intimated, from the fact that there were no children in existence." Rice. Pro. Law 192.

[112] Page on Wills, § 522, p. 608.

[113] Children, it is said, do not include grandchildren, unless from the context of the will it appears that the testator so intended, or unless such meaning is necessary to carry out his manifest intent. 2 Jarman on Wills, 5th ed., 147; Low vs. Harmony, 72 N. Y. 408; Castner's Appeal, 88 Penn. St. 478; Feit vs. Vanatta, 21 N. J. Eq. 84; Stokes vs. Stokes, 12 Bull. 135.

[114] Page on Wills, §§ 523, 524, 525. Woerner on Admin. 896, 897.

[115] See § 913, § 121, Next of kin. Page on Wills, § 521, p. 607.

*The words "next of kin" will not be taken in their technical sense in construing a will, where it clearly appears from the context that a different meaning was intended. (Did not include second husband.) McCormick vs. Dunker, 3 C. C. (N.S.) 303; 24 O. C. C. 553; affirmed 70 O. S. 490.

[116] Bouv. Dic. on Next of kin; Redf. on Wills, 77, § 13; 2 Kent's Comm. 136.

In Nichols vs. Savage (cited in 1 Ves. 53), it was held that a gift to next of kin or relations did not include a husband or a wife. In Davies vs. Bailey, 1 Ves. Sr. 84, the testator gave the residuary personal estate to his wife for life, and the capital at her death to "such of his relations" as would be entitled to it by the statute of distributions; and it was held by Lord Hardwicke that the executor of the wife was not entitled to any share of the principal residue.

It is equally well established that the words "next of kin," in their

natural meaning of "next of kin" points to such, at the death of the person whose next of kin is spoken of, unless the context demonstrated that the person to take is to be ascertained at a future period.[117]

§ 1200. "Relation" construed.

The popular meaning of the words "relatives or relation" is that of all persons within any degree whatever of consanguinity or affinity.[118] Its primary signification means such person as would take under the statute of descent and distribution if testator died intestate and generally the term would include legitimate persons. "Nearest relations" will exclude nephews and nieces when there are surviving brothers and sisters, and applies properly only to those who are of kin by blood; hence, relations by marriage are not included in a bequest to "relations" generally.[119]

Sometimes it would not include the wife.[120]

§ 1201. "Descendants" construed.

The term "descendants" comprises every individual proceeding from the stock of family referred to, and does not, without

strict and primary sense, do not include the widow, and it has accordingly been held that where a residue of personal property is directed to be divided among the testator's "next of kin" or among his "next of kin according to the statute," or among his "next of kin, as if he had died intestate," or where a trust was created for the benefit of those, who, at the decease of a party, should be entitled to his personal estate, as his next of kin, according to the statutes for the distribution of personal estate of persons dying intestate, the widow takes no part. Garrick vs. Lord Camden, 14 Ves. 372; Cholmondeley vs. Lord Ashburton, 6 Beav. 86; Hamlin vs. Osgood, 5 N. Y. Surr. (1 Redf. 409) 409-417; Slosson vs. Lynch, 43 Barb. 147; Murdock vs. Ward, 67 N. Y. 387 and cases cited.

Adjudged cases in courts of high repute have held that the words "next of kin" would include the widow if the general scope of the will indicated the intention of the testator to include her. Withy vs. Mangles, 4 Beav. 358; 10 Cl. & F. 215; Elmsley vs. Young, 2 Myl. & K. 780; Slosson vs. Lynch, 43 Barb. 147; Garrick vs. Camden, 14 Ves. 372-7.

The phrase "nearest of kin" when employed in a last will and testament in the absence of language in the will manifesting a different intention, is to be so construed as to embrace within its meaning such as would inherit under the statutes of descent and distribution, and in the order and proportion therein provided. Godfrey et al. vs. Epple et al., 100 Ohio State 447.

117 Woerner on Admin. 905.

118 Page on Wills, § 529, p. 616.

119 Woerner on Admin. 904.

120 See note to previous section.

But it is held that where A's will gave property to B for life, remainder to B's children if she leaves any, otherwise to B's brothers and sisters or their *families* and at the time the will took effect B had three brothers and sisters, one brother had died leaving no children but a widow, that the *widow* was not included in the term *family*. Lemon vs. McElroy, 101 S. E. Rep. (S. C.) 852.

very clear indications of the testator's intent by the context, include collateral heirs, or heirs generally, or next of kin, but only the issue of the body of the person named. A devise or legacy to descendants, not otherwise qualified, is distributable between them *per capita;* but the ascertained intention of the testator will govern in this respect also.[121]

But there is a plain and broad distinction between the terms children and descendants. The one indicates only lineal descendants, while the other includes both lineal and collateral relations, all in short that would then take the estate under the statute of descent. All persons may not be in fact, but they are in law the descendants of the person from whom they receive the estate. Upon the same principle, it has repeatedly been held in our State, that the term "ancestor," as used in the statute of descents and distribution, means him from whom the estate was inherited.[122]

§ 1202. Disinheriting heirs.

It is a maxim of the law that no one can be heir to the living.[123] And it is equally axiomatic that a person has a right to dispose of his property in such manner as he may think fit.[124]

[121] Woerner on Admin. 903.

A descendant is "one who descends as offspring, however remotely; correlative to ancestor or ascendant." The term includes the most remote lineal offspring, and is practically synonymous with "issue" in its legal meaning. Hence it excludes collateral relations; nor does it include relatives in the ascending line.

Page on Wills, § 527, p. 613.

[122] Turley vs. Turley, 11 O. S. 181.

As to the meaning of the terms family, brothers, sisters, nephews, nieces, cousins, representatives, servants, legatees and survivors, see Page on Wills, §§ 527, 530, 531, 532, 533, 534, 535, 536.

[123] Strictly no man has any heir at all while he is living if we are to be technical about the word heir as used. An heir at common law is one who, after his ancestor's death, has a right to inherit all the intestate estate; by descent, he inherits. But while living, a man strictly has no heir. So that the word heir, as here used, is not used in its strictest sense, but in common parlance it is used to denote children. Ober vs. Hickox, 19 C. C. 45; 10 C. D. 128.

[124] In Lamb vs. Lamb, 105 Ind. 456, the Court approves the following instruction: "A person competent to make a will may disinherit all of his children, and bestow all his property upon strangers, or he may give his property to one or more of his children and disinherit

Whatever interest an heir has in the estate of his ancestor depends purely on statutory provisions. There is an idea prevailing among those who are not versed in the law that unless the testator makes some mention or provision in his will for each one of his children, that the child not so mentioned or provided for will be entitled to the share given to him by the statute of descent and distribution, or that the will is entirely invalid. This idea comes from the civil law and not from the common law.[125]

If the testator makes no mention of one of his children in his will and by such will disposes of all of his property, such child is as completely disinherited as if the testator had specifically so provided. But if the child is not mentioned in the will, then as to property undisposed of by the will, the child will be entitled to the provision given by the statute of descent and distribution; and our Supreme Court has held that a testator can not by any words of exclusion used in his will, disinherit one of his lawful heirs in respect to property not disposed of by his will, and that such words can not be used to control the course of descent so as to carry the property to his other heirs.[126] It is a rule of law that the heir is not to be disinherited without an expressed devise or necessary implication.[127]

the others, or he may bequeath more of his property to some than to others of his children, and the motive for so doing can not be questioned, and the hardship of the case can have no other weight further than a circumstance, tending, with other testimony, to show the insanity of the testator."

[125] Under the civil law a will whereby the testator without just cause excluded from his estate those who were near to him in blood, as where a parent disinherited a child, or a child excluded a parent, was known as an inofficious will, and might be set aside by a form of contest known as *querela inofficiosi testamenti*. Page on Wills, § 385, p. 454.

In Fisher vs. Fisher, 60 Bull. 41, the will was as follows:

"I, John Fisher, make my will and testament, and in case of death or accident I bequeath to Louisa Fisher my house and lot as long as she stays unmarried, and her share in the chattels and money that I may leave. To Fred Fisher I give $5.00, because he is unworthy of anything."

In addition to these two children, there were grandchildren, children of a deceased son and five other children.

The house was sold by testator during his lifetime. There was $4,671.06 personalty to distribute. Louisa was given $1,094.15; Fred $515.27; the rest of the children (6) were given $510.27.

The clause in the will did not disinherit Fred, in fact, gave him $5.00 more than he would have received, had he not been mentioned.

[126] Crane vs. Doty, 1 O. S. 270. The provision in this case was "to his grandson, Albert Jewel, fifty acres of land and no more of my estate."

A man can not provide for the division which shall be made of his property after his death by executory contracts with his children instead of last will and testament. Needles vs. Needles, 7 O. S. 432.

[127] See § 1181.

Gibson vs. Neeley, 11 O. S. 152; Gano vs. Fisk, 43 O. S. 462; Mathews vs. Krischer, 59 O. S. 562.

"The heir is not to be disinherited without an express devise or necessary implication; such implication importing, not natural necessity, but so strong a probability,

Neither can a testator prevent his heirs from inheriting by a doubtful word of exclusion. Thus where the deceased had devised land to his wife and "her heirs forever except the heirs of my deceased son William Robson, and the heirs of my deceased daughter Alma," it was held that the heirs of testator's deceased son and daughter were entitled to the share of their parents in the land *per stirpes*. And if a will is capable of two constructions, one of which will exclude the issue of a deceased child and the other permit such issue to participate in a remainder, the latter will be adopted.[128] But if the intention of the testator is plain from the context of the will that a certain heir is to be excluded, the Court will follow such intention.[129] Of course a testator cannot by will deprive his wife of her dower interest in his real estate, nor can he prevent his children and wife from having a year's allowance set apart, in his estate.[130]

§ 1203. Provision against contesting.

Sometimes testators in order to prevent a contest of their will, make a provision in such will that if any devisee shall contest the same, that he shall forfeit his right in the testator's estate, both under the will and statute of descent and distribution. Such a provision has been expressly upheld by our Supreme Court.[131]

The exact language in this case being "now if any of my heirs is dissatisfied and goes to law to break this will, then my will is and I direct that they shall have no part of my estate and I debar them from any part of my estate whatever."

While this decision settles the law at least in Ohio, some authors are inclined to doubt the wisdom of its strict enforce-

that an intention to the contrary can not be supposed. Merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object." 3 Jarm. 704; Wade vs. Loach, 42 Bull. 255.

128 Wade vs. Loach, 42 Bull. 254.

129 Ober vs. Hickox, 19 C. C. 42; 10 C. D. 128.

130 Page on Wills, § 467, p. 547.

131 Bradford vs. Bradford, 19 O. S. 546.

See *In re* Kirckhold's Estate, 149 N. Y. Supp. 87; 80 Cen. L. J. 15, with note as to what may be considered a contest.

ment. "To exclude all contest," says Schouler,[132] "of the probate on reasonable ground that the testator was insane or unduly influenced when he made it, is to intrench fraud and coercion more securely; and public policy should not concede that a legatee, no matter what ground of litigation existed, must forfeit his legacy if the will is finally admitted." And concludes that all clauses or provisions of this character should at least be construed as strictly as possible, being penal in their operation. But a recent case has held that where an action was brought to ascertain the true construction of the will on proper points, without thwarting the designs of the testator, that such action would not cause the forfeiture under a will which provided that if any devisee should sue or disturb the provisions made by the will he should forfeit his right under the will.[133]

A condition against presenting a claim against the estate has likewise been upheld.[134] However, a beneficiary under such a condition, who procures and obtains another heir to institute proceedings to contest a will, forfeits his interest therein.[135]

§ 1204. Restraints of alienation.

It is a uniform rule that where an estate is devised in fee simple that no condition can be made which will limit the disposition of such estate. Such a limitation would be in direct opposition to the idea of an estate in fee simple. There has been some controversy among various courts as to whether a partial limitation might be made. But in our State even such partial limitations have been denied.[136]

[132] Schoul. on Wills 605.

[133] Smithsonian Inst. vs. Meech, 169 U. S. 398; Black vs. Herring, 79 Md. 146.

[134] Page on Wills, § 680, p. 803.

[135] Page on Wills, § 683, pp. 807, 808.

[136] A restriction upon the authority of the youngest child until he shall arrive at the age of forty years necessarily implies an authority to sell when that age was reached. Pendleton vs. Bowler, 27 Bull. 313.

Anderson vs. Cary, 36 O. S. 506; Myers vs. Moore, 12 Bull. 90; Hicks vs. Stone, 11 Bull. 67.

But the case before us, is the devise of an absolute fee, with a clause restraining the alienation and incumbering of the estate for a limited period, intended, no doubt,

Our Courts have likewise held that where a fee is devised of an estate for ninety-nine years that a condition that the same should not be taken for execution for the payment of devisee's debts was invalid.[137]

And so where a testator bequeathed all the net income of his estate to a trustee in trust for the education and support of a certain person for life, without other limitation, it was held that the bequest so made is an absolute one, and is subject to the claim of creditors.[138] But it seems that where a provision is made in a will that a devisee shall have a mere life estate in the property, which life estate shall terminate upon his attempt to alienate, charge or incumber the property, such a provision is valid. But even this is strictly construed, and permitting the same to be sold on execution is not a forfeiture under the will.[139]

Where a will provided that the devisee should have all the rents and have full and complete control and possession of the property it was held that such rents were liable to be applied on an execution against such devisee.[140]

A provision in a will, however, by a testator, that no part of his estate given to any of his children, should by any process of law be seized or appropriated by a creditor before payment to such child, but should only be paid to such child personally,

for the protection of the devisees, who alone are interested in the estate devised. In holding that such restraint is repugnant to the nature of the estate devised, and is void as against public policy, which in this State in the interest of trade and commerce, gives to every absolute owner of property who is *sui juris*, the power to control and dispose of such property, and subject the same to the payment of his debts, we are fully aware of the fact that many authorities may and have been cited to the contrary. Others, however, support the view we have taken, but I shall not attempt either to review or reconcile the cases, being content to rest the decision upon what we conceive to be sound principle and sound policy. The owner of property cannot transfer it absolutely to another, and at the same time keep it himself. Anderson vs. Cary, 36 O. S. 517.

137 Hobbs vs. Smith, 15 O. S. 419.

138 Thornton vs. Stanley, 55 O. S. 199.

139 Paris vs. Winterburn, 6 C. C. 635; 3 C. D. 622.

140 Merchants' Bank vs. Rieck, 4 N. P. 219; 6 Dec. 331.

is valid; a creditor of any of such children could not, by any process, obtain the application of money so devised in the hands of the administrator.[141]

A provision in a will that there should be no partition of the estate until ten years after testator's death has been held to be valid.[142] In the absence of restraining statutes, says Page,[143] the great weight of American authority is, that if testator expresses his intention in apt and suitable language, it is possible to create such an estate in equity as to exclude the creditors of the beneficiary from reaching such estate and subjecting it to their claims. It seems, however, that it could only be done in Ohio by a will in which there was a gift over to some other person if the condition was broken.[144]

§ 1205. Restraint of marriage.

It is well established that a condition in a will, restraining the devisee from marriage, is a condition contrary to public policy and void.[145] A condition against a remarriage, however, is held to be valid.[146] And this rule as to remarriage is not confined to the surviving spouse of the testator.[147] Restraints against marrying persons belonging to specified classes have been upheld, and so have restraints against marrying a specified individual.[148]

[141] Skillman vs. Symmes, 14 C. C. 547; 7 C. D. 39.

The same kind of a provision in a deed has been upheld. Frazier vs. Wilkinson, 18 C. C. 363; 10 C. D. 106.

[142] *In re* Reynolds, 7 N. P. 626; 5 Dec. 570.

See Page on Wills, §§ 634, 684, pp. 738, 808.

[143] Page on Wills, § 685, p. 814.

[144] Stanley vs. Thornton, 7 C. C. 455; 4 C. D. 677; Thornton vs. Stanley, 55 O. S. 199;, Schoul. on Wills, 601.

[145] Page on Wills, § 681, p. 803; Schoul. on Wills, 603.

[146] Luigart vs. Ripley, 19 O. S. 24.

In this case the testator by his will gave to his wife all his property during her life, provided she so long remained his widow; and directed, that in case she married again, or at her death, the property should be equally divided among his children. The widow elected to take the provision made for her in the will, and afterwards married again. The Court in disposing of the case, said, "and as she took under the will, she lost all of it by her subsequent marriage."

[147] Herd vs. Catron, 97 Tenn. 662.

[148] Greene vs. Kirkwood, 1 Ir. R. (1895) Ch. 130 (a condition against devisee marrying a man "below her social station"); Hodgson vs.

A condition in a will by which an inducement is offered to a married person to obtain a divorce, or to live separate and apart from the other spouse, is contrary to public policy, and void.[149]

§ 1206. When real estate undevised shall be applied to pay debts instead of personalty. "When part of the real estate of a testator descends to his heirs because of its not being disposed of by his will, and his personal estate is insufficient to pay his debts, the undevised real estate first shall be chargeable with the debts, in exoneration, as far as it will go, of the real estate that is devised, unless it appears from the will that a different arrangement of assets, for the payment of his debts, was made by the testator; in which case they shall be applied for that purpose in conformity with its provisions." [R. S. § 5972.][150]

§ 1207. Contribution, when devised or bequeathed property taken to pay debts. "When any estate, real or personal, devised, is taken from the devisee for the payment of the testator's debts, the other devisees and legatees must contribute their respective proportions of the loss to the person from whom it was taken, so as to make the loss fall equally on all the devisees and legatees, according to the value of the property received by each of them excepting as provided in the next following section. [R. S. § 5973.][151]

§ 1208. Except when will otherwise provides. "If, in such case, by making a specific devise or bequest, the testator has virtually exempted a devisee or legatee from his liability to contribute, with the others, for the payment of the debts, or if, by other provision in the will, he has prescribed or required

Halford, 11 Ch. Div. 959; Finlay vs. King, 3 Pet. (U. S.) 346; Graydon vs. Graydon, 23 N. J. Eq. 229.

[149] See Woerner on Admin. 960.

[150] § 10582 G. C.

Ramsdall vs. Craighill, 9 O. 197; Muskingum vs. Carpenter's, 7 O. (1 pt.) 21; Stiver vs. Stiver, 8 O. 217, 248; Piatt vs. St. Clair, 6 O. 227; Bustard vs. Dabney, 4 O. 68.

See § 757, Distribution of real and personal estate; § 674 *et seq.*, Payment of legacies.

[151] § 10583 G. C.

Whether bequest is a personal charge depends on the construction; it cannot be inferred unless the will secures the devisee the advantage which is the consideration of such charge. Where, after a devise of land there is direction to pay debts, a payment of debts is a charge upon the devisee. Decker vs. Decker, 3 O. 157; Clyde vs. Simpson, 4 O. S. 445; Nellons vs. Truax, 6 O. S. 97; Moore vs. Beckwith, 14 O. S. 129; Huey vs. Thomas, 23 O. S. 645.

an appropriation of his estate, for the payment of his debts, different from that prescribed in the next preceding section, the estate must be appropriated and applied in conformity therewith." [R. S. § 5974.][152]

§ 1209. **But whole estate liable for debts.** "Nothing contained in the next two preceding sections shall affect the liability of the whole estate of the testator, for the payment of his debts. The provisions of such sections shall apply only to the marshaling of the assets as between those who hold or claim under the will." [R. S. § 5975.][153]

§ 1210. **Portion of child born after execution of will, or supposed to be dead, or of witness subject to contribution.** "When a part of the estate of the testator descends to a child born after the execution of the will, or to a child absent and reported to be dead, or to a witness to a will who is a devisee or legatee, such estate and the advancement made to such child or witness for all the purposes mentioned in the next three preceding sections, shall be considered as if it had been devised to such child or witness; and he shall be bound to contribute with the devisees and legatees, as before provided, and be entitled to claim contribution from them accordingly." [R. S. § 5976.][154]

§ 1211. **If any liable to contribute are insolvent, etc., how others to make up deficiency.** "When any of the persons liable to contribute toward the discharge of such debt, according to the provisions of the next four preceding sections, is insolvent, or unable to pay his just proportion thereof, the others severally shall be liable to each other, for the loss occasioned by such insolvency, each one in proportion to the value of the property received by him, from the estate of the de-

[152] § 10584 G. C.

Express words are not necessary to charge pecuniary legacies upon the real estate: an intention to do so may be derived by implication. Clyde vs. Simpson, 4 O. S. 445.

When the trust or charge is defined and limited, the purchaser must see to the application of the purchase money; otherwise when it is general and unlimited. *Id.*

Allen vs. Tressenrider, 72 O. S. 77.

[153] § 10585 G. C.

Heirs and devisees hold the land subject to ancestor's debts. Stiver vs. Stiver, 8 O. 217.

Ramsdall vs. Craighill, 9 O. 197.

Purchaser takes land charged with ancestor's debts. Piatt vs. St. Clair, 6 O. 227.

Creditors must first exhaust their remedy against the personal representatives before they can have recourse to lands in the hands of purchasers from the heirs. Stiver vs. Stiver, 8 O. 217.

[154] § 10586 G. C. See §§ 10563-4 G. C., § 1064.

ceased. If any one of the persons so liable dies without paying his proportion of such debt, his executors and administrators shall be liable therefor, in like manner as if it had been his proper debt to the extent to which he would have been liable if living." [R. S. § 5977.][155]

§ 1212. How contribution enforced. "All cases arising under this chapter, in which devisees or legatees are required to contribute to make up the share of a child born after the execution of the will, or of a child absent and reported to be dead, or of a witness to the will, or in which contribution is to be made among devisees, legatees, and heirs, or any of them, may be heard and determined in a single action." [R. S. § 5978.][156]

§ 1213. Order to sell land to pay debts. "When a sale of lands aliened or unaliened, by a devisee or heir is ordered for the payment of the debts of the estate, nothing in the foregoing sections shall prevent the court from making such order and decree for the sale of any portion of the aliened or unaliened land, as may be equitable between the several parties, and also to make such order of contribution, and further order and decree as will settle and adjust the various rights and liabilities of the parties, which arise by reason of the alienation, the order of sale, or otherwise." [R. S. § 5979.][157]

[155] § 10587 G. C.
[156] § 10588 G. C.
[157] § 10589 G. C.

CHAPTER LXV.

ELECTION OF WIDOW OR WIDOWER UNDER A WILL.

§ 1214 Introductory.
§ 1215 Citation to widow or widower to make election.
§ 1215a Construction.
§ 1215b Election—time extended.
§ 1215c Dower and gift.
§ 1216 When citation should issue.
§ 1217 To whom issued.
§ 1218 Form of citation and return to widow to make election.
§ 1219 Time within which election may be made.
§ 1220 When entitled to both dower and the provisions made in the will.
§ 1221 Election or non-election. Effect.
§ 1221a Election noted.
§ 1221b Elects to take under will.
§ 1222 Election made in person.
§ 1223 Judge to explain wills, etc.
§ 1224 Election to be made by record.
§ 1225 Election. Entry, etc.
§ 1226 Election made by acts of parties.
§ 1227 Effect of election to take.
§ 1228 Effect of election not to take.
§ 1229 How election set aside.
§ 1230 Rights of devisee. How affected.
§ 1231 If person unable to appear or non-resident of county, how election taken.
§ 1232 Application for commission, etc.
§ 1233 Commission to take such election.
§ 1234 Form of entry, etc.
§ 1235 How election made for insane or imbecile widow, etc.
§ 1235a Entry, etc.
§ 1236 Application, etc.
§ 1237 Form of commission as to insane or imbecile widow's election.
§ 1238 Duty of Commissioner.
§ 1239 Duty of the Court.[1]

§ 1214. Introductory.

An election means the exercise of a choice, and the provisions of the statute in relation to an election to accept or reject the provisions of the will of a deceased consort, recognizes the fact that under our laws, the surviving consort has some rights in the property of the deceased consort, which it was not within the power of the deceased consort to take away from the surviving one. These rights which cannot be taken away

[1] See § 943 *et seq.*, on Dower. See § 319 *et seq.*, on Widow and children's allowance. § 907 *et seq.*, Descent and distribution. § 674 *et seq.*, Payment of legacies. § 1180 *et seq.*, Construction of Wills.

There is no provision of law for a widow to take under the law. *In re* Bullock, 3 N. P. (N.S.) 390; 15 Dec. 785; affirmed 75 O. S. 574.

from the surviving consort are, first a right of dower; second the right to a distributive portion of the personal property; and third, the right of a widow's or children's year's maintenance. The rights of widows and widowers are the same except possibly to a year's maintenance. It has been held that the release of dower by election to take under the will is intended to be the release of the dower interest to the heirs at law of those entitled to inherit and not as a means of conveyance to strangers.[2]

While the statutory provisions aim to fully advise the parties as to what should be done, yet the want of some particular provisions have presented perplexing questions.[3] Only the Court admitting the will to original probate has power to take the election of the surviving consort. The act does not apply to foreign wills.[4]

§ 1215. Citation of widow or widower to make election. "If provision be made for a widow or widower in the will of the deceased consort, after the probate of such will, the probate court forthwith shall issue a citation to such widow or widower to appear and elect whether to take such provision or to be endowed of the lands of the deceased consort and take the distributive share of the personal estate." [R. S. § 5963.][5]

§ 1215a. Construction. "Such election must be made within one year from the date of the service of such citation; except that such widow or widower, at any time before the period of such election has expired may file a petition in the common pleas

[2] Hessenmueller vs. Mulrooney, 4 N. P. 50; 6 Dec. 123.

In this case the widow was executrix, and as such filed a petition to sell the real estate of her deceased husband. In such proceedings she filed no waiver of her dower right, neither had she made an election to take under the will. After the proceedings were had and the premises sold at the solicitation of the purchaser, she appeared in Probate Court and elected to take under the will. This election at the solicitation of the purchaser, the Court held, did not release the premises before sold from her dower right. Bowen vs. Bowen, 34 O. S. 164.

[3] The reader is referred for discussion of this subject generally, to Woerner on Admin. 269; Page on Wills, § 710, p. 848; 2 Redf. on Wills, 3d ed. 352; Jarm. on Wills, 443.

[4] Jennings vs. Jenning, 21 O. S. 56, 77.

See § 939, Amount of personal property to which widow is entitled. § 947, How dower barred.

[5] § 10566 G. C.

court for the proper county, making all persons interested in the will defendants thereto, asking a construction of its provisions in her or his favor, and for the advice of the court, or the proper appellate court on appeal thereon." [R. S. § 5963.][5*]

§ 1215b. **Election time extended.** "When proceedings for advice, or to contest the validity of a will, are begun within such year, if the will is not set aside, the election may be made within three months after they finally are disposed of." [R. S. § 5963.][5†]

§ 1215c. **Dower and gift.** "No widow or widower shall be entitled both to dower and the provisions of the will in her or his favor, unless it plainly shows that such provision was intended to be in addition to dower and a distributive share of the estate." [R. S. § 5963.][5‡]

§ 1216. When citation should issue.

The language of the statute is, that if any *provision* be made for a widow, etc., the Probate Court shall *forthwith* after the probate of such will issue a citation. If there is no provision whatever in the will of the deceased consort made in favor of the surviving consort, then as a matter of course there is nothing done for which a choice can be exercised and no citation for election is necessary. If there be any provisions whatever, then it is necessary to issue the citation required by statute; for until the citation is issued and served, no rights can be acquired adversely to the right of the living consort to make an election. It is the practice sometimes not to issue this citation at once as the statute requires, but, relying upon a promise of some one to wait for some time for the widow or widower to voluntarily appear and make his or her election. This is a practice not to be commended. The Court should in all instances require the surviving consort to appear at once and make her election or issue a citation as the statute requires. The object and purpose of the statute requiring this citation to be issued *at once*, is, that the estate may be expeditiously settled.[6]

5* § 10567 G. C.
5† § 10568 G. C.
5‡ § 10569 G. C.

[6] A divorced wife need not be cited. Charlton vs. Miller, 27 O. S. 298.

Where a husband devises his property to his wife, and the will is duly and promptly presented for probate, and the widow dies, her heirs, and not those of testator, acquire the property. Hawkins vs. Barrow, 8 C. D. 251; 15 O. C. C. 142.

§ 1217. To whom issued.

This citation may be issued to the sheriff or any other person who is willing to make service of the same upon the widow or widower. The usual practice is to require the executor to make service of the citation. This citation should be immediately served upon the widow or widower, and a memorandum made upon the back of the original writ mentioning the time at which the service was made. For the right to exercise the power of election, *is one year from the date of the service.** The original writ of citation should be returned to the Probate Court and by the Court filed with the proceedings in the case; and the safe way would be when the election is not immediately made to make a docket or journal entry of the fact of issue and return of such citation. The docket or journal entry should show the date at which service was made.

§ 1218. Form of citation and return to widow. To make election.

The State of Ohio,
.....County, ss.
In Probate Court.
To....., widow...of....., deceased.

You are hereby notified that the last will and testament of..... ....., deceased, was on the.....day of.....A. D. 190.., duly admitted to probate by the Probate Court of said county.

You are hereby cited to appear in person before said Probate Court within one year from the date of the service of this citation, and make your election, whether you will take the provision made for you in said will, or be endowed of the lands of your deceased consort, and take your distributive share of h....personal estate, pursuant to the statute in such cases provided.

In testimony wherof, I have hereunto set my hand and affixed the seal of said Probate Court, at....., Ohio, this.....day of..... .....190...

....., Probate Judge.

RETURN.

The State of Ohio,.....County, ss.

I,....., do make solemn oath and say, that on the..... day of.....190.., I served the within citation upon the within named.....by delivering to h....personally a true copy thereof.

.....

Sworn to before me and subscribed in my presence this.....day of.....190...

.....

I hereby acknowledge service of the within citation, this.....day of....., 190....

.....

* Bowen vs. Bowen, 34 O. S. 164.

§ 1219. Time within which election may be made.

An election must be made within one year from the date of the *service* of the citation, not one year from the date that the will is probated, or any action taken therein. The only instance in which a widow or widower can have this right prolonged more than one year from the date of the service of citation, is when such person has filed a petition in the Court of Common Pleas asking for a construction of the provisions of the will. In such cases the right of election is prolonged to a period of three months after such proceedings shall have been finally disposed of. There can be no implied waiver of the issue and service of citation so as to bind the widow or widower; nothing short of an expressed waiver will be sufficient. Thus where a widow came into open Court and upon being asked declined to make an election at that time, it was held that she thereby did not waive the issue and service of a citation.[7]

§ 1220. When entitled to both dower and the provisions made in the will.

Under the laws of Ohio, as set forth in secs. 10566, 10567, 10568, 10569, G. C.,[8] the widow or widower is not entitled to both dower and the provisions of the will in her or his favor, unless it plainly appears by the will to have been the intention that the widow or widower should have such provision in addition to the dower and distributive share. This provision is contrary to the common law doctrine. At the common law where it was not apparent from the will it was held that the devise would be presumed to be in addition to the dower, and now the presumption is, that the provision made in the will is made in lieu of the wife's or husband's dower rights; and if

[7] Bowen vs. Bowen, 34 O. S. 181; Ward vs. Ward, 5 W., L. J. 503; Page on Wills, § 729, p. 868; Cameron vs. Cameron, Goebel, 157.

A Court of Chancery may allow an election after the time limit has expired. Ward vs. Ward, 5 W. L. J. 503.

[8] § 1215.

the surviving consort makes no election, such consort will only be entitled to the share provided by law; and in such cases may be held to have declined to take under the will.

There may be cases where, even if the testator expressly so states in his will, that it will be held that the widow is not entitled to both dower and the provisions of the will. Thus where a testator by clear and express language, in a former clause of his will divided all his property both real and personal between his wife and children, giving to the widow and her heirs forever, one-third of his real estate, and more than one-third of his personal estate, even though in a subsequent clause it was provided that the bequest and devise to his wife were not intended to be in lieu of dower, yet, having disposed of all of his estate and having made provision for his wife, it was held, that the widow would not be entitled to dower, and it was further held that she was not entitled to a distributive share of the estate.[8*]

§ 1221. Election or non-election, effect. "The election of the widow or widower to take under the will shall be made in person, in the probate court of the proper county, except as hereinafter provided. On the application by a widow or widower to take under the will, the court shall explain its provisions, the rights under it, and by law in the event of a refusal to take under the will." [R. S. § 5964.] [9]

§ 1221a. Election to be noted. "The election of the widow or widower to take under the will shall be entered upon the minutes of the court. If the widow or widower fails to make such election, she or he shall retain the dower, and such share of the personal estate of the deceasd consort as she or he respectively would be entitled to by law in case the deceased consort had died intestate, leaving children." [R. S. § 5964][9*]

§ 1221b. Elects to take under will. "If the widow or widower elects to take under the will, she or he shall be thereby barred of dower and such share of personalty, and shall take under the will alone, unless as provided in section ten thousand five hundred and sixty-nine. But an election to take under the will does not bar the right to remain in the mansion of the deceased consort, or the widow to receive one year's allowance

[8*] Parker vs. Parker, 13 O. S. 95; Wilson vs. Hall, 6 C. C. 570, 576; 3 C. D. 589; Hall vs. Wilson, 53 O. S. 679.
See § 327, Widow's allowance.

[9] § 10570 G. C. See § 8592 G. C., § 938, as to Distribution of personal property. See § 8600-7 G. C., § 944, as to Dower.

[9*] § 10571 G. C.

for the support of herself and children, as provided by law, unless the will expressly otherwise directs." [R. S. § 5964; 103 v. 58.][9]†

§ 1222. Election made in person.

The right of election is by statute made purely a personal right and can only be exercised by the party entitled thereto in person, except as especially provided by statute.[10]

If the surviving consort dies without having made an election, her heirs or those claiming under her cannot make an election;[11] neither can her administrator; neither can a creditor of the husband or wife elect for them as by levying execution and selling the property.[12]

Some difficulty is encountered in a case where the widow is properly served with citation but dies before the expiration of the year, in determining whether the widow or her heirs should be entitled merely to the provisions of law or to those made for her in the will. In such cases some of the courts have come to the conclusion that as persons usually select that which is most to their benefit, that it will be presumed that the widow or widower would have elected to accept the more valuable right, and that if the provisions of the will were of more value than the provisions of the law, it will be presumed that the person would have selected the most valuable.[13]

Where the will was not probated until after the death of the widow, thus having given to her no opportunity to make her election, it was held that where the provisions of the will were more valuable than that provided by law, that she or her estate was entitled to the provisions of the will.[14]

9† § 10572 G. C.

Where it does not plainly appear by the will to have been the intention that the widow should have both the allowance made for her and dower, and she elects to take under the will, she will be barred of her dower. Luigart vs. Ripley, 19 O. S. 24.

Where the widow appeared in court and did actually elect to take under the will and the judge failed to make it a matter of record, it is held that an action in mandamus will lie to compel the judge to enter it on the record. But the executor is not the proper person to bring the action. Zollinger vs. Thomas, 24 Dec. 119.

10 See §§ 10573, 10574 G. C., §§ 1231, 1235.

11 Millikin vs. Welliver, 37 O. S. 460; Woerner on Admin. 270.

12 Cunningham vs. Simpson, 1 Bull. 173; Fletcher vs. Huntington, 8 N. P. 333.

13 Page on Wills, § 719, p. 860.

See Millikin vs. Welliver, 37 O. S. 460, *contra.*

14 Hawkins vs. Barrow, 15 C. C. 141; 8 C. D. 251.

§ 1223. Judge to explain wills, etc.

Upon application by the widow or widower to take under the will, it shall be the duty of the Court to explain the provisions of the will and their rights under it, and by law in the event of a refusal to take under the will.[14*] This is the statutory provision and it would seem to place a most important and responsible duty upon the judge of the Court. The only time that our Supreme Court had this question under consideration, it was held that the judge is not bound nor is he authorized to direct her with regard to the validity of the will or her rights as heir in the case the will should be set aside or its devises declared to be void; and that where the judge advised the widow that if she should refuse to take the provisions made for her in the will, she would be entitled to her dower right in all the real estate of which her husband died seized, and to one-half of the first four hundred dollars of his personal estate, and one-third of the residue; but if she elected to take under the will she would be entitled to the provision made

The question most discussed in this case is, whether, where a husband, as in this case, gives the whole of his estate, after the payment of his debts, absolutely to his widow, and she dies, shortly thereafter, before the probate of the will, and without negligence on her part (for the will had been promptly offered for probate, and continued for hearing), or even after the probate of the will and being cited, fails to elect within the year given to her, she loses all the benefit of the provision made for her thereby, and is remitted to her statutory rights as his widow. The question is certainly one of great importance, and it must be conceded, that on the language of the statute, it is a doubtful one. If a husband or wife, relict of a deceased consort, under whose will he or she would be entitled to the whole of the estate, and which provision is of far more value than would be the right under the statute, is to lose the benefit of the testamentary provision made for her thereby, without any fault or negligence on his or her part, simply because the will not being probated before her death, she can not elect to take such provision; or after probate and citation she is prevented by some reason from doing so, great injustice may be done to her. It would seem, therefore, that the courts should not so hold unless it is manifest that such is the clear law. *Id.* 145.

This decision is hardly in accord with the syllabus of Millikin vs. Welliver, 37 O. S. 460.

[14*] A deputy to the judge can not take this election. Mellinger vs. Mellinger, 26 C. C. 683.

A widow who has not elected to take under the will is entitled to dower in all the land of which her husband died seized, and a distributive share in the proceeds of the land which the testator has directed to be sold. *In re* Bullock, 15 Dec. 783; affirmed 75 O. S. 574.

She is, however, not entitled to dower in the land, and a distributive share in proceeds of sale of same land. Geiger vs. Bitzer, 80 O. S. 65; overruling Hutchins vs. Davis, 68 O. S. 160.

If the judge does not explain it the widow is not bound. Ward vs. Sack, 27 Dec. 239; 14 N. P. 401. See Allen vs. Tressenrieder, 72 O. S. 77, Widow may bring action to construe.

for her therein, and would be deprived of her dower in the real estate, and of her said distributive share of the personal estate, it was held to be a sufficient explanation.[15]

While in the abstract this may have been a sufficient explanation, yet it certainly would not answer in all cases. The object and purpose of the statute is, that the Court should not only inform the widow as to the portion she would receive if she refused to take under the will. But she should likewise be informed of what she is to receive under the will. For without full knowledge of the provisions of the will, as well as of her rights at law, she will not be in a position to make an intelligent choice. In this view of the case it places upon the judge one of the most important duties pertaining to his office,[16] and where the judge has doubt as to the effect of the provisions made for the surviving consort in the will, he should advise the person making the election to consult a competent lawyer; and if the surviving consort is then unable to determine what the provisions of the will are, he or she should file a suit in the Court of Common Pleas for a construction of the will.[17]

§ 1224. Election to be made—Record.

A widow or widower may make an election in two ways. One, by following the strict language of the statute, which requires that when the election to take is made, it shall be entered upon the minutes of the Court. The other, by actions. If the widow does not desire to take under the will, she need not make any election at all. But very often for the purpose of assisting in a complete and earlier administration of the estate, the widow or widower makes an election before the year has expired, not to take under the will. This will have the same effect as if no election at all was made and will definitely determine that the surviving consort wishes to retain the rights

[15] Carder vs. Comm'rs of Fayette County, 16 O. S. 353.

[16] Davis vs. Davis, 11 O. S. 386.

[17] §§ 10857-8 G. C., § 133.

Error may be prosecuted from a construction given to a will on a widow's petition, etc. Davis vs. Coffman, 55 O. S. 556.

A deputy clerk in the Probate Judge's office has no power or right to explain the will; the judge must do this personally. Mellinger vs. Mellinger, 5 C. C. (N.S.) 435; 26 O. C. C. 683; affirmed 73 O. S. 221.

A widow consulting the judge as to her right and again appearing in court announcing her intention to take under the will, and the Probate Judge announced that he so understood her, this is an election and a judicial determination of the fact though no written entry was filed or made. State vs. Sloane, 24 Dec. 119.

allowed by law; and it has been held that the entry of an election by the widow to take under the will of her husband need not show affirmatively that the judge had explained to her the provisions of the will and in the absence of averment or proof to the contrary, such explanation will be presumed.[18]

It seems that the only duty that the judge is obliged to perform in order to make a perfect record is to enter upon the minutes of his court, the fact that the surviving consort has elected to take or not to take under the will and that when the entry is once made in conformity with the statute, his authority with regard to it is ended.[19]

The general practice is to require the widow or widower to make the election in writing, although such is not required by the statutes, but it prevents dispute and is a safe practice.

§ 1225. Election. Entry, etc.

While as before stated the statute does not require that the election of the widow or widower be taken in writing, yet it is a commendable practice to require it to be done in that manner; and then let the election become a matter of record. The following will serve as a form for such writing and election as well as a proper entry to be made in such cases.

WIDOW....'S ELECTION.

In the Probate Court of.....County, Ohio.
Election under the Last Will and Testament of....., Deceased.
I, the undersigned, widow....of....., late of.....
.....township, ...county, Ohio, deceased, having had explained to me by the Probate Court of said county, the provisions of said will, my rights under it, and by law in the event of my refusal to take under the will, do hereby elect.....to take under the will; my election so made to be entered of record.

.....

Whereupon, the Court ordered the said election of said..... to be entered upon its minutes, in the words and figures following, to-wit:
....., 190....

In the Matter of the Will of .....
....., deceased. } Election.

This day personally came into open Court....., widow... of said....., deceased, and applied to make h....election whether to take or not to take under the will of said.....,

[18] Davis vs. Davis, 11 O. S. 386.
[19] Davis vs. Davis, 11 O. S. 392.
Declarations, acts and conduct recognizing the will and accepting benefits do not necessarily amount to an election nor estop her from attacking an election made without knowledge of her proportionate share of the estate. Ward vs. Sack, 19 N. P. 401; 27 Dec. 239.

The Probate Court would have no jurisdiction on application where a widow did not elect to hear the case upon the question as to whether by her *acts* she would be held to have elected, etc., unless possibly in an action to sell real estate, etc. Such a matter is for a court of equity.

deceased. Whereupon the Court explained to h....the provisions of said will and h....rights under it, and also h....rights under the law in the event of h....refusal to take under the will; and he declared h....self .....satisfied with the provisions of said will, and elected..... to take under it, and asked that h....election so.....to take might be entered upon the journal of the Court, which is accordingly done.

§ 1226. Election made by acts of parties.

Generally little difficulty is experienced in determining whether an election has been made or not when the election has been made in the Court as contemplated by the statute. But matters of no little difficulty arise in determining when the acts of the widow or widower in relation thereto are such that an election will be presumed.

In order that acts of a widow shall be regarded as equivalent to an election to waive dower, it is essential that she act with full knowledge of all the circumstances and of her rights, and it must appear that she intended, by her acts, to elect to take the provision which the will gave her. These acts must be plain and unequivocal, and be done with a full knowledge of her rights and the condition of the estate. A mere acquiescence, without a deliberate and intelligent choice, will not be an election.[20]

It is believed no case can be found where the facts are held sufficient to amount to an election to waive the widow's rights under the law, unless they are of such a marked character and of such long duration as will clearly and distinctly evince a purpose to take the provisions of the will, and to operate as an effectual equitable bar to dower. Thus, where real estate was devised to a widow for life, remainder in fee to her sons, and she in fact took under the will and occupied the premises for more than sixteen years, she was estopped to deny her election.[21]

[20] Millikin vs. Welliver, 37 O. S. 466, citing, 1 Lead Eq. Cas., title "Election"; Anderson's Appeal, 36 Penn. St. 476, 496; Bradford vs. Kent, 43 Penn. St. 474; English vs. English, 2 Green Ch. 504; Driscoll vs. Koger, 2 Desaus, 295; Wake vs. Wake, 1 Vesey Jr. 335; Reynard vs. Spence, 4 Beav. 103; Tooke vs. Hardeman, 7 Ga. 20; Dixon vs. McCue, 14 Gratt, 540.

[21] Thompson vs. Hoop, 6 O. S. 480.

In the absence of a formal election acts and conduct to amount to such election must be so unequivocal as clearly and distinctly show a purpose to take under the will and operate as an equitable estoppel. Industrial School vs. Bates, 15 O. C. C. (N.S.) 433; 2 O. App. 59; 14 N. P. 81; affirmed 90 O. S. 288.

Where an estate is devised to a widow for life with the remainder in fee to testator's heirs, and the widow, without following the form prescribed by statute for making her election to take under the will, set up no claim for dower, but, with the knowledge and acquiescence of the heirs, in fact took under the will, and had the use and occupancy of the premises for more than eleven years after the probate of the will, it was held that the parties were estopped to deny the election of the widow to take under the will.[22] And where the widow did not make her election, but set up no claim for dower, and actually in fact took under the will and had possession of the lands for sixteen years, it was held that she was barred of her dower, and estopped to deny her election to take under the will.[23]

The mere fact of qualifying as an executor could not be held to be an election under our statute. I have no doubt that the acceptance of money by the widow or widower, given to them under the will, would act as an election to take under the will. But it has been held if the widow accepts from the executor his promissory note for the payment of the legacy, and such note was not paid, that she would not be barred from claiming under the law.[24]

§ 1227. Effect of election to take.

The election of a widow to take under the will does not estop her from contesting the will, denying the validity of its devises, or setting up her claims as heir. She can do all or either of these without having her election set aside. Her right to elect is the creature of statutory law, and we must look to the statute creating it, alone, for the estoppel it is to work. If there is no valid will, there is no valid election, and of course no estoppel or bar.[25] However, if a widow or widower elects to take under

[22] Stockton vs. Wooley, 20 O. S. 184.

[23] Thompson vs. Hoop, 6 O. S. 486; Nimmons vs. Westfall, 33 O. S. 213; Spreen vs. Sandman, 2 C. C. 441; 1 C. D. 577; Page on Wills, §§ 720, 723, pp. 860, 862.

[24] Page on Wills, §§ 724, 864; Alexander vs. Mendenhall, 32 Bull. 175.

[25] Carder vs. Comm'rs Fayette County, 16 O. S. 367.

A widow's election is evinced with necessary clearness where she and her husband executed their wills to carry out a deliberately planned mutual arrangement for the agreed disposition of their estates. Ewalt vs. Ames, 27 O. C. A. 465.

the will, he or she bars himself or herself from all rights of dower and distributive share of the personal property; and this extends to all real estate of which the deceased consort may have been seized as an estate of inheritance at any time during coverture.[26] But the widow or widower, by reason of his or her election, is not barred of dower in lands which are not disposed of by the will in the absence of a provision that the portion given to the widow or widower is in lieu of his or her dower right in such undevised lands.[27]

It is also held that the release of dower by election only releases the dower interest to the heirs at law or those entitled to inherit, and can not be used as means of conveyance to strangers.[28]

The Courts have also upheld cases where a testator confers a benefit out of his own estate upon another, whose estate he also attempts to dispose of by such will, and the acceptance of the benefit by the devisee is a ratification of the attempted disposition of his own estate.[29]

An election to take under the will bars the right to dower and the right to a distributive share of the personal property, unless the will expressly otherwise provides. But such election shall not bar the right to remain in the mansion house or the widow to receive one year's allowance unless the will expressly otherwise direct.[30]

[26] Corry vs. Lamb, 45 O. S. 203.

[27] *In re* McDonald, 2 N. P. 232; 4 Dec. 396.

This case is, for reasons therein stated, in direct opposition to the holding of the Circuit Court in Swihart vs. Swihart, 7 C. C. 338; 4 C. D. 624.

Text approved. Bonds vs. McGill, 22 Dec. 409. See Dymond vs. Dymond, 22 Dec. 563, and Foster vs. Clifford, 87 O. S. 294, as to portions to which the widow is entitled.

[28] Hessenmueller vs. Mulrooney, 4 N. P. 70; 6 Dec. 123.

[29] White vs. Brocaw, 14 O. S. 339; Ide vs. Clark, 5 C. C. 239; 3 C. D. 120.

See § 1192.

[30] Where the widow elects to take under the will by which in lieu of dower and of antenuptial contract she is to receive the income of a certain sum, and afterwards the investment of such sum is greatly depreciated, she is not entitled after the estate is distributed to require other legatees to contribute to make her loss good. Such income is not an annuity, which is a fixed periodical sum. Krigbaum vs. Irvine, 10 Dec. 226.

See Hutchings vs. Davis, 68 O. S. 160 (1903).

It always seemed to the author that this decision was wrong (since the above was written the Supreme Court has overruled it. Geiger vs. Betzer, 80 O. S. 160), and, of course, must be strictly limited to the facts of that particular case. And it has been held that if the widow declines to take, she can not share in the real estates other than have her dower therein. *In re* Bullock, 50 Bull. 160. This decision is certainly right.

Where a testator makes a pro-

If a widower (or widow) elects to take under a will which disposes of his property, he will be bound, and the will will be effective and control the title to such property.[31]

Taking under a will does not affect the right to claim homestead, where a petition is filed to sell to pay debts.[32]

§ 1228. Effect of election not to take.

If the widow or widower shall fail to make such election, the widow or widower shall retain the dower, and such share of the personal estate of the deceased consort as the widow or widower would be entitled to by law in case the deceased consort had died intestate leaving children.[33] And the portion of his wife's estate, to which a surviving husband is entitled under the law, should in such case be allowed to him, insofar as the same is insufficient therefor and applicable thereto, out of the provision made for him in said will, and the balance, if any, applied to the compensation of disappointed legatees and devisees, if there are any.[34]

The widow refusing or neglecting to take under her husband's will is entitled to the same portion of his personal estate as if he had died intestate.[35]

If a widow refuses to take under the will her rights are in no way affected by it. Hence where the will provides for a conversion of realty into personalty, and the widow refuses to take under the will, she takes her dower in realty as realty, and not as personalty.[36]

§ 1229. How election set aside.

There seems to be no provision of the statute which authorizes an appeal or proceeding in error from the action of the Court

vision that the bequests in favor of his wife are in lieu of dower, etc., and she accepts the same, she is then a legatee or devisee under his will. And that if there was a contribution required from the legatees she would have to bear her portion. Allen vs. Tressenrieder, 72 O. S. 77.

[31] Hibbs vs. Ins. Co., 40 O. S. 543; Huston vs. Cone, 24 O. S. 11.

[32] Wanzer vs. Smitt, 2 W. L. M. 426.

[33] § 10572 G. C., § 1221.

[34] Wilson vs. Hall, 6 C. C. 570 3 C. D. 589; Hall vs. Wilson, 53 O. S. 479.

Where the widow elects not to take under the will she is entitled to only so much of the personal property as would have passed to her had her husband died intestate. Harbeson vs. Mellinger, 35 O. C. C. 195; 18 O. C. C. (N.S.) 524; 2 O. App. 75.

[35] Hartshorne vs. Ross, 2 Diz. 444.

[36] Page on Wills, § 737, p. 876.

If a widow elects not to take, she can take nothing in virtue of bequests made to her in the will, in lieu of dower. Jones vs. Lloyd, 33 O. S. 572.

in the matter of a widow or widower's election to take under the will of his or her deceased consort. The fact is that the act of the Court seems to be more in the nature of a ministerial act than a judicial decision. When the judge has explained to the widow or widower the provisions of the will, etc., as required by the statute, nothing remains to be done but to make an entry of such fact on his journal. Should the judge refuse to perform such an act I have no doubt he could be compelled to do so by a proceeding in mandamus.[37] And whatever may be the decision elsewhere, our Supreme Court has decided that the Probate Judge has no right to set aside such an entry once made, even though he is satisfied that it was made through a mistake or fraud.[38]

If the election was procured by fraud or imposition, or entered under such a mistake as would justify its rescission, resort may be had to the chancery powers of the Court of Common Pleas, which are ample to meet the exigency, by inquiring into the fraud, imposition or mistake, and if true, directing a cancellation of the entry of election; and this may be done even after the expiration of one year from the probate of the will, if other and new interests have not intervened.[39]

This holding of our Supreme Court gives an additional reason for the judge to exercise great care in his instruction and advice to widowers or widows in reference to electing under the will of their deceased consort, for if once made and entered, his power ceases; and then if a mistake or error was made, proceedings must be had in another court.[40]

§ 1230. Rights of devisee. How affected.

Where a widow elects to be endowed of the lands of her husband, the devisees who are prejudiced by such election, are

[37] *In re* Thomas Carter's Estate, 4 W. L. M. 428.

[38] Davis vs. Davis, 11 O. S. 386.

[39] *Id.* 392; Smith vs. Smith, 2 W. L. M. 426.

[40] Davis vs. Coffman, 55 O. S. 536. See Mellinger vs. Mellinger, 26 C. C. 682, where a Court of Equity set the order aside and gave as one of its reasons that the will was explained by the deputy, etc., instead of the judge. 73 O. S. 226.

The widow is not estopped from denying her election to take under the will, or asking that an alleged election by her be cancelled and set aside, where the Probate Judge did not at the time of said election explain to her the provisions of the will and her rights both thereunder and by law in the event of her election or refusal to elect. The reported case does not disclose in what manner the question was raised. See Ward vs. Sack, 27 Dec. 239; 14 N. P. 401. If the judge takes the election, he may be by mandamus compelled to enter the same on the records. State vs. Sloane, 24 Dec. 119.

equitably entitled to compensation out of the rejected provision made for her in the will.[41] If such disappointed beneficiaries can not be compensated out of the property devised, which has been rejected by the widow or widower, such beneficiary is then entitled to be compensated out of the residuary estate. If there is no property out of which to compensate the disappointed beneficiaries, they are entitled to take the property devised, subject to dower rights thus asserted.[42]

On the other hand, the election of the widow to take under the law can not increase the estate given to others by the will. Thus where a devise of one-half was given to the widow for life, the residue to be equally divided between the heirs and a specified church, it was held that upon the widow's election to take under the law, the church could, in no case get more than one-fourth of the estate given by the will.[43]

If the renounced share is insufficient to compensate the disappointed beneficiary, the other devisees or legatees, at least such as are in the same class with him so far as priority of payment is concerned, must contribute *pro rata* to make up the deficiency.[44] And in order that other devisees and legatees may be affected as little as possible, the Court will order that the dower be assigned out of the portion which was rejected.

[41] Jennings vs. Jennings, 21 O. S. 56.

A widow has a perfect right to insist that dower, which the policy of the law awards to her, shall not be taken from her by the will of a deceased husband. But she has no equitable right, as widow, to insist that the benefit intended by the testator, as a compensation for her dower, shall be treated, upon her rejection of it, as a lapsed legacy or devise, and go to the heir as intestate property. And her rights, as widow, are not affected by the facts that she may be, as in this case, herself the heir. The authorities cited by counsel for defendants clearly show that the rule in cases of testamentary election, is compensation or forfeiture, and not intestacy; and that the principle of compensation is applied in the case of an election against the will by a widow, equally with that of a similar election by any other devisee. Timberlake vs. Parish, 5 Dana, 345; McCallister vs. Brand, 11 B. Monroe, 370; Kainnaird vs. Williams, 8 Leigh, 300-409; Dixon vs. McCue, 14 Grattan, 540; *Id.* 81.

[42] Page on Wills, § 737, p. 875.

[43] Lilly vs. Menke, 126 Mo. 190; Maskell vs. Preston, 2 W. L. G. 65.

[44] Woerner on Admin. 273.

In the case of Hutchings vs. Davis, 68 O. S. 160, the doctrine of conversion was carried to a great extent. The case was afterwards overruled. Geiger vs. Betzer, 80 O. S. 65.

And if the remainder is not specifically disposed of, it will be applied to the compensation of disappointed legatees or devisees, and if not required for that purpose it will descend as intestate property.[45]

§ 1231. **If person unable to appear or non-resident of county, how election taken.** "If the widow or widower of the testator be unable to appear in court by reason of ill health, or is not a resident of the county in which such election is required to be made, on an application in behalf of such person, the probate court shall issue a commission, with a copy of the will annexed, directed to any suitable person, to take the election of such widow or widower, to accept the provisions of such will in lieu of the provisions made by law. In such commission the court shall direct such person to explain the rights of such widow or widower under the will, and by law." [R. S. § 5965.][46]

§ 1232. Application for commission, etc.

The Court might issue a commission to take the testimony of a widow or widower, who is a non-resident or in ill health, without any formal application for that purpose. Yet it is not presumed to be within the knowledge of the Court whether a person entitled to an election is a non-resident or in ill health; and therefore it would be proper to bring the matter to the attention of the Court by a formal application stating the facts. This application may be in the following form:

Probate Court,.....County, Ohio.

In the Matter of The Will of ....., deceased.	No..... Election of Widow.... Application for Commission.

To the Probate Court of said County:

The undersigned respectfully represents that....., late of said county, deceased, died testate on or about the.....day of..... .....A. D. 190.., leaving....., h....widow....., for whom provision was made in the will of.....said deceased consort. That said will was duly admitted to probate and record by said Court on the .....day of.....190...

That said widow....is "unable to appear in Court by reason of ill

[45] Williams v. Hall, 6 C. C. 570; 3 D. C. 589. Aff. 34 Bull. 298.

[46] § 10573 G. C.

health," "not a resident of this county" and that...he resides in.....
.....county, ...

The undersigned therefore makes application in behalf of said widow...; that said Probate Court issue a commission, with a copy of said will annexed, directed to some suitable person, to take the election of said widow...., to accept the provisions of said will in lieu of the provisions made by law.

Dated this.....day of....., 190...

Respectfully, ...

The State of Ohio,.....county, ss.

....., being duly sworn says that the statements in the foregoing application are true as...he verily believes.

.....

Sworn to before me and signed in my presence this.....day of.....
....., 190...

....., Probate Judge.
By....., Deputy Clerk.

JOURNAL ENTRY.

ORDER FOR COMMISSION TO TAKE ELECTION OF WIDOW....

Probate Court,.....County, Ohio.

In the Matter of the Will of ....., deceased.	.....190.. Election of Widow.... Order for Commission.

This day.....appeared in open Court and made application for a commission to issue to some suitable person to take the election of....., widow....of....., deceased, to accept the provisions of the will of said decedent in lieu of the provisions made by law. And it appearing to the Court that said widow....is "unable to appear in Court by reason of ill health," "not a resident of this county," and resides in.....county, ...

It is therefore ordered that such commission issue, with a copy of said will annexed, to....., to be returned with all convenient speed, and this cause is continued.

....., Probate Judge.

§ 1233. Commission to take such election.

The usual practice is to issue the commission to a justice of the peace or notary public, or some one of that character. But this is not necessary. All that the statute requires is that the judge should direct the commission to any suitable person. A practice to be commended is that it be sent to a person of both ability and standing in the community, and one who has the confidence of the widow or widower. The form of such commission may be as follows:

COMMISSION TO TAKE ELECTION OF WIDOW.....

Probate Court,.....County, Ohio.

In the Matter of the Will of ....., deceased.	No..... Election of Widow.... Commission.

To....., Greeting:

Know ye, that having confidence in your prudence and fidelity, you have been appointed by the Probate Court of said county, and by these presents you are commissioned with full power and authority to take the election

of....., widow....of....., deceased, under the last will and testament of h....late consort. A copy of said will is hereto attached, marked "A."

You are, therefore, directed to proceed forthwith to the place of residence of said.....and then and there read to.....the will hereto annexed, and explain to h....h....rights under it, and by law in the event of a refusal to take under the will. After which you will take h.... election as to whether or not..he will accept the provisions of such will in lieu of the provisions made by law.

You will thereupon reduce your report of such election to writing, and return the same (together with this commission and the copy of the will hereto annexed) closed up, under seal, into our Probate Court, with all convenient speed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Probate Court at....., Ohio, this.....day of....., 190....

....., Probate Judge.

COMMISSIONER'S REPORT.

Probate Court,.....County, Ohio.

In the Matter of the Will of ....., deceased. } No..... Election of Widow....

I,....., duly appointed and commissioned by the judge of the Probate Court of said county to take the election of..... under the will of.....late consort,....., deceased (which commission and copy of the will are hereto annexed), do hereby certify that, in pursuance of said commission, I did, on the.....day of..... .....A. D. 190.., go to the residence of....., widow...of ....., deceased, and then and there read to h....the will hereto annexed and explained to h....the provisions of the same, h.... rights under it, and by law in the event of a refusal to take under the will. Whereupon..he made h....election.....to accept the provisions of such will in lieu of the provisions made by law.

In testimony whereof I have hereunto set my hand this.....day of .....A. D. 190...

....., Commissioner.

Probate Court,.....County, Ohio.

In the Matter of the Will of ....., deceased. } No..... Election of Widow....

....., commissioner appointed by the Probate Court of said county to take my election as widow....under the last will and testament of....., deceased, having first explained to me my rights under the will, and by law, I hereby elect.....to take the provision made for me in said will in lieu of being endowed of the lands of my deceased consort and taking the distributive share of h....personal estate.

Dated this.....day of.....A. D. 190...

.....

§ 1234. Form of entry, etc.

When such commissioner has made his report, the same should be made a matter of record, and the Court should make a journal entry, which may be in the following form:

(*Title.*)

This day there was filed in this Court a report of A. B., who has been heretofore appointed as a commissioner to take the election of C. D. under

the will of G. H. And it appearing to the Court that said commissioner has properly discharged his duty under the law and that all the proceedings therein are regular, and that having explained to the said C. D. her rights under the provisions of the will of the said E. F. and her rights under the law, and she having declared herself as satisfied with the provisions of said will, and elected to take under it, and asked that her election so to take might be entered upon the journal of this Court, which is now and here accordingly done.

§ 1235. How election made for insane or imbecile widow, etc. "When, because of unsound mind, the widow or widower of a testator is unable to make an election, as soon as the facts come to the knowledge of the probate court, at any time within one year after the testator's death, it shall appoint some suitable person to ascertain the value of the provision made for such widow or widower in lieu of the provisions made by law, and the value of the rights by law in the estate of the deceased consort." [R. S. § 5966.][47]

§ 1235a. Entry. "If, on the return of the report of the person appointed to make such investigation, the court is satisfied that the provision made by the testator for the widow or widower, in the will, is more valuable and better than the provision by law, it shall record upon its minute book an entry that such insane or imbecile widow or widower, by virtue of the proceeding herein provided, elects to take under the will which election, when so entered, shall have the same force and effect as an election made by one not under such disability." [R. S. § 5966.][47*]

§ 1236. Application, etc.

As was said in a previous section, the Court will not be presumed to know that a widow is insane or unable for that reason to make an election, therefore it is a practice desired, and in fact should be required, that some person who has knowledge of the facts appear in Court and make a formal application that some suitable person be appointed to make an election for such imbecile or insane widow or widower. When such application is filed, the Court should enter a finding and order some suitable person to ascertain the value of the provision made by the testator for such widow or widower in lieu of the provisions made by law, etc. The form of application used where a commissioner is appointed to take the testimony of a widow in ill

47 § 10574 G. C.

47* § 10575 G. C.

See Industrial School vs. Bates, 90 O. S. 297. Can only elect to take when will is better provision than the law gives.

health, and the entry ordering the same can easily be changed to suit the provisions of the above section.

§ 1237. Form of commission as to insane or imbecile widow's election.

In the Probate Court of.....County, Ohio.
....., Deceased.

To.....

It having come to the knowledge of the Probate Court of said county, that by reason of insanity — imbecility of mind —....., widow of....., late of said.....county, deceased, is unable to make her election as to the provision made for her by the will of her said husband, heretofore admitted to probate and filed in said Court. This is therefore to authorize and direct you "to ascertain the value of the provision made by the testator for her in his will, in lieu of the provisions made by law, and the value of her rights by law in the estate of her husband." You will make due return of this order, with your findings endorsed thereon, to this Court without delay.

Given under my hand and the seal of said Court this.....day of..... .....A. D. 190...

....., Probate Judge.

RETURN OF FINDINGS.

Pursuant to the command of the foregoing order I have made diligent investigation and find — 1st, as to the value of the provision made by the testator for....., his widow, in lieu of the provisions made by law, That.....
2d, as to the value of her rights by law in the estate of her husband, That .....

§ 1238. Duty of commissioner.

Similar to the section providing for a commissioner to take the election of a widow in ill health, sec. 10574 G. C. (§ 1235),[48] requires that the person appointed to ascertain the value, etc., where the widow is insane, the appointment should be of *a suitable person*. The law contemplates and requires of this person that he shall find out the value of the provisions made in the will for the widow, and then he should make a calculation of what the dower interest of the widow or widower in the real estate of the testator is worth, as well as the probable distributive share of the personal property. These matters can very often be ascertained from the will and the inventory and sale bills of the executor. Annuity tables may be used for ascertaining the probable value of the dower interest.[49]

[48] § 1235.

[49] See chapter next index.

The person appointed to ascertain such values should consult the Court, and if the Court deemed it advisable, appraisers might be appointed, but such would rarely be required.

§ 1239. Duty of the Court.

The commissioner having ascertained the value of the provisions made by the testator for such widow or widower, and also having ascertained the value of the rights of such widow or widower by law in the estate of the deceased consort, then the duty devolves upon the Court to make an election for such insane or imbecile widow or widower; and if the Court is satisfied that the provisions made by the testator for the widow or widower in the will are more valuable and better than the provision by law, then he should make an entry that such insane or imbecile widow or widower, by virtue of such proceeding, elects to take under the will of such deceased consort; and then such election shall have the same force and effect as if made by a person of sound mind and in open Court. While the statute does not so provide, yet it would be proper if the Court found that the provisions of the law were more valuable and better for the widow than those of the will, to make finding of that fact and likewise make an election not to take under the will. The entry might be in the following form:

(*Title.*)

This day came A. B., a suitable person, who was heretofore appointed by this Court to ascertain the value of the provisions made in the will of G. H. for his widow, who is now imbecile or insane, and the value of the rights of such insane or imbecile widow in the estate of her deceased consort, and filed his report herein; and the Court finding from said report and being satisfied from said report that the provision made by said testator for his widow in his will is more valuable, and better than the provision by law, it is now ordered that the said C. D., widow of the said G. H., elect to take under the will of the said G. H., her deceased consort. And it is ordered that the said election be entered upon the journal in this Court and be made a part of the proceedings of this case.

See Industrial School vs. Bates, 90 O. S. 297.

CHAPTER LXVI.

GIFTS CAUSA MORTIS.

§ 1240 Definition, etc.
§ 1241 What kind of property may be given.
§ 1242 Requisites of gift.
§ 1243 In view of death.
§ 1244 Death of donor.
§ 1245 Delivery of subject of gift.
§ 1246 Gift should be absolute.
§ 1247 Revocation of gift.
§ 1248 Evidence of gift.
§ 1249 Rights of creditors and family.

§ 1240. Definition, etc.

Following the right to dispose of one's property in whatever manner he may choose is the disposition of his property by way of gift. So long as sufficient property is retained to pay all his legal obligations,[1] and the donor acts free from undue influence and with sufficient capacity to understand the nature of his acts, a gift may be as an effectual a mode of transferring property as any other. The one distinguishing characteristic of gifts in order to make them effectual is that the subject of the gift must have been delivered. The subject of gifts is usually treated under two divisions, *i. e., inter vivos* and *causa mortis.* There may be occasions when an executor or administrator will be required to ascertain whether a gift is legal notwithstanding the class to which it may belong. But his attention will more frequently be called to that class of gifts coming under the designation of gifts *causa mortis.* Such a gift has been defined as "a gift of personal property made by a person in peril of death and in expectation of an early demise, consummated by a manual delivery of the subject of the gift or of the means of obtaining possession of the same by the donor, or by another person in his presence and by his direction, to the donee, or to a third person for the donee, and acceptance on the part of the

[1] Hayes vs. Moore, 5 N. P. 220; 5 Dec. 520.

Where one intending to make a gift of money purchased United States money orders in the name of the prospective donee, but died before delivering them, and with the orders in her possession, the gift was incomplete, and the administrator was entitled to the money. McKelvey vs. McKelvey, 33 O. C. C. 117.

donee, followed by the death of the donor before the donee, and defeasible by reclamation, the contingency of survivorship, or delivery from the peril." [2]

It will be observed that such a gift in some respects resembles a testamentary disposition, the only essential difference between such a gift and a nuncupative will is that of delivery of the property disposed of, and it differs chiefly from a gift *inter vivos* in that it is to a certain extent incomplete, and always revocable should the donor survive his present illness. The law having provided a method of disposing of property to take effect after one's death by way of testamentary disposition, gifts *causa mortis* are not favored.[3]

§ 1241. What kind of property may be given.

It is laid down as a general proposition of law that only personal property capable of delivery is subject of a gift *causa mortis,* and that it may embrace all the testator's estate, however large the amount and value.[4] The reason for confining such gifts to personal property is that real estate is incapable of manual delivery.[5]

There also seems to be some doubt upon the proposition whether or not a person may give all of his property.[6] It is well settled, however, that a delivery of the donor's own promissory note, without any other contract, by which he undertakes to pay money either during his lifetime or out of his estate after his decease, will not constitute a valid gift *causa mortis.*[7] Of course, if the note was founded on a consideration, a different rule might apply.[8] Checks or drafts may be given, but if

[2] Woerner on Admin. 117.

[3] Gano vs. Fisk, 43 O. S. 462.

See Ambler vs. Admr. Boon, 3 O. App. 87; 19 O. C. C. (N.S.) 281; 24 O. C. C. 512, where a note was given and not to be collected except on demand of payee, and put in a bond box and the key delivered, etc. It was held it was neither a gift *inter vivos* nor *causa mortis* and it was an asset of the estate.

[4] Redf. Sur. Prac. 471, citing Meach vs. Meach, 24 Vt. 591; White vs. Wagner, 32 Barb. 250.
vs. Wager, 32 Barb. 250.

In Curtis vs. Barrus, 38 Hun (N. Y.) 165, it was held, that real estate might pass by such a gift.

[6] 8 Am. & Eng. Ency. of Law, subject, Gifts.

The only limit in Ohio would be that sufficient remains to pay debts.

[7] Starr vs. Starr, 9 O. S. 75.

[8] Hamor vs. Moore, 8 O. S. 239.

The gift of a maker's own note is the delivery of a promise only and not of the thing promised, and the gift therefore fails. Kent's Comm. 438.

The defendants' intestate executed the following paper:

they are unpaid at the death of the donor, the gift fails.[9] Certificates of deposit payable to the bearer,[10] or when made payable to order and indorsed by the payee,[11] and notes secured by mortgage on real estate, may pass by gifts *causa mortis.*[12]

§ 1242. Requisites of gift.

It will be well to remember that in order to constitute a valid gift *causa mortis* it must appear, *first,* that the gift was made in view of the donor's death from his present illness, or from external and apprehended peril; *second,* the donor must die of that ailment or peril; *third,* there must be a delivery of the subject of the gift; *fourth,* the gift must be absolute.[13]

These essentials will be treated in their order.

§ 1243. In view of death.

It is not necessary, in order to constitute a valid gift *causa mortis,* that the person must be *in extremis,* or that he should die from the very disease in apprehending of which the gift was made; it is only necessary that he shall not recover from the disease that he then apprehended would cause death.[14] It

"For value received, I promise to pay to Mrs. Hamor, wife of John Hamor, the sum of $300, as a small recompense for the kindness shown to me by her. The executors of my last will and testament are hereby directed to pay the above to Mrs. H., or her sons, Moses and John, after my decease.

"JOHN R. MOORE."

"Attest: Philip Giggs, February 28, 1850."

And delivered the same to the subscribing witness, with injunctions to deliver it to Mrs. Hamor after his death; which was done. It was held that this was not a gift *inter vivos,* nor a gift *causa mortis,* nor was it good as a testamentary disposition. Hamor vs. Moore, 8 O. S. 239.

See § 1014, Distinguishing characters of wills.

[9] Simmons vs. Savings Soc., 31 O. S. 457.

A note executed by the donor, and given to the donee, in consideration of love and affection, to take effect at the death of the donor, can not be enforced against the donor's estate. Prior vs. Reynolds, 8 W. L. J. 325.

[10] Brooks vs. Brooks, 12 S. C. 422.

[11] Basket vs. Hassell, 107 U. S. 602.

[12] Woerner on Admin. 119.

See subsequent section on delivery and evidence of gift. §§ 1245, 1248.

Promissory notes for a specific sum of money payable one day after date but understood to be payable at death of giver, executed and given to his housekeeper to remunerate her for a deficiency in her compensation, are supported by good consideration and are valid against his estate. *In re* Jenny Est., 22 Dec. 348.

[13] Redf. Sur. Prac. 472; Woerner on Admin. 118.

[14] Ridden vs. Thrall, 125 N. Y. 572.

A delivery of bonds by the donor in anticipation of death within one year, possession taken by the donee, death by the owner without recovering from illness and without revocation thereof, constitutes a valid gift. Galbraith vs. Sutton, 50 O. C. C. 653.

is said that if a gift is made with the view that it take effect upon the donor's death, but while in ordinary health, and not in immediate apprehension of death, it may be a valid gift *inter vivos,* but it cannot be *causa mortis.*[15]

Where it appears that the gift was made during the testator's illness, and only a few weeks before his death, the law presumes that the gift was made in contemplation of death.[16]

§ 1244. Death of donor.

It is essential to the validity of the gift that the donor must have died, for as the gift is conditioned to take effect upon the donor's death by the then existing disease or impending peril, it is obvious that it can not take effect until his death, and that until such death occurs, it is revocable at his pleasure. If it is not revocable, the gift becomes a gift *inter vivos* and not *causa mortis.*

§ 1245. Delivery of subject of gift.

The one essential of gifts *causa mortis* which seems to have given the most litigation is that of delivery of the subject of the gift.[16a] In order to give effect to the gift, the donor must at the time of the delivery part with the possession of the subject of the gift. It must not remain incomplete or rest in mere intention; and this is so whether the gift is by delivery only, or by the creation of a trust in a third person or in the donor.[17]

[15] Woerner on Admin. 120.

[16] Merchant vs. Merchant, 2 Bradf. 432.

Old age and feeble health is not sufficient foundation of a gift *causa mortis*, the apprehension must be of immediate death and not of the death as a possible result. Robson vs. Jones, 3 Del. Ch. 51; 2 Kent's Com. 444.

[16a] The gift must be absolute. The mere delivering of a certificate of deposit will not be sufficient; unless the owner surrenders the control of it, otherwise the holder will be deemed the agent of the owner. Merchant vs. Building & Loan, 34 O. C. C. 348.

[17] Martin vs. Funk, 75 N. Y. 134, cited in Gano vs. Fisk, 43 O. S. 472.

Where bonds were given by an invalid sister, in expectation of her death, but conditioned that the interest should be paid her, and the bonds returned in event she needed them, is valid, although her death did not occur for six months, she dying of the same malady. Sutton vs. Galbraith, 18 Dec. 864.

G. was a man of advanced age, having a wife, and daughter by a first wife, and by the present wife a son, with whom he boarded; his property consisted partly of a farm and stock thereon, but mostly of promissory notes of various amounts; before his last sickness he had expressed a desire "that his children should have his notes and his son should have his farm;" on the morning on the day of his death, and in the presence of a daughter's husband, herself and a sister, G. called the daughter and said to her: "My notes are in a little box on the bureau there; I want you to take them and divide them equally among you children."

Where a person enclosed a note in an envelope and directed the same to be given after his death, it was held not to be a sufficient delivery.[18]

Where a husband and wife brought an action in their joint names to recover the amount due on a note, the wife told the husband that he should collect the note, that she "wished the business settled up, and wanted him to have the money," it was held that this did not constitute a gift *causa mortis*.[19]

Where a father, having bonds, endorsed upon each of them these words, "This bond I give and set over to my daughter M. W., this 20th December, 1878," which daughter was an infant, and the mother kept the bonds until the death, it was held sufficient delivery.[20]

Where among a testator's writing there was found a mortgage with the following endorsement, "This mortgage is transferred to my wife in case of my death," it was held that there was no delivery.[21]

A delivery to the donee of a deposit book issued by a savings bank, accompanied with appropriate words, with the intention to give the donee the deposits represented by the book, is a sufficient delivery.[22]

The best delivery must be made that the nature of the article will permit, where the subject of the gift is not such that it can be actually delivered, there may be a constructive delivery. There is some question whether there can be a symbolical de-

He told her to get the key to the box, and she got the key and tried it in the box, and gave the key to her husband for safekeeping. After the death of intestate, she took the box and did not divide the notes, but returned them to the administrator, and they were appraised and held as part of the estate. In an action by the daughters, claiming for themselves and the son, the notes and their proceeds, as against the administrator and the widow. It was held, these facts do not show such a delivery as constitutes a valid gift *causa mortis*. These notes and their proceeds are assets of the estate, and the widow is entitled to her proper part thereof. *Id.* 462.

[18] Phipps vs. Hope, 16 O. S. 586.

[19] Carter vs. Buckingham, 1 Handy, 395.

See *In re* Est. of Scheiberg, 51 Bull. 252.

[20] Rote vs. Warner, 17 C. C. 350; 9 C. D. 540.

[21] Hadlow vs. Beavis, Supr. Ct. unreported, 42 Bull. 256.

[22] Polley vs. Hicks, 58 O. S. 218; Ridden vs. Thrall, 125 N. Y. 572; Pierce vs. Savings Bank, 129 Mass. 425.

livery.[23] There is no doubt of the fact, however, that delivery may be made to a third person.

§ 1246. Gift should be absolute.

In order to constitute a valid gift, the owner must renounce all interest in and title to the gift. Our Supreme Court has said the donor must not only part with the possession, but with the dominion and control of the property. An intention to give is not a gift.[24] And it is said one can not, without a written transfer or declaration of trust, make a valid gift of an instrument securing the payment of money, reserving to himself the accruing interest during life, unless there is an absolute delivery of the security to the donee, vesting the entire legal title and possession in him.[25]

§ 1247. Revocation of gift.

One of the essential features of a gift *causa mortis* is that it is revocable. It may be revoked by acts of the party himself or by a changed condition. If the party gives it to another, this would be a revocation,[26] although it has been held that a gift *causa mortis* can not be revoked by a last will and testament because the will speaks as of the moment of the testator's death, while the gift had previously vested in the donee. But the gift of a legacy to one who has received a gift *causa mortis* may raise the presumption that the former is a substitution for the latter, and sometimes the donee may be compelled to choose between them.[27]

If the donee dies before the donor, this will be a revocation; and if a check is given and the donor dies before the check has been accepted or paid, this will be a revocation.[28] Likewise such a gift may be revoked by a demand of the donor, although

[23] 8 Am. & Eng. Ency. of Law, subject, Gifts. Woerner on Admin. 123.

[24] Flanders vs. Blandy, 45 O. S. 108.

[25] Redf. Sur. Prac. 475, citing Young vs. Young, 80 N. Y. 422.

[26] Parker vs. Marston, 27 Me. 196.

[27] Woerner on Admin. 126.

See § 624 *et seq.*, Payment of legacies.

[28] Simmons vs. Savings Soc., 31 O. S. 457.

See Delfs vs. Yeager, 16 C. C. (N.S.) 436, Delivery of savings bank book; Anderson vs. Allen, 19 C. C. (N.S.) 51, Delivery of horse.

the donee refused to surrender the article.[29] So it has been held that a subsequent birth of a child which operates to revoke a will, would have the same effect on a gift *causa mortis.*[30]

§ 1248. Evidence of gift.

Gifts *causa mortis*, like gifts *inter vivos,* are watched with caution, and to support them, clear and convincing evidence is required.[31] In another case it is said the proof of a gift must be clear and positive.[32] Thus where the evidence shows that a father advanced money to his daughter to build her a home, with the intent that the interest should be paid to him during his life, and that the principal should be paid the daughter at his death, it was not sufficient to establish either an advancement or a gift *inter vivos* or *causa mortis.*[33]

Oral statements or declarations of an alleged donor are not competent as against innocent third persons, to prove a gift of real estate.[34]

It is not necessary that the donee be required to prove affirmatively and with minuteness the circumstances under which the alleged gift was made, nor is he required to effectually show that the donor was of sound mind when he made the gift. He makes a *prima facie* case when he shows that the gift has been made according to the requirements of law.[35]

§ 1249. Rights of creditors and family.

It is so well settled as to need nothing more than mentioning that a person can not give away his property and defeat claims of his creditors. There has been some question in our State

[29] Merchant vs. Merchant, 2 Bradf. 432.

[30] Bloomer vs. Bloomer, 2 Bradf. 339.

See § 1062, Revocation of will by birth of child.

[31] Flanders vs. Blandy, 45 O. S. 113.

[32] Meyer vs. Shaney, 2 W. L. J. 182.

[33] Medill vs. Fitzgerald, 15 C. C. 415; 8 C. D. 129.

[34] Hall vs. Geyer, 14 C. C. 229; 7 C. D. 436.

[35] Redf. Sur. Prac. 477.

Where the son executed a note in favor of his mother and paid interest thereon, there is a presumption raised that the money evidenced by the note was a loan and not a gift. Admissions by the mother that it was a gift are admissible. Hicks vs. Hicks, 9 C. C. (N.S.) 413; 29 O. C. C. 628; affirmed 76 O. S. 575.

A stipulation in a mortgage to pay a certain amount, after death of another person, is valid. Prindle vs. Wood, 3 C. C. (N.S.) 641; 24 O. C. C. 74.

See Laws vs. Mosley, where evidence held insufficient, 37 C. C. 209.

whether a person might by gift *causa mortis* deprive his family of such portions of his estate as they would be entitled to under the law of distribution, etc. It has recently been held by the Supreme Court that a man can not convey or give away his real estate and defraud his wife of her marital rights.[36] But gifts *causa mortis,* as a rule, do not apply to real estate, and as there are no legal impediments to a person's right to dispose of his personal property in such a manner as he sees fit regardless of the interest of his wife, it has been held that a wife may make a gift *causa mortis* of all her personal property to the exclusion of her husband,[37] and also that a husband may by gift *inter vivos* deprive his widow of any share that she may have in his property.[38]

If the husband could make a valid gift *inter vivos,* there seems to be no reason why he could not make the same kind of a gift *causa mortis.*[39]

[36] Ward vs. Ward, 63 O. S. 125.

[37] South vs. Fair, 41 Bull. 343.

[38] Brodt vs. Rannells, 7 N. P. 79; 9 Dec. 592.

[39] See Discussion, Woerner on Admin. 128.

§ 939, note 93.

CHAPTER LXVII.

TESTAMENTARY TRUSTEES.

§ 1250 Definition, etc.
§ 1251 Distinction between executor and testamentary trustee.
§ 1252 Who may be a trustee.
§ 1253 Jurisdiction of Probate Court, etc.
§ 1254 Application, etc.
§ 1255 Form of application for appointment of trustee.
§ 1256 Trustees appointed by will to give bond, unless, etc.
§ 1257 Comments.
§ 1258 Removed on failure to give bond.
§ 1259 Form of trustee's bond.
§ 1260 Appointment of trustee.
§ 1261 Entry for appointment of trustee.
§ 1262 Form of letters of trusteeship.
§ 1263 Inventory of estate.
§ 1264 Separate bond from each trustee, or joint bond.
§ 1265 Surviving trustee may execute trust.
§ 1266 When Probate Judge may appoint person to execute a trust.
§ 1267 Trusts created by foreign will.
§ 1268 Id. Trustee named in foreign will to give bond.
§ 1269 How trustee appointed by foreign Court may execute a trust.
§ 1270 Comments.
§ 1271 Probate Court may appoint a trustee under a foreign will.
§ 1272 Comments.

§ 1250. Definition, etc.

A trust is defined to be an equitable obligation, either express or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence.[1] Generally speaking, a trust is an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof.[2]

[1] 27 Am. & Eng. Ency. of Law 3.

[2] 2 Story's Eq. Jur., § 964. Substantially the same definition is given by Mr. Spence and Mr. Snell. See 2 Spence Eq. Jur. 875; Snell's Princ. of Eq. (Lawson's Am. Ed.) 59.

See § 1261, Guardians.

The rules governing testamentary trustees and trustees are the same as those governing guardians and administrators of estates. Boals vs. Clingan, 6 N. P. (N.S.) 609; 16 Dec. 267.

See § 1387 for form investment of funds, etc.

See Fidelity & Deposit Co. vs. Wolfe, 100 O. S. 332, as to general powers of Probate Court, etc.

The person in whom the confidence is reposed, and whose duty it is to manage the trust, is called a trustee. When the trust is created by a last will and testament, it is called a testamentary trust, and the person, whether designated by the will or appointed by the Court, whose duty it is to execute the trust, is called a testamentary trustee. Such trustee receiving his trust by virtue of the last will and testament, must execute such trust in accordance with the creating power, unless the same is contrary to some positive law. Where the last will and testament does not provide in detail the manner in which the trust should be executed, then the law applicable to trusts generally applies.[3] In its enlarged sense, executors, administrators, guardians, assignees, etc., are trustees, but it will be the province of this and succeeding chapters to deal with trustees occupying other relations. The principle that every trustee must act honestly and for the best interest of his trust, is alike applicable to all persons who hold a trust position.[4]

§ 1251. Distinction between executor and testamentary trustee.

Where the will creates a trust and directs that some person other than the executor shall execute the trust, little difficulty is

[3] As used in the New York code, a "testamentary trustee," includes every person except an executor and administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will. It also includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator (Co. Civ. Proc., § 2514, subd. 6).

[4] Trusteeship is not mere contract to manage property for another, but it is a relationship, involving many duties and liabilities. It is not always desirable to be a trustee, and before undertaking any trust the individual should make a careful examination of the trust instrument to ascertain its particular provisions and what his duties and liabilities will be. He should also examine the property to see that his personal interests will not conflict with his duties as trustee. The duties of a trustee to his beneficiary require not only the highest good faith in their execution, but also the absence of conflicting personal interests, and often the sacrifice of personal convenience and chance of profit. An individual may be willing to trust the whole or some part of the management of his personal affairs to others; but a trustee must manage the trust affairs himself. Loring Trustees' Handbook, 1. Allen vs. Insurance Co., 19 Bull. 198.

See § 1361, Guardians.

experienced in separating the duty of each. But where the same person is mentioned as both executor and trustee under a will, it is a matter of extreme difficulty very often to determine when a certain act is done as executor or as trustee. Generally speaking, it is the duty of an executor to pay the debts of the decedent and distribute the estate. It is not the province of an executor to hold and manage the estate. This ordinarily would be the duty of a trustee. Where such duties are placed by will upon one person, he may accept the one and decline the other, but if he accept the execution of the trust by qualifying as executor, he will be deemed to accept the trust, and he might be held to account in each capacity. In such cases it is not required that he take an additional oath of office, nor is it necessary that letters testamentary directed to him should designate his function as trustee from that as executor. Wherever the trust is separate and distinct, for instance, if the will provided that the executor should collect the assets and distribute all the funds except a certain portion, which he was to hold for one person for a number of years, and then pay the remainder over to the heirs of such person, in such a case the executor should unquestionably settle his accounts as executor and make application and give a new bond and be appointed as a trustee.[4*] This would save all trouble as to liabilities of sureties in reference to the fund for which they might be held responsible. In some States the sureties on an executor's bond will not be held liable for his acts as trustee.[5] But the rule is otherwise in other States.[5*]

The Courts in Ohio would probably follow the decision of the Massachusetts Courts, as much of our probate law is taken from the laws of that State.[6] Where the same person is appointed trustee and executor under a will, he holds the property as executor until he has settled his account in the Probate Court

[4*] P. C. & St. L. Ry. vs. Schmidt, 8 C. C. 355; 4 C. D. 535.

See Wilson vs. Wilson, 17 O. S. 150, as to transferring of funds, where one person held two positions.

[5] Drake vs. Price, 5 N. Y. 430.

[5*] White vs. Ditson, 140 Mass. 351; Groton vs. Ruggles, 17 Me. 137; Hall vs. Cushing, 9 Pick. 395; Perkins vs. Moore, 16 Ala. 9.

[6] But see P. C. & St. L. Ry. vs. Schmidt, 4 C. D. 535; 8 C. C. 360.

as executor, crediting himself with the funds he holds as trustee, or done some other notorious act of transfer.[7]

Where a general power of appointment is exercised by will, the executors of the will, not the trustees, will carry out the trust, and where the power is special, the same rule should prevail, unless the appointment is directly to the objects of the bounty, and was not meant to pass through the executor's hands.[8] Our Circuit Court has held, where under a will there is doubt, whether the executor is to act as such or as a trustee, the rule is that the duty or trust devolves upon the executor or upon the trustee as executor by virtue of his office as executor.[9]

[7] Gandolfo vs. Walker, 15 O. S. 273; *In re* Higgins Est., 15 Mont. 474; 28 L. R. A. 116; Crocker vs. Dillon, 133 Mass. 91, 98.

When a trust fund is to be created by an executor out of the assets of an estate, something more must be done by the executor, in order to impress the trust on particular property, than to hold the property with the intention that it shall constitute the trust fund. There must be some act of appropriation which transfers it to the trust fund and gives the beneficiaries right to have it held for them. Sheffield vs. Parker, 158 Mass. 330.

[8] Sargent vs. Sargent, 168 Mass. 420.

[9] *In re* Crawford, 21 C. C. 554.

The general rule that where there is a devise or bequest to an executor in trust, the executor receives the property or fund at once and the same never becomes assets, must be subject to the qualifications, that if needed assets, the title of the executor is superior to that of trustee, so that the former may take, use and account for the same as assets; and also that if the property is not reduced to the form or condition in which it is to be distributed as trust property, the duty of thus transforming it may devolve upon and be exercised by the executor as such, and that this will be the case unless the will distinctly provides that this duty shall devolve upon the trustee as such. In such cases the same person being both executor and trustee, he will not take in the latter capacity, until he has fully discharged his duties in the former capacity, and not until the fund or property has been distinctly set apart as trust property. The title to money and personal property devised by will does not devolve upon the legatees until the probate of the will and administration of the estate. Under a will devising certain sums of money to executors in trust for certain purposes, and devising to such executors all real and personal property, in trust for the execution of the will with full power to sell or mortgage and convey any property, without being required to obtain orders of Court therefor, the executors will take as executors, and their relations to the estate as trustees cannot arise until the estate has been

As a general rule, the powers of an executor are co-extensive with all the trusts devolved upon him by the will, and all acts done by him in executing such trusts will be regarded as done in his capacity as executor, unless it plainly appears, from the whole will, that the testator intended to create a special trust to be managed by the person named as executor in the capacity of special trustee.[10]

Where a testator directed in his will that the executors should carry on his brewery business for seven years, "for the benefit of the estate," and at the end of that time should deliver the brewery and its "proceeds" to residuary legatees named in the will, the executors carried on the business accordingly, using and employing the funds of the estate for that purpose. It was held that the moneys and profits arising from the business were assets in the hands of the executors, for the administration of which their sureties are liable.[11]

§ 1252. Who may be a trustee.

In absence of any statutory provision, any person that has the capacity to hold the title to the property and the right to exercise the power may be a trustee.

A corporation having such capacity and rights among its charter powers is such a person, and may be a trustee.[12]

The sovereign may be trustee, but the beneficiary can not enforce the trust except by petition,[13] until the property is conveyed to some one amenable to the jurisdiction of the Court.[14]

The trust estate may vest in a lunatic or infant, but they will be removable.[15]

An infant may be compelled to convey by statute,[16] and so

reduced to money and nothing remains but to distribute or invest the funds as provided by the will. *Id.*

[10] Mathews vs. Meek, 23 O. S. 272.

[11] Gandolfo vs. Walker, 15 O. S. 251.

[12] Atty. Gen. vs. Landerfield, 9 Mod. 286; Dublin Case, 38 N. H. 459.

A foreign trust company may act for foreign trustees. Bank vs. B. & O. R. R. 53 Bull. 181.

[13] Briggs vs. Light Boat, 11 Allen, 157.

[14] Winona Co. vs. St. Paul Co., 26 Minn. 179.

[15] Irvine vs. Irvine, 9 Wall. 617; Swartwout vs. Burr, 1 Barb. 495.

[16] Brightly's Dig. Pa. (1894), p. 2033, § 46; Gen. Laws R. I. (1896) ch. 208, § 16; Gen. Stat. N. J. (1895), p. 3683, §§ 2, 3.

long as infants or lunatics hold the property the trust will be administered by the Court through them or their guardians.[17] Having no discretion, they can not act in trust affairs any more than they can in their own affairs,[18] and if one of three trustees is an infant or lunatic, action by the other two is barred.[19]

At common law a wife could not be a trustee for her husband, but she may be now in most jurisdictions under the statutory rules.[20]

A trustee should be "capable"— that is to say, a person having the legal and actual capacity to hold the title to the trust property and exercise the powers. Thus the trustee should be a person of full age and sound discretion. He should be "fit," that is to say, a person in whose hands the property will be safe,[21] and who will be impartial in the administration of his trust. Thus a bankrupt is not a "fit" person, as being unsuccessful in his own affairs, he is not likely to be successful in those of others, and a drunkard or person of dishonest or of bad character is unfit, since the property would not be safe in his hands. So too a beneficiary is an unfit person, whether he be a life tenant or remainderman, since he will naturally be partial to his own interests,[22] and for similar reasons a near relation is objectionable, although in this country they are more often appointed than strangers. The fact of near relationship makes the trustee less able to withstand the importunities of their beneficiaries,[23] and moreover such a connection, especially where a parent or older relation is trustee for a child, is too often made an excuse for lax management, and the knowledge that a breach of trust is likely to be condoned not infrequently leads to disregard of strictly legal management, which is the only safeguard of trust estates. Deviation from the rules of strict accountability only too often leads to speculation and the loss of the property.[24]

[17] *Ex parte* Sergison, 4 Ves. Jr. 147.

[18] Person vs. Warren, 14 Barb. 488.

[19] King vs. Bellord, 1 Hem. & M. 343.

[20] Schluter vs. Bowery Sav. Bank, 117 N. Y. 125.

[21] *In re* Backer's Trusts, 1 Ch. D. 43.

[22] *Ex parte* Conybeare's Settlement, 1 Weekly Rep. 458.

[23] Wilding vs. Bolder, 21 Beav. 222; Parker vs. Moore, 23 N. J. Eq. 228, 240.

[24] Loring on Trustees, 13.

See § 1332, Who should be appointed guardian; §§ 74-83, Who should be appointed executor; §§ 115-123, Who should be appointed

§ 1253. Jurisdiction of Probate Court, etc.

The enforcement and management of trusts from the peculiar nature and character of the interests involved, fall within the ordinary powers of a Court of chancery jurisdiction; and where not otherwise provided, it still will come within the power of the equity side of our Court of Common Pleas. The Probate Court being a Court of limited jurisdiction, it only has power over a trust when such power is given by some positive provision of our statute law; and an examination of the General Code will show that no exclusive jurisdiction is given to the Probate Court in its control over trusts and trustees like there is over guardians or administrators and executors.[25]

Secs. 10591, G. C., to 10600, G. C.,[25*] confer power upon the Probate Court where the trustee is appointed in a will or where the trust is created by a will, and sec. 11014, G. C.,[26] relates to non-resident minors, idiots, lunatics or imbeciles. It seems therefore that unless a trust comes within one of these statutory provisions that the Probate Court has no authority in the matter, unless possibly there might be some matter pending in the Probate Court in which it would be necessary to appoint a trustee to care for such fund as is provided in sec. 11031, G. C.[26*] If another Court appoint a trustee, such trustee will remain under the jurisdiction of the Court that makes the appointment. It would hardly be within the power of the Chancery Court to appoint a trustee and direct such trustee to account in the Pro-

administrator: § 1548, Who should be appointed assignee.

25 § 10492 G. C., § 27.

Where a will rests a discretion in a trustee, such trustee becomes under the original jurisdiction of the Probate Court, and the Court of Common pleas is without jurisdiction in an original action to determine whether or not the welfare of the ward requires the sale of the property, etc. Stasel vs. Rieter, 24 Dec. 288.

25* § 1256.

26 § 1274.

26* § 1286.

Section 10591 *et seq.*, are not mandatory in their provisions, but simply directory as to what court has jurisdiction to appoint a trustee. Where no trustee has been appointed by the Probate Court, where the will is probated, then the Probate Court of any county in which the will has been recorded, and in which the beneficiary resides, may make such appointment. Boals vs. Clingan, 6 N. P. (N.S.) 609; 16 Dec. 267; and such court could order a sale of real estate.

An annuity may be assigned, and where an estate has all its legal debts paid, and parties holding an annuity agreeing thereto, the estate may be finally settled. Trust Co. vs. Kirby, 17 Dec. 196; 4 O. L. R. 304.

bate Court for the funds in his hands. A testamentary trustee, unless the will is a foreign will, is under the control and within the jurisdiction of the Court of the county in which the will is admitted to record.[27]

If it be a foreign will, such trustee must give bond and therefor be accountable to the Probate Court of the county in which any lands are situate that are effected by the trust,[27*] and trustees of non-resident minors, etc., are only appointed by the Probate Court of a county in which there is situated some real estate, goods, chattels, rights, credits, moneys or effects belonging to such non-resident minors, etc.[28]

The Probate Court has no power, however, to construe a trust. If a trustee is in doubt about any of the provisions of the instrument creating the trust, he may file a petition in the Court of Common Pleas and get a construction of such instrument.[29]

It would seem from the provisions of sec. 11029, G. C.,[30] which requires a trustee who has received his appointment by virtue of a *deed,* to account in the Probate Court, that the Probate Court would have jurisdiction of a trust of that kind, except when the deed or will creating the trust, designates some other tribunal as a proper one in which to make a settlement, or where some other tribunal has in some method acquired jurisdiction.[31]

§ 1254. Application, etc.

There is no statutory requirement that an application should be filed for the appointment of a trustee as there is in the State of Massachusetts. There it is required that the appointment shall be made by petition, and it is said that the petition should state in general terms the nature of the trust, the manner in which it was created and the willingness of the petitioner to accept the trust and give the bond required.

If the appointment is necessary in consequence of a vacancy in the office of trustee, the petition should set forth the fact, and state in what way the vacancy was occasioned, whether by

[27] § 10591 G. C., § 1256.
[27*] § 10598 G. C., § 1268.
[28] § 11014 G. C., § 1274. Schouler on Exrs. 472.
[29] §§ 10857-8 G. C., § 33.
[30] § 1293.
[31] See § 11301 G. C., § 1295, Power over execution of trust.

the omission of the testator to make an appointment, or by the resignation or death of a former trustee, or otherwise.

Any person interested in a trust estate may petition for the appointment of a trustee. A citation to parties interested will be ordered before an appointment is made, unless their written assent is given to the prayer of the petition.[32]

The above taken from a leading work on the probate law of Massachusetts, is very applicable to what should be done in the way of making a formal application for letters for a testamentary trustee. In our State the Court might make an appointment without such a formal application, but in order that the proceedings may show on their face their exact nature and character, and the Court may be informed of the nature and character of the estate, a written application should in all instances be required.

§ 1255. Form of application for appointment of trustee.

Of and for....., beneficiary under will of..... ....., deceased.
In the Probate Court of.....County, Ohio.
The undersigned....., a resident of the county of..... .....and State of Ohio, and whose postoffice address is..... .....county, Ohio, hereby makes application to be appointed trustee of and for....., a beneficiary under the last will and testament of....., late of.....county, Ohio, deceased.
Said....., being sworn says, That the property and estate of said beneficiary.....that will come into h....hands as such trustee, or of which..he will have the care and management, according to the terms and requirements of said trust, will be, as nearly as can now be stated, as follows:

Real estate, subject to sale by said trustee, estimated value, $.....
Probable annual rents of real estate - - - - - $.....
Personal estate, - - - - - - - - - - - $.....
Probable annual income from moneys invested or to be invested, - - - - - - - - - - $.....
.....

The State of Ohio,.....County, ss.
....., being first duly.....say..the foregoing statement is true as..he verily believes.
.....
Sworn to and subscribed before me this.....day of.....190..
.....Probate Judge.

§ 1256. Trustees appointed by will to give bond, unless, etc. "Every trustee appointed in a will, before entering upon his

[32] Smith Pro. Law, 136.

duty as such, must execute a bond with freehold sureties, payable to the state, in the probate court of the county in which such will is admitted to probate, to the satisfaction of the court, conditioned for the faithful discharge of his duties as trustee; except that, when by the terms of a will, the testator expresses a wish that his trustee may execute the trust without giving bond, the court admitting the will to probate, may grant permission to the trustee to execute the trust with or without bond. When granted without bond, at any subsequent period, upon the application of a party interested, the court may require bond to be given; and, upon the application of an interested party, if deemed necessary, require a new or additional bond at any time before the completion of the trust." [R. S. § 5981.][33]

§ 1257. Comments.

By the provisions of the above section it is made mandatory upon every trustee appointed in a will, before entering upon his duty, to execute a bond with freehold sureties to the satisfaction of the Court unless the will expressly otherwise provides, and even then it is left in the discretion of the Court whether to obey the requests of the will or not. If the Court is advised by a petition or otherwise that a certain person has been selected by the testator for a trustee, the Court should cite such person to appear and accept the trust or decline, in the same manner persons entitled to the administration of an estate are cited, and if the person neglects to appear and refuses to give a bond, the Court should declare the trusteeship vacant and proceed to appoint some suitable person. It is no doubt the intention of these statutory provisions that no person should be qualified as a trustee or entitled to act as such, until he has complied with the requirements of giving a proper bond. The statute specifically provides that if he fails to give a bond he shall be removed. This statute is as follows:[34]

[33] § 10591 G. C.

The sureties on the bond must be inhabitants of the State. § 10611 G. C.

[34] § 101, as to new or additional bonds. § 243 *et seq.*

This section is merely directory as to what court should appoint. Boals vs. Clingman, 6 N. P. (N.S.) 609; 16 Dec. 267.

Where a party is both executor and trustee, separate bonds should be given. P. C. & St. L. R. R. vs. Schmidt, 4 C. D. 535; 8 O. C. C. 355.

§ 1258. Removed on failure to give bond. "If such trustee fails to give bond within the time ordered by the court, he shall be removed from his trust, or be considered to have declined it; and another person may be appointed in his stead, upon giving the required bond." [R. S. § 5983.][35]

§ 1259. Form of trustee's bond.

Know all Men by these Presents:

That we,.....as principal and..... and.....as sureties, are held and firmly bound unto the State of Ohio, in the just and full sum of.....dollars, for the payment of which sum well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators, and each of them firmly by these presents. Signed by us this.....day of..... A. D. 190.., at....., Ohio.

The condition of this obligation is such, that whereas, on the.....day of....., 190.., the Probate Court of the county of..... .....in the said State of Ohio, appointed the said..... as trustee for and of certain estate of..... The object and purpose of said appointment and trust being: That by the last will and testament of....., late of said county of..... ....., deceased, which said last will and testament has been duly admitted to probate and record in said Court, it was among other things provided.....

Now if the said.....as such trustee of said..... .....shall well and truly do, perform and discharge with fidelity, all and singular the duties which he as such trustee ought to do, perform and discharge, and act in all things as required by law, and faithfully account for all money and funds that may come into his hands as such trustee, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

This bond approved in open Court, this.....day of.....190.. .....Probate Judge.

The State of Ohio,.....County, ss.

I,....., trustee of....., do solemnly swear that I will faithfully and honestly discharge the duties devolving upon me as such trustee, as I will answer to God.

Sworn to before me and signed in my presence, this.....day of..... .....190...

....., Probate Judge.

§ 1260. Appointment of trustee.

While the testator may designate a person as trustee, it is undoubtedly the purpose of our statute that no one shall be qualified to act in that capacity until he has given the required bond.[36]

A testator may select any one that he chooses and may appoint a person actually unable or unfit as his appointee, and

[35] § 10593 G. C.

[36] P. C. & St. L. Ry. Co. vs. Schmidt, 8 C. C. 355; 4 C. D. 535.

such person will be entitled to act, and could only be removed for cause.[37]

Before the passage of the statute requiring bonds to be given by testamentary trustees, it was probably the law that no issue of letters testamentary was necessary, and such seems yet to be the law in the State of New York,[38] and there does not appear to be any express statutory provision authorizing or directing the Probate Court to issue letters testamentary. But as no person is entitled to act as trustee unless he has given bond, it follows as a very proper, if not necessary, practice that letters for testamentary trustees should be issued as evidence of the fact that a proper bond has been given. If the will authorizes some person to designate who the trustee should be, the person so designated will be entitled to make the appointment in the same manner as if he was designated in the will. Where the Court is called upon to appoint a trustee, it will only appoint a person who is actually and legally capable and fit, and it will have due regard to the wishes of the maker of the trust if they can be discovered.[39]

Generally, Courts will not appoint a non-resident as trustee, but statutes providing that no non-resident should be appointed have been held unconstitutional.[40] If the beneficiaries all agree on a person, the Court will nearly always appoint him, even though he be a beneficiary or otherwise unfit.[41]

§ 1261. Entry for appointment of trustee.

This day this matter came on to be heard upon an application by a petition filed herein by A. B. for the appointment of a trustee (here state how the trust was created and should usually be designated, by giving items of the will of the deceased). And it appearing to the Court that (here recite facts; that is, that the will was duly probated and such facts as will show that it is proper that a trustee should be appointed). And it appearing to the Court that a trustee is necessary and that C. D. is a suitable person to be appointed, and he having filed in this office a statement, duly verified by his affidavit of the whole estate, and the probable

[37] Wetmore vs. Truslow, 51 N. Y. 338.

See §§ 79-81, Legally competent.

[38] Redf. Sur. Prac. 272.

[39] Perry on Trust, § 36; Story, Eq. 11th ed., vol. 2, § 1289; Underhill on Trust, 408.

[40] Ghirk vs. La Fayette, 52 Fed. Rep. 857.

[41] Young vs. Young, 4 Cranch C. C. 499.

§ 116, Residence of administrator; § 1332, Who should be appointed guardians.

value thereof, and also the probable rents of the real estate. It is ordered that said C. D. be appointed such trustee upon giving bonds with sureties, as required by law, in the sum of.....dollars. (The general practice is that the bond is filed at the same time. If this be done, the entry may continue as follows:)

And thereupon came the said A. B. and accepted the appointment as trustee of.....and filed herein his bond in the sum of..... .....dollars, conditioned according to law, with..... and....., freeholders, as sureties thereon, which bond is approved by the Court.

It is therefore ordered that letters of trusteeship issue to said A. B. and that this proceeding be recorded, and that said trustee pay the costs herein taxed at.....dollars.

§ 1262. Form of letters of trusteeship.

Of and for....., beneficiary under will of..... ....., deceased.

The State of Ohio,.....County, ss.

Be it known, That heretofore, to-wit, on the.....day of..... .....A. D. 190...,.....was by the Probate Court of .....county, Ohio, appointed trustee of and for..... ....., beneficiary under the last will and testament of..... ....., late of.....county, Ohio, deceased, to whom is hereby granted all and singular, the powers necessary, and by law required to enable..h....the said.....to faithfully execute said trust and perform all and singular the duties of such trustee, according to the statute in such case made and provided.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said Probate Court at.....in said county, this..... day of.....190..

....., Probate Judge,
And ex-officio Clerk of the Probate Court.

§ 1263. Inventory of estate.

The statutes nowhere require that a testamentary trustee should file an inventory. It is the practice of some Courts to require inventories to be filed in the same manner as guardians are required by statute. This is to be commended and should be followed in all cases except where the exact amount of funds coming in the hands of the trustee is shown in an account of an executor or a preceding trustee. It is exceedingly important to beneficiaries, as well as to the trustee himself, that it be definitely known what the exact amount of the funds or property was which came into his hands. If no inventory is filed, the property with which the trustee is charged may depend upon a number of extraneous circumstances, and result in misunderstanding and faulty accounts in the future.[42]

[42] § 1367, Guardian's inventory.

§ 1264. Separate bond from each trustee or joint bond. "When two or more persons are appointed trustees by a will, the probate court may take a separate bond from each, with sureties, or a joint bond from all, with sureties." [R. S. § 5984.][43]

§ 1265. Surviving trustee may execute trust. "When two or more trustees are appointed by will, to execute a trust, and one or more of them dies, declines, resigns, or are removed, the survivors or remaining trustees or trustee may execute the trust, unless the terms of the will express a contrary intention." [R. S. § 5985.][44]

§ 1266. When Probate Judge may appoint person to execute a trust. "If a testamentary trustee dies, declines to accept, resigns, becomes incapacitated, or is removed, and such will has not provided for the contingency of the death, incapacity or refusal of such trustee or trustees to accept or execute the trust, or such will names no trustees, the court having probate of the will may appoint some suitable person or persons to execute the trust, according to the will, who must give bond with security as provided herein." [R. S. § 5986.][45]

§ 1267. Trusts created by foreign will. "Trusts created by a will made out of this state, and relating to lands situated herein, after the will is duly admitted to record in this state, may be executed as hereinafter provided." [R. S. § 5987.][46]

[43] § 10594 G. C. This section is very much similar to § 10611 G. C. (§ 86), where separate bond may be taken from executors.

See §§ 86 and 201 *et seq.*, for law as to separate bond, etc.

[44] § 10595 G. C.

[45] § 10596 G. C.

This section carries into effect the principle of law, that a trust will never be allowed to fail for reason of the want of a trustee, and it especially confers jurisdiction upon the Probate Court to designate and appoint a proper trustee in the emergencies provided by the above section. Taylor vs. Galloway, 1 O. 232; Hunt vs. Freeman, 1 O. 490; Steele vs. Worthington, 2 O. 182; Dabney vs. Manning, 3 O. 321.

The above section would authorize the Court to appoint a trustee, although there was one trustee living, provided the will did not show that the power given to the first trustee was a personal trust and confidence that could not be exercised by others. Sowers vs. Cyrenius, 39 O. S. 29.

See §§ 11035-6-7 G. C., § 1300.

[46] § 10597 G. C.

As to how foreign will may be admitted, § 1118 *et seq.*

One trustee died, and another removed to place unknown, the Probate Court had power to fill vacancies, although there was a surviving trustee. Sowers vs. Cyrenius, 39 O. S. 29.

§ 1268. Id. Trustee named in foreign will to give bond. "If a trustee is named in such foreign will, he may execute the trust, upon giving bond to the state in such sum and with such sureties as the probate court, of the county in which such lands or a part thereof are situated, approves, conditioned to discharge with fidelity the trust reposed in him; except that, if the testator in the will naming the trustee orders or requests that bond be not given by him, bond shall not be required, unless from a change in the situation or circumstances of the trustee, or for other sufficient cause, the court of probate thinks proper to require it." [R. S. § 5988.][47]

§ 1269. How trustee appointed by foreign court may execute a trust. "If a trustee has been appointed by a foreign court according to the laws of the foreign jurisdiction, he may execute the trust upon giving bond as provided in the next preceding section, and satisfying the probate court of the county in which such lands, or a part of them, are situated, by an authenticated record of his appointment, that he has been duly appointed trustee to execute the trust." [R. S. § 5989.][48]

§ 1270. Comments.

The above section places it within the power of a person who has been appointed by a foreign Court to execute the trust in reference to lands situate in our State. Where such foreign trustee wishes to act here, he should apply to the Probate Court of the county in which the lands are situate or some part of them; and he should file an application setting forth the fact of his appointment in some foreign Court, giving the name of the Court and, should describe the character and nature of the trust, and with his application he should file an authenticated record of his appointment. Having made the proper application, it would seem that the Probate Court must allow

[47] § 10598 G. C.

When a trustee is to be appointed under a foreign will, an application should be filed setting forth the facts that such will has been filed and admitted to probate, or record in the county in which the application was made to have a trustee appointed; and the statute gives a discretion in the requirement of a bond being filed where the testator dispenses with such bond.

[48] § 10599 G. C.

him to execute the trust. But before such foreign trustee can enter upon the discharge of his duties, he must file a bond in the same manner as a home trustee would be required. And having filed the bond it would follow that the Court should issue to him letters evidencing his appointment as trustee.

§ 1271. Probate Court may appoint a trustee under a foreign will. "When necessary, the probate court of the county where the property affected by the trust is situated, on application by petition of the party or parties interested, may appoint a trustee to carry into effect a trust created by a foreign will; which trustee, before entering upon his trust, must give bond, with such security, and in such amount, as the court directs." [R. S. § 5990.][49]

§ 1272. Comments.

It would seem that before a trustee could be appointed under the above section, it would be necessary that the foreign will should have been admitted to record. This being done, it would likewise be necessary that there is some property within the county in which the application was made. Then if it is necessary to carry out the trust, some party in interest must file an application. This application may be very much similar to the one asking the appointment of a home trustee,* it should set out the fact of the existence of the foreign will, and the fact that such will has been admitted to record and such other facts as will show the necessity of the appointment of the trustee. This being shown and bond being given in an amount which the Court shall think proper, letters of trusteeship should issue. In all cases it is advisable that the trustee appointed, be a resident of the county in which the estate is located, for then jurisdiction over such trustee can easily be exercised. There may be cases, however, especially under a foreign will, in which it would be much better for the trust if some person were appointed who is familiar with matters surrounding the testator's domicile.

[49] § 10600 G. C. * § 1255.

CHAPTER LXVIII.

TRUSTEES FOR NON-RESIDENT.

§ 1273 Introductory.
§ 1274 How trustees are appointed for non-residents.
§ 1275 When appointment to be made.
§ 1276 Jurisdiction.
§ 1277 Bond and duties.
§ 1278 Trustee may lease or sell real estate as guardian of minor.
§ 1279 How long trustee to hold office.
§ 1280 When and to whom trustee shall pay over money.
§ 1281 Comments.
§ 1282 How foreign guardian, etc., may collect money.
§ 1283 Petition, etc.
§ 1284 Entry and notice.
§ 1285 Hearing, etc.
§ 1286 Trustee may loan money in certain case.

§ 1273. Introductory.

In addition to the appointment of trustees provided for by a will or deed,[1] the statute further provides that trustees may be appointed to take care of the estate of a non-resident. Secs. 11022 to 11024 of the General Code provide for the appointment of trustees of non-residents by courts of record, when it is shown that there is a fund in a proceeding pending therein which belongs to such non-resident person. These sections further provide that the trustee shall hold such funds for five years, then the prosecuting attorney shall collect the same and turn it into the county treasury. A trustee of such a non-resident could not very often be appointed by the Probate Court, for the statute makes special provision for direct payment into the county treasury by an administrator or executor when an amount in his hands remains unclaimed.[2]

The only case in which a Probate Court could appoint a trustee of a non-resident adult not an imbecile, would be in a

1 § 11035-7 G. C.

2 See § 10843 G. C.

Section 11028 G. C. provides that the probate court may appoint a trustee to collect and preserve property of a person who has not been heard of for such length of time as to cause the heirs at law to believe he is dead, such person to act until an administrator or executor of his heirs is appointed.

proceeding to sell real estate. The subsequent provisions of this chapter relate to the appointment of a trustee for non-resident minors, idiots, imbeciles and lunatics, and the laws generally applicable to resident minors and lunatics, etc., may be applied in carrying into execution these statutory provisions.[3]

§ 1274. How trustees are appointed for non-residents. "When a minor, idiot, lunatic or imbecile, residing out of this state, has real estate, goods, chattels, rights, credits, moneys, or effects in this state, the probate court of the county where such property or a part of it is situated, if it considers this necessary, may appoint a trustee of such minor, idiot, lunatic, or imbecile, to manage, collect, lease, and take care of his property." [R. S. § 6320.][4]

§ 1275. When appointment to be made.

The first necessary condition for an appointment to be made for a non-resident minor, etc., is the fact that there is property within the county where the Probate Court is located in which it is sought to have an appointment made. Before the Court should make an appointment, an application should be filed; if the person be a minor, reciting the same facts as is required in the appointment of a resident minor. If the person be a lunatic or imbecile, the same proceeding should be had as if the imbecile or lunatic was a resident of the county. Perhaps if there were no next of kin within the county upon whom service could be made, the Court might proceed to make the appointment without having the hearing, provided for in the case of resident lunatics, etc. But the safe and better course to pursue would be to proceed in the same manner as if the lunatic was a resident, and have a proceeding first to find the fact of lunacy and then proceed with the appointment. The forms and entries used in cases of appointment of resident minors, etc., may be used under this section.[5]

[3] See § 1218, Ancillary guardian.
See §§ 1319 to 1500 as to gdns., for minors, etc.
See § 1475 as to foreign gdns.
See §§ 1351, 1480.

[4] § 11014 G. C.

[5] § 1319 *et seq.* See § 1322, Resident of county.
Equity will not let a trust fail for want of technical words in its creation, or for want of a trustee. Robbins vs. Smith, 27 O. C. C. 91; 12 Lon. D. 164.

§ 1276. **Jurisdiction.** "The appointment of a trustee, first made, shall extend to all the property, and effects of the minor, idiot, lunatic, or imbecile in this state, and exclude the jurisdiction of the probate court of any other county." [R. S. § 6321.][6]

§ 1277. **Bond and duties.** "The trustee shall give bond, payable to the state, with such sureties, and in such sum, not less than double the value of all the property that will probably come into his hands, as the court approves, and take upon himself the care and management of the property of such minor, idiot, lunatic, or imbecile, situated in this state, the collection of debts and other demands due such minor, idiot, lunatic, or imbecile, from persons residing or being in this state. He shall settle with the court, and be liable to suit or removal for neglect or misconduct in the performance of his duties, as provided by law in respect to guardians of minors, and for the settlement of the accounts of trustees. Such surety or sureties may be discharged in the manner provided by law for the release of sureties of guardians." [R. S. § 6322.][7]

§ 1278. **Trustee may lease or sell real estate the same as guardian of minor.** "The trustee may lease or sell the real estate of such minor, idiot, lunatic, or imbecile, under the rules and limitations provided by law for the sale of real estate by guardians of minors in this state." [R. S. § 6323.][8]

§ 1279. **How long trustee to hold office.** "Unless removed by the court, the trustee shall hold his appointment until such minor arrives at the age of majority, whether or not such minor be under twelve or over fourteen years of age at the time of appointment, or until the disability of such idiot, lunatic or imbecile is removed, or the minor, idiot, imbecile, or lunatic dies." [R. S. § 6324.][9]

[6] § 11015 G. C.

This section seems to be a matter of surplusage for a general provision of the R. S. makes a like provision. § 10498 G. C., § 27.

[7] § 11016 G. C.

The bond and letters used in the previous chapter can easily be applied to suit an appointment under the above section. §§ 11035-6-7 G. C., § 1300, in the next chapter, provides for the removal of such trustee.

[8] § 11017 G. C. See §§ 10961, 11017 G. C., § 1432, Power to lease; §§ 10994-5-6 G. C., § 1522, Sale by guardian; § 10946 G. C., § 1410, for lease and sale of real estate.

[9] § 11018 G. C.

§ 1280. When and to whom trustee shall pay over money. "All moneys due to such minor, idiot, lunatic, or imbecile, in the hands of such trustee, during the minority of such minor, or the disability of such idiot, lunatic or imbecile, shall be paid over to his foreign guardian, so far as necessary or proper for his support and maintenance, or in case of his decease, to his administrator or other legal representative; if the court which appointed such trustee has satisfactory proof, as hereinafter provided, of the authority of such guardian, administrator, or other legal representative, to receive the moneys or estates of such minor, idiot, lunatic or imbecile, and that the security given by such guardian, administrator, or other legal representative, is sufficient to protect his interest or estate, and deems it best for him, or his estate." [R. S. § 6325.][10]

§ 1281. Comments.

The provisions of this section when read with the previous one would seem to indicate a purpose on the part of the Legislature not to permit a trustee when once appointed to pay over the entire fund to a foreign trustee, but only so much thereof as might be necessary for the maintenance and support of the non-resident minor, etc., and even in such cases, the Court which appointed the trustee must have satisfactory proof that such foreign guardian, etc., or where the non-resident minor, etc., has died, his administrator, is entitled to receive the money and the Court must be further satisfied that the foreign guardian or administrator has given sufficient bond in such jurisdiction to protect the interest of such minor. Before such local trustee pays over any money to a foreign representative, an application therefor should be made as provided in the next section.

Notwithstanding the provisions of the subsequent sections, it is evidently the intention of the legislature that having once appointed a trustee, that such trustee should hold until the minor becomes of age or until the disability of such idiot, etc., is removed.

[10] § 11019 G. C.

See kindred section, §§ 11940, 11944 G. C., § 1480, § 1476.

§ 1282. How foreign guardian, etc., may collect money. "When a foreign guardian, administrator, or other legal representative of such minor, idiot, lunatic, or imbecile, applies to have all or any of the moneys or property in the hands of such trustee paid or delivered to him, he must file his petition, or motion, to that effect, in the court by which such trustee was appointed, giving such trustee thirty days' notice of the time of hearing thereon, and also produce an exemplification from under the seal of the office, if there be a seal, of the proper court of the state of his residence, containing all the entries on record in relation to his appointment and qualification, authenticated as required by the act of Congress in such cases. Upon the hearing thereof, the court shall make such order, as, under the circumstances it deems for the best interests of such minor, idiot, lunatic, or imbecile, or his estate." [R. S. § 6326.][11]

§ 1283. Petition, etc.

It is necessary that the foreign guardian or administrator file his petition and this must be done in the Court in which the local trustee was appointed. This petition may be in the following form:

(*Title.*)

Now comes A. B. and represents to the Court that on the.....day of .....he was duly appointed by a Court having proper jurisdiction of the same, situate at.....in the State of..... ....., as guardian of E. F., an alleged imbecile, and that he is still acting in that capacity. He further represents to the Court that on the .....day of....., one G. H. was appointed by this Probate Court as a trustee under the provisions of the General Code for property belonging to the said E. F., situate in this county.

He further represents to the Court that it is necessary for the support and maintenance of the said E. F., that the property now in the hands of the said G. H. be paid over to him. He further represents to the Court that he has attached hereto and marked "exhibit A," an exemplification under the seal of the office of the Court, wherein he received his appointment, containing all the entries on record in relation to his appointment, which shows that he has given bond in the ..... sum of ..... dollars, which facts are authenticated, as required by the Act of Congress in such cases.

He further represents that the laws of the State of ....., in which he received his appointment, have made a similar provision to the laws of Ohio, as to the payment of funds to a foreign guardian or trustee.

[11] § 11020 G. C.

Wherefore he asks that notice of the filing of this petition be given to G. H., at least thirty days before the time of hearing the same, and upon the hearing of this application, it may be ordered that the said G. H. shall deliver to the undersigned the funds in his possession belonging to the said E. F., an alleged imbecile.

.....

Sworn to before me and subscribed in my presence this.....day of....., 190..

§ 1284. Entry and notice.

Upon the above application being filed in the Probate Court, the Court should make an entry setting the matter down for hearing and ordering that at least thirty days' notice thereof be given to the local trustee. The entry may be in the following form:

(*Title.*)

This day came A. B. and filed herein his petition that G. H., trustee of E. F., an alleged imbecile and a non-resident of this State, be required to transfer to the said A. B. as guardian of said E. F., appointed within the jurisdiction of the domicile of E. F., the funds now in the possession of the said G. H.

Whereupon it is ordered that the said cause be set down for hearing on the.....day of....., 190.., at least thirty days' notice of the filing of the said petition, and the time of hearing thereof be given to said G. H.

The following may be used as form of notice to the trustee (guardian), etc.:

(*Title.*)

To G. H., Trustee (guardian) of E. F.:

You are hereby notified that on the.....day of....., A. B., guardian of said E. F., appointed within the jurisdiction of the domicile of said E. F., has made application to this Court to have the funds now in your hands turned over to him as such guardian. Said cause has been set for hearing on the.....day of....., at which time you are ordered to be present and answer concerning said application and whether the interest of your said ward will justify the removal of the funds now in your possession.

§ 1285. Hearing, etc.

The Court being satisfied that the local trustee has due and proper notice, a careful investigation should be made of the allegation of the petition in reference to the fact whether it would be for the best interest of the non-resident imbecile to

have the fund transferred beyond the jurisdiction of this Court. The Court should be exceedingly careful to ascertain that the proceedings show that the foreign guardian has given ample bond, and the Court should further investigate whether such foreign representative is a proper and suitable person to have charge of the fund. If the Court is not satisfied that the best interests of the non-resident imbecile, minor, etc., will be better subserved by the transferring of the fund than its remaining, the application should be refused.[12]

FORM OF JOURNAL ENTRY.

(Title.)

This day this matter came on to be heard upon the application of A. B., a guardian of E. F., residing within the jurisdiction of the residence of the said E. F., for an order of this court, requiring G. H., the trustee (or guardian) of said E. F. appointed by this Court; and was submitted to this Court upon the pleadings and testimony. Whereupon the Court finds, after due consideration, that G. H. has had due and legal notice of the pendency of this proceedings and the prayer thereof as required by law and the former orders of this Court. That the allegations of the petition are true and that the said A. B. has filed in this Court an exemplification from under the seal of the office of the Probate Court of the State of his residence, containing all the entries recorded in relation to his appointment.

The Court further finds that the bond given in the Court which made the appointment of said A. B. is ample to cover the fund to be received in this proceeding, and that the laws of the State in which said A. B. received his appointment contain similar provisions to the law of this State referring to the transfer of such fund; and the Court being further satisfied that under all the circumstances it will be for the best interest of said ward and of his estate, it is hereby ordered that G. H., within.....days file his account in this Court and that upon the final hearing of said account he transfer the fund in his hands to the said A. B.

§ 1286. Trustee may loan money in certain case. "When money of such minor, idiot, lunatic, or imbecile is in the hands of such trustee, and not likely to be needed for the support and education of such minor, idiot, lunatic, or imbecile, such trustee shall loan it in the manner guardians by the laws of this state are required to loan the moneys of their wards." [R. S. § 6327.][13]

[12] §§ 10941-2 G. C., § 1477.

A foreign guardian ineligible to appointment in Ohio will not be permitted to collect money due a ward in this State.

[13] § 11021 G. C.

See § 10933 G. C., as to the manner guardians should loan money, § 1367, § 574, and § 11214 G. C. as to how trustee should loan money.

CHAPTER LXIX.

TRUSTEE. DUTIES. ACCOUNTING, ETC.

§ 1287 Duties of trustee.
§ 1288 Principal and income.
§ 1289 Dividends.
§ 1290 Gain and loss.
§ 1291 Alteration and repairs.
§ 1292 Expenses. Taxes. Insurance.
§ 1293 Trustees must render biennial account.
§ 1294 Citations and notices.
§ 1295 Probate Court to determine as to execution of trust.
§ 1296 Comments.
§ 1297 Appeal from determination of Probate Court.
§ 1298 Force and effect of determination.
§ 1299 Allowance of compensation.
§ 1300 When Court may accept resignation of trustee or remove him.
§ 1300a When trustee under a will may be removed.
§ 1300b Trustee to be removed when guardian appointed.
§ 1301 Removal of trustee, etc.
§ 1302 Causes for removal.
§ 1303 Distribution of fund.
§ 1304 Termination of trust.

§ 1287. Duties of trustee.

As executors, administrators, and guardians are trustees in the general sense of the term, various duties and liabilities of testamentary trustees and trustees for non-residents are discussed in this work when treating of administrators, executors, and guardians. A testamentary trustee must be controlled largely by the instrument creating the trust, and in this respect is very much similar to an executor,[1] except that it is the duty of an executor, strictly speaking, not to hold and manage the estate, but to convert it into money and make distribution, where an executor or a trustee is to hold and manage the estate, the general rules and liabilities applicable to guardians would be applicable to them, and such matters will be discussed when treating of the subject of guardians.[2]

[1] See § 516, as to discussion of care and management of assets by executor and administrator. § 1378, as to guardian.

[2] See § 1378.

It might not be amiss here to state a few general principles applicable to trustees in the performance of their duties. The trustee is liable for his errors in judgment (unless expressly exempted) in the performance of his duties, but not in the exercise of his discretionary powers.[3] He is held to perform his duties with reasonable discretion, that is to say, with the same intelligence that a reasonable man would use in the transaction of his own affairs; the fact that he is incompetent is no excuse. He must be at the pains to learn his duties.[4]

For instance, it being the duty of the trustee to invest the trust funds, if he invests too large a proportion in certain securities or if he uses poor judgment in investing, he will be liable for the loss, irrespective of his honesty. But he is not supposed to be infallible, and where he has acted with that amount of discretion which an ordinarily prudent man uses in his own affairs,[5] and honestly, he will be protected; and even where he has acted in good faith only the Court will treat him leniently, and give him the benefit of the doubt,[6] especially if he is acting under advice of counsel,[7] since this fact shows that he used due diligence, though it is not in itself an excuse.[8]

And some other matters are equally well settled, that he can not do. He cannot deal with the estate for his own profit, or for any purpose unconnected with the trust. All his skill and labor must be directed to the advancements of the interests of his beneficiaries.[9] He may take no benefit directly or indirectly from the estate or his office, except the regular compensation allowed by law, and if he take a present or be paid a

[3] Miller vs. Proctor, 20 O. S. 442.

[4] Hun vs. Cary, 82 N. Y. 65. In Pierce vs. Prescott, 128 Mass. 140, a guardian was held liable for not knowing the law of distribution. C. J. Gray cites many other cases in the opinion.

[5] *In re* Cousin's Estate, 111 Cal. 441.

Wells vs. Brancher, 79 O. S. 289.

[6] Crabb vs. Young, 92 N. Y. 56.

[7] Perrine vs. Vreeland, 33 N. J. Eq. 102.

[8] Gilbert vs. Sutliff, 3 O. S. 129; Stott vs. Milne, 25 Ch. D. 710; Boulton vs. Beard, 3 De G., M. & G. 608; *in re* Westerfield, 32 App. Div. (N. Y.) 324. Loring Trustee's Handbook, 126.

[9] Arnold vs. Brown, 24 Pick. 89, 96.

bonus or commission of any kind in a trust transaction by a stranger, he must account to the trust for it.[10]

He cannot set off his own debts in equity against one who sues him as trustee. He cannot use the real estate or chattels, or pledge any of the property, as security for his debts. Nor can he purchase them directly or indirectly at public or private sale,[11] except by arrangement with all the beneficiaries, or under leave of Court,[12] or at a judicial sale which he does not control in any manner.[13] It is immaterial that the price paid is a fair one. The transaction is a breach of trust, and may be set aside by the beneficiary,[13*] but no stranger to the estate can question the transaction.[14]

§ 1288. Principal and income.

The duties of an ordinary trustee are different from either an administrator or guardian in this, that the trustee holds the property, the income of which usually is to go to one person, and the principal to another; it therefore becomes very important for the trustee not to intrench upon either fund for the benefit of the other. If he wrongfully pays principal to the life tenant, and the life tenant would become insolvent, the trustee would be sure to suffer a loss, for he must account to the remaindermen for the entire principal notwithstanding he

[10] "This principle has been pushed to a vigorous extent in our own Courts." Chief Justice Lane, in Dunlap vs. Mitchell, 10 O. 117, 120.

Welsh vs. Perkins, 8 O. 52; Armstrong vs. Nuston, 8 O. 552, 554; Glass vs. Greathouse, 20 O. 503; Sheldon vs. Newton, 3 O. S. 494; Barrington vs. Alexander, 6 O. S. 189; Riddle vs. Roll, 24 O. S. 572; Piatt vs. Longworth, 27 O. S. 159; Rammelsberg vs. Mitchell, 29 O. S. 22; Beard vs. Westerman, 32 O. S. 29 See also Perry on Trusts, §§ 602v, 602w, 194-210, 787; 3 Redf. on Wills, 534; 2 Kent's Com. 433, n (c); Tyler on Inf. and Cov. § 175.

[11] Hoyt vs. Latham, 143 U. S. 553; Morse vs. Hill, 136 Mass. 60; Amer. & Eng. Ency. Law, vol 27, p. 197.

See § 492, Purchase by administrator.

[12] Morse vs. Hill, 136 Mass. 60, 67.

[13] Allen vs. Gillette, 127 U. S. 589.

[13*] Denholm vs. McKay, 148 Mass. 434; Davoue vs. Fanning, 2 Johns Ch. (N. Y.) 252; Quirk vs. Liebert, 12 App. D. C. 394.

[14] Harrington vs. Brown, 5 Pick. 519. See § 515, Administrator's care of estate; [3] 1361, Guardian's relation to his trust; § 1603, Diligence required of assignee.

may have innocently paid some of it to the wrong person. In general, at the time the estate comes into the trustee's hands, it is all principal in whatever condition it may happen to be, and all the yearly increase thereafter is income. This would always be true where the property comes into the trustee's hands without delay and invested in proper securities, but if there is a deferred receipt of the principal, the rule might be different. Thus where for any reason the property does not come into the hands of the trustee for some time after the beginning of the trust, and in the meanwhile the life tenant has no benefit from it, the fund when realized must be so apportioned that the life tenant will get the usual rate of interest from the beginning of the trust, and the remainder will be the principal fund.[15]

This may be the case where the amount of a legacy or other fund is not immediately received or not received in full,[16] or where the property being an unsuitable investment is sold for conversion at an interval after the trust went into effect.

The rule is the same whether the property is to be converted because it is unproductive or because the earnings are greatly in excess of interest, as in the case of a business or partnership, or on a wasting investment such as a land stock where the dividends will ultimately exhaust the security. In either case the rule is the same, namely, that sum is to be found which at the current rate of interest for the period from the beginning of the trust to the time of conversion will yield the amount realized. The sum so ascertained is the principal, and the interest is the income payable to the immediate beneficiary.[17]

[15] Kinmonth vs. Brigham, 5 Allen 270; Hagan vs. Platt, 48 N. J. Eq. 206; Westcott vs. Nickerson, 120 Mass. 410. See § 943, Dower.

[16] Cox vs. Cox, L. R., 8 Eq. 343.

[17] Loring's Trustee's Handbook, 105.

For instance, in a case where a trustee who had wasted the estate was removed and only part of the estate was recovered by his successor, the amount of the original estate was $30,000, and the whole amount recovered after one year and two months was $26,000. The tenant for life got $1,742.50, which is the interest at six per cent. on $24,257.50, the new capital for one year and two months. Parsons vs. Winslow, 16 Mass. 361; Maclaren vs. Stainton, L. R., 11 Eq. 382; Meldon vs. Devlin, 31 App. Div. 146 (N. Y.); Greene vs. Greene, 19 R. I. 619.

Where the amount recovered is damages for an injury it[18] need not be apportioned, as the fund invested will yield an income.[18*]

§ 1289. Dividends.

The fluctuating character and the various methods pursued in declaring dividends makes it often a difficult question to determine whether they belong to the principal or are income. All ordinary dividends declared during the life tenancy as a general rule may be considered as income and not as principal, and this is irrespective of the time when the funds were earned out of which the dividends are declared.[19]

No part of the company's property belongs to a stockholder until it is separated and declared as a dividend; hence a dividend is an independent debt payable to the stockholders of a certain day, and remains principal until separated from the other funds and declared payable to the stockholders,[20] and therefore is never apportionable, and is always payable, no matter when paid, to the person entitled to the same at the time[21] specified in the vote. As to extra dividends, the law is not uniform in all jurisdictions as to whom they belong.[22] The early English rule was that the extra dividends or additions to the usual annual dividend, whether paid in cash or in capital stock went to the principal.[23]

But it seems to be now generally held that cash dividends, extra dividends, or bonuses declared from the earnings of corporations are income and not principal.[24] But the enhanced

[18] Heard vs. Eldredge, 109 Mass. 258.

[18*] See Fritter vs. Withoff, 47 Bull. 787, where annuity was held to bear the loss.

[19] 5 Am. & Eng. Ency. of Law, 736.

[20] Granger vs. Bassett, 98 Mass. 462; Bates vs. McKinley, 31 Beav. 280.

[21] Clive vs. Clive, Kay, 600. *Contra*, Johnson vs. Bridgewater Mfg. Co., 14 Gray 274; Hite's Devises vs. Hite's Exrs., 93 Ky. 257. See Lang vs. Lang Ex., 57 N. J. Eq. 325, where dividends are apportioned like interest.

[22] Underhill on Trust, 226; Perry on Trust, § 545.

[23] 5 Am. & Eng. Ency. of Law, 736.

[24] See authorities cited in 5 Am. & Eng. Ency. of Law, 737. The article thereon being a contribution by the author.

See Barbour vs. Gallagher, 23 O. C. C. (N.S.) 490; 2 O. App. 205. Distribution of accumulations.

price for which stock sells by reason of dividends earned but not declared belong to the principal.[25]

§ 1290. Gain and loss.

It is likewise important for a trustee to know where there are gains and losses whether the same should be paid by the life tenant or the remainderman. The general rule is that, any gain other than the usual yearly income, and any loss other than the usual yearly charges, fall to the principal of the fund.[26]

Gain or loss in continuing a business temporarily until it is converted is to be apportioned,[27] but where the business is conducted under direction of the trust instrument, ordinarily all the income will go to the life beneficiary. When a trust estate consists of country real estate, timber cut for thinning will be income, other timber, principal, and it has been held that gravel sold will be income, but probably not to such an extent as to be waste. If the property in trust consists of chattels, which are intended to be used and not converted into cash and invested, the life tenant may wear them out in ordinary use, and need not replace them.[28]

If the property consists of farming stock, it should be converted, unless intended to be used by the life tenant. The life tenant cannot sell it and replace it by other kinds of stock, but he may use it up, and need not replace it, when it dies. The natural increase of the stock will belong to the life tenant.[29] Where, however, the stock is left with a farm, and there is an intention expressed or implied that the farm shall be kept up, so much of the increase as is necessary to keep up the herd will belong to the principal, and only the excess to income.[30]

[25] See § 374, Annuities and dividends; § 1378, Management of estate by guardian.

[26] Loring Trustee's Handbook, 106. See 47 Bull. 787.

[27] Underhill on Trust, 250.

[28] Wootten vs. Burch, 2 Md. Ch. 190; Woods vs. Sullivan, 1 Swan's 507.

[29] Saunders vs. Haughton, 8 Ired. Eq. 217; Lewis vs. Davis, 3 Mo. 133; Major vs. Herndon, 78 Ky. 123; Hunt vs. Watkins, 1 Humph. (Tenn.) 498.

[30] Calhoun vs. Furgeson, 3 Rich. Eq. 160; Robertson vs. Collier, 1 Hill Eq. 370 (S. C.). But see Flowers vs. Franklin, 5 Watts (Pa.) 265.

§ 1291. Alterations and repairs.

Alterations and additions to real estate whereby usefulness or rental value is increased are chargeable to principal,[31] but the repairs or expenditures which are necessary to maintain the property in proper condition are chargeable to income.[32] It is often a difficult question of fact to decide whether a specified expenditure is an addition to the property or a current repair; but the rule may be stated that, where repairs improve the property to the extent of their cost, they are chargeable to principal, and are a judicious investment of the trust funds.[33]

For instance, the addition of an elevator to a building which previously had none will be charged to principal, while putting in a new elevator in the place of an old one will be a repair chargeable to income, but generally such an addition could only be made by permission of Court.[34] So also an expenditure may be in the nature of both an addition and a repair, and is then chargeable to principal only to the extent to which it benefits the property; and in some States [35] there are statutes allowing an apportionment in such cases. And in any case of doubt, it is well to get the instructions of the Court before undertaking an expensive job, which, if charged wholly to the income, might be very burdensome.[36]

All expenditures on newly acquired property which are necessary to put it in condition to let or to hold, whether they are in the nature of repairs or additions are chargeable to principal.. For instance, fencing in land or repairing a house to obtain a tenant. These expenses, although chargeable to income at other times, on the acquisition of a new estate will be considered as so much additional purchase money, and chargeable to principal.[37] All ordinary current expenses are charged to income. Shaw, C. J., says income means net income after

Life tenant was to keep up farm; increase held to go to remainderman.

[31] Sophier vs. Eldredge, 103 Mass. 345; Caldecott vs. Brown, 2 Hare 144.

[32] Underhill on Trust, 250.

[33] Sophier vs. Eldredge, 103 Mass. 345.

[34] Little vs. Little, 161 Mass. 188.

[35] Penn.

[36] Caldecott vs. Brown, 2 Hare 144.

[37] Parsons vs. Winslow, 16 Mass.

deducting taxes, repairs, and ordinary current expenses,[38] and in some jurisdictions the premiums paid for securities.[39]

§ 1292. Expenses. Taxes. Insurance.

As a general rule all expenses for managing the trust property are charged to income. Extra charges which are beneficial to the principal fund should be charged to the principal or it may be apportioned equitably.[40]

Legal expenses of settling the interpretation of the trust instrument are to be borne by the principal. But the reappointment of trustee should be charged to the income. All annual taxes are charged to the income.[41] An exception to this rule is made in some cases where the property is vacant land.[42]

In case of special assessments, our statute provides that they may be apportioned between the life tenant and remainderman.[43] Carefully drawn trust instruments usually provide that property should be insured and chargeable to income. Where no expressed provision is made in the instrument the general practice is to charge them to the income.[44]

In case of a partial loss, the funds recovered would be used in repairing.[45] In case of a total loss, the fund should be invested,[46] and could be used in rebuilding if such an invest-

361; N. Eng. Trust Co. vs. Eaton, 140 Mass. 532.

[38] Watts vs. Howard, 7 Met. 478.

[39] Loring Trustee's Handbook, 114, 115.

[40] Gordon vs. West, 8 N. H. 444. But see Spangler's Estate, 21 Pa. St. 335, where such charges were held to be the ordinary charges of protecting the property, and so charged to income. Underhill on Trusts, p. 246, n.

[41] See §§ 511, 517, as to taxes and insurance.

[42] Heard vs. Eldredge, 109 Mass. 258; Howland vs. Green, 108 Mass. 283.

[43] § 3895 G. C.

[44] Loring in his valuable little handbook on Trustees, says that there is singularly little authority on this question, probably because in early times in England insurance was not considered a necessary precaution of an ordinary cautious man, and because failure to insure by a life tenant is not permissive waste. Loring Trustee's Handbook, 116.

It would certainly seem to be the law now that such insurance should be charged to the income as it is regarded as within the scope of action of a reasonably prudent man.

[45] Brough vs. Higgins, 2 Gratt. 408.

[46] Lerow vs. Wilmarth, 9 Allen, 382.

Where the owner of real estate died testate on the day on which the taxes became a lien for the

ment is authorized, and will retain its character as real estate, although it may be otherwise where the insurance existed at the time of the will, as in such case the policy was a personal asset at the outset.[47]

If the life tenant insures the property, the remainderman has no claim on the fund recovered, the contract of insurance being merely to indemnify the individual for his loss. The fund recovered does not represent or stand in the place of the building destroyed.[48] But where a trustee insures the building, he will insure all his interest which is subject to the claim of both life tenant and remainderman, and in such case the fund recovered would stand in the place of the property destroyed as the property of the remainderman of which the life tenant has the use.[49]

§ 1293. **Trustees must render biennial account.** "A trustee of a non-resident idiot, imbecile, or lunatic so appointed, and a trustee created by last will or deed, at least once in each two years, must render an account of the execution of his trust, to the probate court of the county in which he was appointed, or in which such last will or deed is recorded, in the manner provided by law for the settlement of the accounts of executors and administrators. This section shall not apply in any case in which the will or deed creating such trust designates a tribunal for the settlement of the trust, or in which any other tribunal has acquired jurisdiction." [R. S. § 6328.][50]

ensuing year, but they were not yet ascertained, a trustee under the will having become the owner must pay such taxes, and not the executor. *In re* Est. of O'Brien, 2 N. P. (N.S.) 421; 14 Dec. 319.

[47] Haxall's Exrs. vs. Shippen, 10 Leigh, 536. In that case the life tenant gave bond to invest money and pay over on death of life tenant, hence had no right to convert.

[48] Harrison vs. Pepper, 166 Mass. 288.

This would be true where only the life tenant's interest is insured.

[49] Graham vs. Roberts, 8 Ired. Eq. 99; Haxall's Exrs. vs. Shippen, 10 Leigh, 536; *In re* Housman, 4 Dem. 404; Loring Trustee's Handbook, 116, 117. See Fleming vs. Jordan, 28 Bull. 332, § 950.

[50] § 11029 G. C.

The account required to be rendered by a trustee, will be very much similar to that required of a guardian, and will be discussed under that head. § 1378.

As for the discussion of administrator's accounting, see § 702 *et seq.*

The account must contain a full

§ 1294. Citation and notices. "The probate court shall issue and have served in the manner provided by law, in the case of settlements by executors and administrators, the necessary citations and notices by publication or otherwise, requiring all persons interested, to attend such settlement and make objections thereto, if any they have." [R. S. § 6329.][51]

§ 1295. Probate Court to determine as to execution of trust. "Such court may hear and determine all matters relative to the manner in which the trustee has executed his trust, and as to the correctness of his accounts, and also require any trustee so created within such county, on the determination of his trust, or removal, resignation, or on his death, his executor or administrator, to render a final account of the manner in which he executed his trust; and such court may hear and determine all matters relating thereto, in the manner that the accounts of executors and administrators are required by law to be settled." [R. S. § 6330.][52]

§ 1296. Comments.

It is obviously the intention of the above section to confer upon the Probate Court like jurisdiction to examine and pass upon the accounts of a trustee as it has to pass upon the accounts of executors, administrators and guardians. It is not the purpose of the above section to give the Probate Court jurisdiction to construe a trust, other than to pass upon the account, and perhaps in that manner, construe the trust in giving a judgment whether or not the trustee has properly discharged his duties. If it is desirable to construe the trust, such an action must be had in the Court of Common Pleas.[53] As the section particularly gives the same jurisdiction as the Court has in passing upon the accounts of executors and ad-

itemized statement of all funds, the nature of their investment, security and rate of interest, §§ 10820-1 G. C., § 703; § 10933 G. C., §1367.

See 19 Cyc. 864.

[51] § 11030 G. C.

See § 702, as to the law applicable to executors and administrators. The court has no jurisdiction unless notice be given. Ballard vs. Mack, 3 L. R. 249; 17 C. D. 839.

[52] § 11031 G. C.

[53] See §§ 10857-8 G. C., § 33.

Hollister vs. Howe, 6 Dec. 157; 4 N. P. 168; Wing vs. Hibbert, 8 Dec. 65; 7 N. P. 124; MacClement vs. MacClement, 1 Dayton 31. See Pike vs. White, 22 C. C. (N.S.) 61 as to supervising power of Probate Court.

ministrators, reference will be made to accounts of administrators.[54] Section 11031, G. C., has been held to apply to guardians.[55]

§ 1297. Appeal from determination of Probate Court. "The determination of the probate court on such settlement, whether final or intermediate, may be appealed from in the manner provided for an appeal from such court on the settlement of the accounts of executors and administrators, and like proceedings shall be had on such appeal, and the result of such proceedings certified back to such court." [R. S. § 6331.][56]

§ 1298. Force and effect of determination. "The determination of the probate court on such settlement, shall have the same force and effect as a like determination respecting the account of an administrator or executor. When an account is settled in the absence of a person adversely interested, and without actual notice to him, the account may be opened on his filing exceptions to it within eight months thereafter. Upon any settlement of an account by a trustee, all his former accounts may be so far opened as to correct a mistake or error therein, except that a matter of dispute between two parties, which had been previously determined by the court, shall not be again brought in question by either of the same parties without leave of the court." [R. S. § 6332.][57]

§ 1299. Allowance of compensation. "The probate court may make such allowance as compensation to trustees for their services and expenses in executing their trusts, as it deems just and equitable, not exceeding that allowed to guardians for like services; and the judge of such court shall have the same fees as in the settlements of administrators and executors." [R. S. § 6333.][58]

[54] § 702 *et seq.* See § 10957 G. C., § 1499, as to how executor and guardians are required to settle a trust. See § 10822 G. C., § 707, as when executors have died.

[55] Melting vs. Strickland, 18 C. C. 140; 8 C. D. 841, for service on non-resident. See § 10850 G. C., § 770.

[56] § 11032 G. C.

See § 11206 G. C., § 747.

[57] § 11033 G. C.

This section is almost a verbatim copy of §§ 10834-5-6 G. C., and reference will be made to the discussion of that section, § 743.

[58] § 11034 G. C., § 654.

§ 1300. When Court may accept resignation of trustee or remove him. "The probate court may accept the resignation of any trustee accounting therein, or who has been appointed by it, and shall remove such trustee, he having ten days' notice thereof, for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, or because the interest of the trust requires it, or upon the written application of more than one-half of the heirs, or next of kin, or legatees having an interest in the estate controlled by such trustee. The trustee himself is not to be considered an heir, next of kin, or legatee under such proceedings." [R. S. § 6334.][59]

§ 1300a. When trustee under a will may be removed. "No trustee appointed under a will, shall be removed on the written application of more than one-half the heirs, next of kin, or legatees, as provided in the next preceding section, unless for good cause." [R. S. § 6334.][59*]

§ 1300b. Trustee to be removed when guardian appointed. "When a minor for whom the trustee was appointed, has, since the appointment, become a resident of the state, and a resident guardian has been appointed for him or her, such court shall remove such trustee and require an immediate settlement of his account. Upon the resignation, removal or death of such trustee accounting under this and the next two preceding sections, the probate court shall cause such estate to be settled up and administered upon according to law." [R. S. § 6334.][59†]

§ 1301. Removal of trustee, etc.

The above section confers jurisdiction upon the Probate Court over every trustee accounting in such Court. It gives to such Probate Court the power of accepting the resignation of any such trustee and removing any trustee whenever the Court is of the opinion that the interests of the estate demand such removal. In the absence of special statute, giving the power to appoint, it would likewise have the power to appoint a successor.[60]

See §§ 10837-8 G. C., as to the discussion of compensation of administrators. See § 10953 G. C., § 1490, as to compensation allowed guardians.

[59] § 11035 G. C.

[59*] § 11036 G. C.

[59†] § 11037 G. C.

See § 1558, Removal of assignee.

[60] But special power is given to fill vacancies occurring in a testamentary trusteeship. § 10596 G. C., § 1266.

See Sowers vs. Cysenius, 39 O. S. 29.

The above section seems to make two kinds of proceedings for the removal of trustees. First the Court may remove the trustee on its own motion, or it may remove the trustee on a written application of more than one-half of the heirs or next of kin exclusive of the trustee himself. If the trustee is acting for a non-resident minor, and such minor becomes a resident of this State, then the trustee must settle at once and account to the resident guardian. If the Court removes the trustee on its own motion for either of the reasons mentioned in the above section, the decision of such Court is final and cannot be reviewed on appeal or error.[61]

If the Court acts by virtue of a written application of more than one-half of the heirs where the trustee is appointed under a will, then it seems the Court does not have absolute discretion, but must only remove for good cause, and it is probable that the proceedings might be reviewed on error.[62] The forms and entries provided in the chapter on removal of executors and administrators could easily be adopted for proceedings under the above.[63]

The question has sometimes been made whether the Court has any power to compel the trustee to account after an order has been made to remove such trustee. It seems, in order to properly protect the trust, that the Court ought to have such power and such is the holding of the Courts.[64] Where one of the trustees named in the will died, and another removed to a place unknown, the Court has power to fill such vacancy, although there was a surviving trustee capable of executing

[61] Stafford vs. Am. Missionary Assn., 22 C. C. 399.

This is now changed by statute, § 12241 G. C., § 52; § 11206 G. C., § 39.

[62] Stafford vs. Am. Missionary Assn., 22 C. C. 399.

[63] § 208 *et seq.*

[64] In Netting vs. Strickland, 18 C. C. 136; 9 C. D. 841, where a guardian removed from the State, which *ipso facto* removed him, it was *held*, that the Court could compel the guardian's administrator appointed in Illinois, to account and had power to issue a citation and have it served by publication.

In Gilbert vs. Gilbert, 13 C. C. 29; 7 C. D. 58, it was held that no accounting could be required, because of great lapse of time.

Schwab vs. Rappold, 12 Bull. 197, holds that jurisdiction is maintained and notice may be given in such manner as the Probate Court may direct under § 11205 G. C. See James vs. West, 47 Bull. 750.

the trust.[65] A resignation may be made even if the trustee is in default.[66]

§ 1302. Causes for removal.

The statute specifically provides that trustees may be removed for habitual drunkenness,[67] neglect of duties,[68] incompetency,[69] fraudulent conduct,[70] or because the interest of the trust requires it. This law is very broad and under its provision it has been held that a trustee will be removed who denies the trust or is unfriendly to it,[71] who unreasonably or corruptly disagrees with his co-trustee, or who, having a discretionary power over payments to his beneficiaries, has an unreasonable prejudice or dislike to him which is likely to defeat the purposes of the settlement,[72] or favors one beneficiary to the prejudice of the others,[73] or whose relations with his co-trustee or the beneficiaries are such as to interfere with the proper management of the estate.[74]

The Court will remove sometimes, though not necessarily, a trustee who becomes a bankrupt,[75] or goes to reside permanently without its jurisdiction;[76] but it will not remove a trustee simply because he is poor,[77] or to satisfy the caprice of a beneficiary;[78] or because he is prejudiced against or dislikes a beneficiary where he has no discretionary power over the payments to him.[79] Nor will a trustee be removed for the non-

[65] Sowers vs. Cyrenius, 39 O. S. 29.

[66] Withers vs. Ewing, 40 O. S. 400.

[67] § 221.

[68] § 222.

[69] § 224.

[70] § 225.

[71] Irvine vs. Dunham, 111 U. S. 327; Quackenboss vs. Southwick, 41 N. Y. 117.

[72] McPherson vs. Cox, 96 U. S. 404; Wilson vs. Wilson, 145 Mass. 490.

[73] Scott vs. Rand, 118 Mass. 215.

[74] *In re* Nathans' Estate, 191 Pa. St. 404.

[75] Paddock vs. Palmer, 6 How. Pr. 215.

[76] This is by statute made a cause of removal of an administrator, § 10629 G. C., § 213.

Culp's Est., 5 Pa. C. C. R. 582; Brightly's Dig. Pa., p. 2037, § 70; Hughes vs. Chicago, etc., R. R. Co., 47 N. Y. Sup. Ct. 531.

[77] Jones vs. McPhillips, 77 Ala. 314.

[78] McPherson vs. Cox, 96 U. S. 404.

[79] Frantz vs. Frantz, 4 St. P. 278; 6 Dec. 555; Nickels vs. Phillips, 18 Fla. 732; Forster vs. Davies, 4 DeG., F. & J. 133.

exercise of, or the manner in which he exercised, a discretionary power, provided he is honest and reasonable in the use or non-use of his discretion. Nor will a trustee be removed for a technical breach of trust, or one made unintentionally or through mistake.[80]

§ 1303. Distribution of fund.

It is a well settled principle of law that the trustee must distribute the fund properly at his peril, and if he distributes the wrong amount or pays it to the wrong person, he must bear the loss. The fact that he has been diligent or has taken advice, will not protect him, and his only protection is to obtain a decree of distribution from a proper Court.[81]

As the sections of the General Code providing for the accounting of trustees provide that the court shall have the same power as in the case of executors or administrators, it is probably the law that the court could make no specific order of distribution, but should provide that the fund should be distributed according to law. The trustee might then refuse to pay over the fund for thirty days and then the person claiming such fund could bring his action as provided in sec. 10448 of the General Code.[82]

The fact that he pays on a forged order, or an invalid assignment,[83] or on a power of attorney which he supposes to be good, but which has in fact been revoked, will not protect him. He must not pay a minor's share to himself or his parent or guardian without an order of Court. The fact that the trustee files his account in Court, which account shows that a payment has been made to a wrong person, the passing upon such account by the Probate Court will not relieve the trustee.[84]

The trustee might likewise after his account has been passed upon, bring an action in the Court of Common Pleas, making

[80] Perry on Trusts, §§ 275 to 287, and Underhill on Trust, 393 n., for other instances. Loring Trustee's Handbook, 20, 21; § 1360.

[81] Banning vs. Gotshall, 62 O. S. 211.

[82] § 761.

[83] Palmer vs. Whitney, 166 Mass. 306.

[84] Banning vs. Gotshall, 62 O. S. 210; Swearingen vs. Morris, 14 O. S. 424.

all the parties having an interest in the fund parties defendant, and require the Court to determine to whom the fund should be paid.[85]

§ 1304. Termination of trust.

The trust may be terminated in several ways. It may be terminated by virtue of the expiration of a time limited, as provided in the trust instrument or it may be terminated by virtue of an agreement of all the parties in interest.[86] And where a state of things have arisen which the testator had not anticipated, and there is no object in continuing the trust, our Supreme Court has held that the beneficiary could maintain a bill in equity to terminate such trust.[87]

Where a will requires the executors to hold the property in trust for all the children, including themselves, and to divide it whenever a majority should consent, and after all debts have been paid, the children by contract, though without deeds, set off to one of the trustees his share in severalty, and the residue to the other children jointly, each agreeing to execute any necessary papers, this contract must be deemed as distributing the property and terminating the trust.[88]

[85] An attorney acting as a trustee will not be excused when he erroneously settles up an estate in ignorance of well settled rules of law. Nyce vs. Hornitz, 20 Bull. 276.

[86] Soteldo vs. Clement, 29 Bull. 384.

[87] Taylor vs. Huber, 13 O. S. 288.

Where a testator, by his will, directed his executors to invest a specific fund, the interest to be paid annually to the widow during her life and widowhood, at the death of the widow the principal thereof to be paid to her two sons; and the sons on both arriving at the age of maturity, executed under their hands and seals to the widow, an assignment of all their interest and right in such fund. It was *held* that the trust should be terminated. Gloyd vs. Roff, 2 C. C. 253; 1 C. D. 472.

But a trust created by will, the provisions of which are not repugnant to law or contrary to public policy, will not be decreed terminated where the objects of the trust have not been accomplished, and their accomplishment has not been made impossible. Robbin vs. Smith, 72 O. S. 1.

And parties in interest cannot by agreement terminate a trust, unless the trust has been fully accomplished. Jones vs. Creamer, 32 O. C. C. 1910—Fayette Co.

See Lohrer vs. Citizens, 14 Dec. 289, as to when a Court of Equity will terminate a trust.

[88] Culver vs. Culver, 58 O. S. 172.

Of course if the beneficiary becomes the owner of the entire interest, the trust would be terminated.[89] A question might arise whether the Probate Court would have jurisdiction to terminate a trust. I apprehend that no action could be brought in the Probate Court to have a trust declared terminated. But if a trustee should file an account of his trust and make a distribution of the fund which account would be approved by all the parties in interest, providing such parties in interest were of full age and not under any disability, that the approval of such account by the Probate Court would terminate the trust, and all parties in interest having approved such action of the trustee they would be estopped and not permitted to question the same, but such action could only be done where all parties consent. I doubt whether the Probate Court could compel the trustee to terminate the trust and pay over to the beneficiaries, the amount to which they might be entitled, although petitioned so to do by all the beneficiaries. Where the trustee refuses, it would seem that an action to terminate the trust must be filed in the Court of Common Pleas.[90]

[89] Taylor vs. Huber, 13 O. S. 288.

[90] A trustee under a will has no right to terminate the trust, with the consent of the *cestui que trust*, if the rights of third parties under the will are impaired. Kreisted vs. Smith, 8 N. P. 378; nor, it might be added, if it is not in accord with the wishes of the testator expressed in the will creating the trust, but it will not be continued merely for the benefit of the trustee. Lohrer vs. Citizens Trust Co., 14 Dec. 289.

This case discusses the matter fully. See Robbins vs. Smith, 5 C. C. (N.S.) 545; 27 O. C. C. 91.

CHAPTER LXX.

GUARDIANS, KINDS, ETC.

§ 1305 Definition.
§ 1306 Natural guardians.
§ 1307 Testamentary guardian.
§ 1308 How testamentary guardian to be designated.
§ 1309 Testamentary guardian to have preference. His duties, powers and liabilities.
§ 1310 When testamentary guardian shall give bond.
§ 1311 Guardian of the person and the estate.
§ 1312 Guardian of the person.
§ 1313 Duties of guardian of the person, etc.
§ 1314 Bond of guardian of person.
§ 1315 Guardian of the estate.
§ 1316 Duties of guardian of estate only.
§ 1317. Other kinds of guardians.
§ 1318 Ancillary guardians.

§ 1305. Definition.

The textbooks say that the law relating to the rights and duties of guardian and ward are very much similar to those of parent and child.[1] The term guardian is defined by a learned author as follows: "Guardian, in the popular sense, one who guards, preserves, or secures, is the generic term applied, in legal usage, to a person whose right and duty it is to protect the rights, whether of the person or property, of some other person, his ward, who, as in the case of minors, is conclusively presumed, or as in the case of idiots, lunatics, spendthrifts, etc., is adjudged to be, incompetent to manage his affairs. In respect to minors, the guardian of the person stands *in loco parentis*, thus giving rise to the designation, sometimes applied to them, of 'temporary parents.'"[2]

While there were numerous kinds of guardians spoken of and recognized by the common law, yet with us the term is generally used as applicable only to that kind of guardianship that is provided for by statute. The kinds of guardians for

[1] 1 Bl. Comm. 459; 2 Kents 220.

[2] Woerner on Guardians, 39.

which provision is made in our statute are three. First, guardians of minors; second, guardians of lunatics, idiots and imbeciles; third, guardians of habitual drunkards.[3a] These again are divided into guardians of the person and the estate. These various kinds of guardians are provided for by separate provisions of the General Code and will be considered in their order.[3]

§ 1306. Natural guardians.

The natural guardian of a child is the father if he be alive and the mother if the father is dead. In the case of illegitimate children, the mother is the natural guardian.[4] While at common law it was the duty of the natural guardian to take charge of the child's property and account for profits,[5] yet such is not recognized to be the law of this State. The only manner in which our law recognizes natural guardianship of father or mother is that no person can be appointed a guardian of the *person* of a child unless the Court first finds that the father or mother is an unsuitable person to have the control and custody of the person of such child. In no case is the father or mother entitled to the custody of the *property* of his or her child,[6] unless he or she is appointed by the Probate Court as guardian of the estate of such child, and then he or she must give a bond in the same manner as any other person would be required to do if he were appointed guardian.[7] Usually if there is no estate, the natural guardian, the father or mother, will not be interfered with.

[3] See § 1534.

[3a] The statute now adds incompetency, etc.

[4] Such children, though, at common law were regarded as having no natural guardian. Schouler Dom. Rel. § 278. The father of a bastard is entitled to the custody of such child, as against all but its mother, and for such reason is the proper person to be appointed statutory guardian for such child. Pote's App., 106 Pa. St. 574. But a stepmother is not the natural guardian of her husband's children by a former marriage, after the death of her husband. Bounell vs. Berryhill, 2 Ind. 613.

[5] 1 Bl. Comm. 461.

[6] The personal earnings of a minor is not the property of such minor.

[7] Brooke vs. Logan, 112 Ind. 183; Perry vs. Carmichael, 95 Ill. 519; Kendall vs. Miller, 9 Cal. 592; Fonda vs. Van Horn, 15 Wend. 631; Alston vs. Alston, 34 Ala. 15. A parent as the natural guardian of

§ 1307. Testamentary guardian.

Following somewhat in the line of the right of guardianship by nature is the statutory provision, that in certain instances a testator may provide who shall be guardian of his children. The section of the General Code providing therefor is as follows:

"A surviving parent by last will in writing, may appoint a guardian or guardians, for any of his or her children, whether born at the time of making the will, or afterward, to continue during the minority of the child, or for a less time." [103 v. 905.] [8]

This section as now amended limits the right to designate a guardian by will to surviving parents. It still leaves open the question whether or not a parent could not, although not a surviving parent, designate a person as guardian to hold certain property, devised to a child in the will. It is the opinion of the author that this section only limits the right to appoint a guardian of the person of the child, not of his estate received under the will. It places husband and wife in regard to their children on the same plane; under the former statute, a father had the right to designate a guardian, even though the mother be living, and the mother had no such right unless the father be dead or gone to parts unknown.

This amended section recognizes the absolute right of a surviving parent to the care and custody of his child, unless by his own conduct he has forfeited the right.

The right to appoint a testamentary guardian resides only in

the child cannot bond such child by any contract made for him, in the absence of statutory authority, Jones vs. Jones, 46 Iowa 466. A natural guardian has no authority to lease an infant's lands. Magruder vs. Peter, 4 Gill & J. 323; Ross vs. Cobb, 9 Yerg. 463. Nor to receive the rents and profits from such land. Jackson vs. Combs, 7 Cowen 36. Nor can he receive legacies belonging to such child. Genet vs. Tallmadge, 1 Johns. Ch. 3; Miles vs. Boyden, 3 Pick. 213. Nor can such natural guardian make any compromise in behalf of the child, which will be binding upon the child. Houston, etc., R. R. Co. vs. Bradley, 45 Tex. 171.

[8] § 10930 G. C.

But an executor cannot be guardian of the estate, etc., § 1331.

the parent of the child.[9] A grandfather has no right to appoint for his grandchild.[10] A father cannot appoint for his illegitimate child,[11] but he may for an adopted child.[12] If the testator appoint his widow so long as she remains unmarried, an appointment by the Court is necessary on her remarriage.[13] If a mother has been divorced from her husband and awarded the custody of her child, she may, during the life-time of the father, appoint by will a guardian for her child.[14] This is denied in our State.[14*]

§ 1308. How testamentary guardian to be designated.

It is not necessary that a testamentary guardian should be expressly so designated in the will.[15] Thus, if a testator direct his son to maintain his infant brother in the same manner as a father or guardian and the infant to render him due subjection as a child by labor and obedience, he is thereby designated as a testamentary guardian.[16] And if a testator direct his wife to have the care and custody of his children until they become of age or until she remarries, it will be a sufficient designation.[17] The designation is a personal

[9] Brigham vs. Wheeler, 8 Met. 127; Camp vs. Pittman, 90 N. C. 615.

[10] Fullerton vs. Jackson, 5 Johns Ch. 276; *Ex parte* Bell, 2 Tenn. Ch. 327; Hoyt vs. Hilton, 2 Edw. Ch. 202.

[11] Sleeman vs, Wilson, L. R., 13 Eq. 36.

[12] *In re* Upton, 16 La. Ann. 175.

[13] Corrigan vs. Kiernan, 1 Bradf. (N. Y.) 208; Holmes vs. Field, 12 Ill. 424.

[14] Wilkinson vs. Deming, 80 Ill. 342. *Contra,* McKinney vs. Noble, 37 Tex. 731. *In re* Coons, 20 C. C. 479.

When husband and wife are divorced and the Court of Common Pleas in granting the divorce also awards the children to either parent or some other person, such children become the wards of the court and the jurisdiction of the court is a continuing one and can not be affected by the appointment of a guardian by any other court. *In re* Crist, 89 O. S. 33.

If a father appoints a guardian by will for his children, other than the mother, she, if a competent person, is entitled to the custody of such children, against the testamentary guardian. Lord vs. Haugh, 37 Cal. 657. For while a father has authority to appoint a guardian by will, he can not by contract with some third person bargain away the mother's right in the child. Moore vs. Christian, 56 Miss. 408.

[14*] *In re* Coons, 20 C. C. 479.

[15] Miller vs. Harris, 14 Sim. 540; Mendes vs. Mendes, 1 Ves. Sr. 89; Johnston vs. Beattie, 10 Cl. & Fin. 42; Marton vs. Tally, 72 Ala. 23.

[16] Balch vs. Smith, 12 N. H. 437.

[17] Corrigan vs. Kiernan, 1 Bradf. (N. Y.) 208; Macknet vs. Macknet, 9 C. E. Gr. 449.

A direction in a will that the executor shall hold the estate in trust until the youngest child shall become of age, and that he pay out

trust and cannot be assigned.[18] Probably the same rule should be applied as to what would constitute a designation in a will of a person as testamentary guardian, as is applied to constitute an executor.[19]

§ 1309. **Testamentary guardian to have preference. His duties, powers and liabilities.** "When a guardian has been appointed by will, by the father or mother of a child, he shall be entitled to preference in appointment over all others, without reference to his place of residence, or the choice of such minor. His appointment, duties, powers, and liabilities in all other respects shall be governed by the law regulating guardians not appointed by will, except as otherwise specially provided." [R. S. § 6267.][20]

By the above provision a testamentary guardian is entitled to preference over all others without reference to his place of residence or the choice of such minor. But otherwise he is under the same law as if not designated by any last will and testament. While the above section seems to warrant the appointment of a guardian designated by a parent in his will over both the person and estate of the minor, yet other sections seem to limit the rights of such guardian to the guardianship of an estate, where there is a competent surviving parent;[21] for it is provided that the guardian of the person and estate shall not have the custody of the person and the control of the education of such minor if there be a father or mother who is a suitable person.[22]

of the estate annually a sum sufficient to clothe, educate and support the minor children until they become of age, makes him a trustee of the estate, and, in effect, a testamentary guardian of the minors, and the court has no rightful power to require the executor to pay over any money to the statutory guardian of such minors for their support and education. Caps vs. Hickman, 97 Ill. 429.

[18] *In re* Goods of Parnell, L. R., 2 P. D. 379; Eyre vs. Countess of Shaftbury, 2 P. Wms. 121; Matter of Reynolds, 11 Hun. 41; Balch vs. Smith, 12 N. H. 437.

[19] See §§ 80, 81.

[20] § 10931 G. C.

But even a testamentary guardian will not be appointed without notice to the surviving parent. *In re* Geibig, 57 Bull. 77; 11 N. P. 529.

A decree of divorce giving the custody of the child to one of the parents does not clothe the parent with authority to appoint a testamentary guardian for the child, as between such testamentary guardian and the surviving parent the court will consider the best interests of the child in choosing a guardian. *In re* Geibig, 57 Bull. 77; 11 N. P. 509.

In such cases the court granting the decree has continuing jurisdiction. *In re* Crist, 89 O. S. 33.

[21] See note § 1307.

[22] § 10928 G. C., § 1366.

One who has a right to appointment and waives the same by consenting to the appointment of another will not thereafter be heard to have himself appointed. Woerner on Gdns. 99.

A testamentary guardian is without authority until appointed by the court. 3 O. App. 444.

While this section would seem to direct the appointment of a person who might be a non-resident of the State, yet from the fact that the statute provides that a removal from the State shall terminate the guardianship, it would necessarily follow that a non-resident ought not to be appointed.[23] Whether or not when a person designated, is evidently unsuitable the Court must make the appointment, is not clear. In reference to executors it is held that the executor is entitled to the appointment, but the Court may proceed to remove him for cause.[24]

A testamentary guardian will serve until his ward becomes of age, unless removed by the Court. The ward can not ask his removal when he arrives at the age of fourteen.[25]

§ 1310. When testamentary guardian shall give bond, etc. "Each such testamentary guardian must give bond, in the manner and with the conditions required of a guardian appointed by the probate court; except that, when in the will appointing the guardian, the testator orders or requests such bond not to be given, it shall not be required, unless, from a change in the situation or circumstances of the guardian, or for other sufficient cause, the probate court thinks proper to require it." [R. S. § 6268.][26]

§ 1311. Guardian of the person and the estate.

Our law clearly recognizes that there may be separate persons who are guardians for the same person, one being guardian of the person of the ward and the other of the ward's estate, and that where no order is made providing for the separation of guardianship, it will be presumed that the person appointed is guardian of both the person and the estate of the ward. The statute providing therefor is as follows:

"A guardian may be appointed to take charge only of the estate of a minor. At the time of, or after the appointment of such guardian to a minor having neither father nor mother, or whose father and mother are unsuitable persons to have the

[23] § 10936 G. C., § 1358.
[24] See § 81.
[25] Woerner on Guardians, 94.
[26] § 10932 G. C.

The discretion about requiring a bond is very much similar to that in reference to executors. See § 85. § 1256, Testamentary trustees.

custody and tuition of such minor, or whose interests for any other cause, in the opinion of the court, will be promoted thereby, it may also appoint a guardian to have the custody and provide for the maintenance and education of such minor. If the powers of the person appointed guardian be not limited by the order of appointment, he shall be guardian both of the person and estate of the ward. In every instance the court shall appoint a guardian both of the person and estate of the ward, unless in its opinion the interests of the minor will be promoted by the appointment of separate guardians." [R. S. § 6255.][27]

§ 1312. Guardian of the person.

If the Court is of the opinion that the interests of the ward will be best subserved by appointing a person to act only for the tuition, maintenance and control of the ward, a guardian for the *person* may be appointed. Where the father or mother be living, no such guardian can be appointed unless they be notified and the Court find that they are not suitable persons to have the custody and tuition of such minor.[28]

The powers and duties generally of a guardian of the person of the ward will be discussed in this volume when treating of the subject of guardians, generally, adopting the rule that the same person is usually the guardian of both person and estate. The statute specifically provides that certain duties shall devolve upon the guardian of the person which are as follows:

§ 1313. Duties of guardian of the person, etc. "When a guardian is appointed to have the custody, maintenance, and education of a minor, his duties are:

"1. To protect and control the person of his ward;

"2. To provide a suitable maintenance for his ward, when necessary, which must be paid out of the estate of such ward, in the hands of the guardian thereof, upon the order of the guardian of the person of such ward;

[27] § 10916 G. C.

[28] Boescher vs. Boescher, 7 N. P. 418; 5 Dec. 184.

Before a stranger can be appointed guardian for a child, the record must show that the father consents thereto or is an unsuitable person. Cited Hare vs. Sears, 4 N. P. (N.S.) 566; 17 Dec. 590.

"3. When such ward has no father, or mother, or having a father or mother, such parent is unable or fails to maintain or educate the ward, the guardian so appointed shall provide for him such maintenance and education as the amount of his estate justifies, which shall be paid out of his estate in the hands of the guardian thereof, upon the order of the guardian of the person of such ward;

"4. To obey all the orders and judgments of the court touching the guardianship." [R. S. § 6271.][29]

§ 1314. Bond of guardian of person.

A guardian of the person of a minor must give bond in the same manner as if he were guardian of the estate. The amount of the bond must be double the probable expenses of maintaining and educating such minor during one year. Likewise the guardian must take an oath that he will faithfully discharge his duties. The statute providing therefor is as follows:

"Before a person is appointed guardian to have the custody, maintenance, and tuition of a minor, without the right to take charge of the minor's estate, he must give bond in double the probable expenses of maintaining and educating the minor during one year. In all other respects the bond shall be the same as if he had charge of the estate of his ward. He also must take the oath prescribed in the next preceding section." [R. S. § 6260.][30]

§ 1315. Guardian of the estate.

If the ward has property and the Court is of the opinion that the person who is entitled to the control and custody of the ward is a suitable person to keep such control and custody, but not a suitable person to manage the estate of the ward, then a guardian for the estate only should be appointed; and where the entry of appointment provides that a person is appointed guardian of both the estate and person of the ward, yet if the ward have a father or mother who is a suitable person to have the custody of such ward and the control of its educa-

[29] § 10935 G. C.

[30] § 10923 G. C.

tion, then the guardian is practically a guardian of the estate only. The statute providing for the duties of such guardian is as follows:

§ 1316. **Duties of guardian of estate only.** "When a guardian is appointed to take charge only of the estate of a minor, his duties shall be the same as those specified in the next preceding section, except that he shall not be required to perform the sixth duty therein mentioned when a guardian of the minor's person has been appointed." [R. S. § 6270.][31]

§ 1317. Other kinds of guardians.

In addition to the kinds of guardians specifically referred to in the previous sections of this chapter, there is recognized by the statutes of our State what is known as a guardian *ad litem.* This kind of a guardian is also known as a special guardian, being appointed by the Court to look after the interests of a minor when his property is involved in litigation.[32]

And a person occupying a similar position who brings a suit for a minor is known as *prochein ami,* or the minor's next friend. The power to appoint a next friend like the power to appoint a guardian *ad litem,* is inherent in every Court when the interests of minors require it.[33]

At common law there were other guardians known as chancery guardians and ecclesiastical guardians, but these are merely the memory of a past method of judicial procedure. Our statute makes specific provision for the appointment of guardians of idiots, imbeciles and lunatics and also for habitual drunkards [34] and incompetents and improvidents.

See Heckman vs. Adams, 50 O. S. 305; *In re* Baier, 8 N. P. 107; 11 Dec. 47.

[30] Previous section is § 10933 G. C., which gives various duties. See § 1367.

[31] § 10934 G. C.

The same rule is adopted as to bond in the case of a guardian for the estate only as is required of a guardian for both the person and estate of a ward.

[32] Woerner on Guardians, 63.

[33] Woerner on Guardians, 64.

An appointment of a next friend and a *prochein ami* usually devolves upon the Court of Common Pleas, in the litigation of general matters and not in the Probate Court. A guardian *ad litem* may be appointed by the Probate Court, notably in proceedings brought for the sale of real estate. See §§ 838, 1384, for discussion of the duties of a guardian *ad litem.*

[34] See § 1501 *et seq.*, for idiots, incompetents, etc.; § 1534 *et seq.*, for habitual drunkards, improvidents.

Some States also have made provision for the appointment of guardians of spendthrifts, but no such power is given by any provision of our statutory law. With us if a person is not an idiot, an imbecile, lunatic or habitual drunkard, unable to manage his own affairs, he may spend his money in as needless a way as he can design, and there is no power of the Court to prevent him. Statute now seems to provide for improvidence, see § 1535, and incompetents, § 1501.

§ 1318. Ancillary guardians.

Our statutes do not recognize what might be termed an ancillary guardian, but provide that where it might be proper to appoint, an ancillary guardian, a trustee for a non-resident be appointed.[35] Our statutes also provide that foreign guardians may, by complying with the statutory provisions, be recognized in our Courts, and in that manner acquire jurisdiction over the property of a non-resident ward.[36]

The general principles relating to ancillary guardians might be applied to a trustee of a non-resident. That is, a guardian of the domicile of an infant might be advantageously appointed as an ancillary guardian.[37] A domiciliary guardian must account for all property received from an ancillary guardian.[38]

A receipt given to a guardian appointed in one State by a guardian subsequently appointed in another State for specific personal property of the ward, transferred by the former to the latter, does not discharge the former from responsibility to account for previous loss by his mismanagement of the ward's property.[39] The fact that the letters granted in this State are prior in point of time to letters granted in the domiciliary State does not prevent the letters here being regarded as ancillary.[40]

Unless provision is made by statute, a guardian appointed in one State, has no authority in another State, and it would be

[35] § 11014 G. C., § 1274.

[36] § 1475 *et seq.*, on foreign guardians.

[37] Hoyt vs. Sprague, 103 U. S. 613.

[38] Secchi's Estate, Myrick, Prob. (Cal.) 225.

[39] Lamar vs. Micou, 112 U. S. 452.

[40] Metcalf vs. Lowther, 56 Ala. 312.

necessary to have a guardian appointed in such State if there was any property of the ward in such State. But an appointment is void, if the infant is neither domiciled nor resident in the State in which it is made and has no property there.[41]

[41] Woerner on Grdns., 87, 88, citing Barnsback vs. Dewey, 13 Ill. App. 581; Clark vs. Cordis, 4 Allen 466.

§ 11020 G. C., § 1282, provides, how a foreign guardian may procure moneys in the hand of a resident trustee, and § 10953-6 G. C., § 1481. provides how foreign guardians may sell lands, etc., in this State.

See § 165 *et seq.*, Ancillary administration.

See § 1273.

CHAPTER LXXI.

GUARDIAN. APPOINTMENT AND BOND.

§ 1319 Court having jurisdiction.
§ 1320 When necessary.
§ 1321 Minors.
§ 1322 Resident of county.
§ 1323 Statement of ward's estate to be filed and bond given — mortgage in lieu of freehold surety — oath.
§ 1323a Surety in lieu of freehold.
§ 1323b Oath.
§ 1324 Application for appointment.
§ 1325 Form of application for appointment of guardian.
§ 1326 Notice to parties.
§ 1327 When minor may choose guardians; or Court may appoint.
§ 1328 How made, etc.
§ 1329 Parents' choice.
§ 1330 Court's choice.
§ 1331 Who ineligible by law.
§ 1332 Who should not be appointed.
§ 1333 Must give bond.
§ 1334 Form of guardian's bond.
§ 1335 Mortgage in lieu of freehold sureties.
§ 1336 Oath.
§ 1337 Bond not void on account of informality.
§ 1338 One bond for two or more wards, etc., fees.
§ 1339 Order of appointment.
§ 1340 Form of entry.
§ 1341 Letters of guardianship.
§ 1342 Appeal and error.

§ 1319. Court having jurisdiction.

By a general provision of our statutes "the Probate Court shall have exclusive jurisdiction to appoint and remove guardians, to direct and control their conduct, and to settle their accounts." [1] And, furthermore, it is declared that the jurisdiction of a Probate Court, once having jurisdiction, over a matter or proceeding, is exclusive of that of any other Probate Court.[2] In construing this jurisdiction, our Supreme Court has held that "Plenary and exclusive original jurisdiction is given by law to the Probate Courts of this State, in the matter of the appointment of guardians, and that jurisdiction attaches in any given case, whenever application is duly made for its exercise

1 § 10492 G. C., § 27. Wegner vs. Wiltsie, 23 C. C. 302.

2 § 10498 G. C., § 29. Newton vs. Hammond, 38 O. S. 430.

Where, in a divorce proceedings, the custody and control of a child is awarded to one of the parents, such custody and control can not be affected by the appointment of a guardian in the Probate Court, unless sanctioned by the court granting the divorce. *In re* Crist, 89 O. S. 73; and this applies to Juvenile Courts. Cleveland, etc., vs. Soule, 36 O. C. C. 135; 24 O. C. C. (N.S.) 153.

therein. Such proceedings are not *inter partes* or adversary in their character. They are properly proceedings *in rem;* and the order of appointment, made in the exercise of jurisdiction, binds all the world. The actual presence of the ward is not essential to the jurisdiction, unless, by reason of his right to choose a guardian, or for other cause, the statute so require." [3]

The section of the General Code particularly relating to the appointment of guardians by the Probate Court is as follows:

"When necessary the probate court in each county shall appoint guardians of minors resident in such county." [R. S. § 9254.][4]

§ 1320. When necessary.

Sec. 10915, G. C., above quoted, gives power to the Probate Court to appoint *when necessary.* This certainly confers upon the Probate Court a very wide discretion as to when or under what circumstances it will act and make the appointment, yet it is a judicial discretion which must be exercised, if the facts show that there is some necessity for the appointment of a guardian, either to take care of the minor's estate or to have the custody and control of his person. Thus it has been held that a Probate Judge has no authority to appoint a guardian for the avowed purpose of sending the ward to a foreign country.[5] Also, if a minor has either a father or mother who is a suitable person to have charge of the minor's custody and education, and the minor has no estate, there is no necessity for the appointment of a guardian: and an appointment made under such existing state of facts would probably be held void; and even if a minor is entitled to property, but is not entitled to the possession and control of it, a necessity may not exist for the appointment of a guardian. Thus, if property is in the hands of a testamentary trustee, no appointment should be

[3] Shroyer vs. Richmond, 16 O. S. 455.

[4] § 10915 G. C.

See § 1275, Trustee nonresident.
§ 1534, Drunkards.

[5] Describes vs. Wilmer, 69 Ala. 25; 44 Am. Rep. 501.

made.[6] Of course, if a guardian has already been appointed by another jurisdiction, no necessity would exist ordinarily for a new appointment until the former guardian has been in some manner superseded. Where the infant has no estate, and its father or mother be living, and are suitable, the Court is without power to appoint a guardian to have the care and custody of such infant.[7]

In the exercise of this discretionary power a distinguished author says: "In the appointment of guardians for minors, the power of the Courts of Probate is as undefined by statute, and as discretionary, as that of a Court of chancery. Having jurisdiction of the subject-matter by the residence of the minor, and in an application for the exercise of the jurisdiction, it is as broad as that of any Court of equity." [8]

The Court ought never to make an appointment, unless it affirmatively appear that there is some good reason for so doing. Too often, I fear, appointments are made merely because an application is made for that purpose. It has been held that no appointment of a guardian could be made if the ward has *no estate*.[9]

§ 1321. Minors.

The second requisite for the appointment of guardians other than for imbeciles, etc., and drunkards, is that the person for whom application is made is a minor. Our statute provides that all male persons of the age of twenty-one years and upward, and all female persons of the age of eighteen years and

[6] Vaccaro vs. Cicalla, 5 Pickle, 63 (Tenn.).

[7] Woerner on Guardians, 88.

[8] Gray's Pro. Law, §§ 766, 767. Rice's Pro. Law and Prac., 476.

[9] *In re* Baier, 8 N. P. 107; 11 Dec. 47.

I very much doubt this decision. One reason of the Court's opinion is based on the fact that there is a special provision.

§ 8031 G. C., which provides how children without means, etc., shall be taken care of—but this statute applies to vagrants, etc. I have known cases where it was highly important for a child to have a guardian, who had no estate. Of course, in no case can a guardian be appointed for the person of a minor, where a parent is living without a finding that the parent is unsuitable, and before a finding to that effect can legally be made the parent must be notified. Boescher vs. Boescher, 7 N. P. 418; 5 Dec. 184.

Order is final order. Hare vs. Sears, 17 Dec. 590; 4 N. P. (N.S.) 567.

upward, are considered to be of full age, any law and custom to the contrary notwithstanding.[10]

Formerly it was held that females were not of full age until they were twenty-one years of age,[11] and such is yet the law in some other States.[12] It is generally held that a person becomes of age the day preceding his twenty-first birthday, if a male, or her eighteenth birthday, if a female.[13]

The fact that a minor was married would not prevent the appointment of a guardian for his or her estate, but would prevent such appointment of the person of a female if she were married.[14]

The fact that the person for whom a guardian is appointed is a minor is a jurisdictional fact, and a finding to that effect must be made or the proceeding will be invalid.[15]

§ 1322. Resident of county.

The second jurisdictional fact that must appear before the court can make an appointment is that the minor must be a resident of the county in which it is sought to have the guardian appointed. This residence must be either actual or constructive, and if neither exists, the appointment is void.[16] The statutes of many of the States provide that the appointment may be made if the minor is a resident or has property within the county. A property qualification does not exist in our State except as to the appointment of non-resident minors.[17]

The residence of the minor within the meaning of this statute

[10] § 8023 G. C., § 1020.

[11] McClintock vs. Chamberlin, Wright 547.

[12] See Indiana, etc., § 1028.

[13] Hamlin vs. Stevenson, 4 Dana (Ky.), 597; Herbert vs. Turball, 1 Keble, 589; Fitzhugh vs. Dennington, 6 Mod. 259; Ross. vs. Morrow, 85 Tex. 172; S. C. 19 S. W. Rep. 1090.

[14] § 10929 G. C., § 1356.

[15] Where real estate is devised the law of the place where the real estate is located controls as to when a minor becomes of age. Craighead vs. Pike, 4 Rec. 199.

See § 1891.

[16] Commercial Gazette Co. vs. Dean, 25 Bull. 250; Maxon vs. Sawyer, 12 O. 195.

Temporary absence from the county does not affect the appointment. Sprague vs. Letherberry, 4 McLean, 442; Fed. Cases. No. 13251.

[17] § 1275.

So long as both parents are living the residence of the child is that of the father, if he be dead, that of the mother, if both are dead then of the grandparents, etc.; where a father, before his death, gave his child to the maternal grandparents in another state, who kept the minor continuously until long after the father's death, the domicile of the child becomes that of the grandparents and a Probate Court in Ohio has no jurisdiction. *In re* John Cleighton, 61 Bull. 355.

means domicile or home, as distinguished from residence, which may be temporary or for a special purpose. The residence of an infant is that of his father, if legitimate, or of his mother, if illegitimate. After the death of the parents it may be that of a grand-parent, or of some other person who stands in the relation of a parent.[18]

In law the residence of the husband is the residence of the wife. But if the wife should desert the husband, and take with her a minor child, the Court of the county in which the mother actually resided might legally appoint a guardian.[19]

While the residence of the father is the residence of the minor, yet, after the father's death, the mother may change the domicile of her infant children by changing her own. Doubts have been expressed, however, says Woerner,[20] as to her power to retain for her children their domicile while changing her own. On her remarriage she ceases to be the head of the family, and necessarily takes the residence of her husband. Then

[18] Woerner on Guardians, 80; Commercial Gazette Co. vs. Dean, 25 Bull. 252.

[19] Maxon vs. Sawyer, 12 O. 195.

The facts in this case were, that Mrs. Maxon was the mother of a child by a former marriage, she married again and deserted her second husband and took with her, her minor son. She afterwards apprenticed this son to a person in Pennsylvania, and the son went there to live. The Court appointed a guardian at the residence of the mother and it was held that this was the residence of her minor child, although her husband was living in another county and the child itself was living in another State. The Court says, "the father is the natural guardian of his natural children. On his death the mother is, by nature, guardian of those of tender years, and entitled to their custody and control. If she marry, unless the children reside at home, the stepfather, as distinct from the mother, has no authority over them. Her actual was his constructive residence; and he was, therefore, when the guardian was appointed, constructively, with his mother, in the county of Ashtabula. It will hardly be contended that an actual residence is necessary to give the Court jurisdiction of the appointment. Such appointment would scarcely be questioned, when the actual residence of the minor was in the county, but at the moment of the appointment, he was over the county line, for a temporary purpose, merely. He would be considered as, constructively, within the county, and the appointment would be valid." Maxon vs. Sawyer, 12 O. 208.

[20] Woerner on Guardians, 81.

The residence of a child is the last had by the parent. And if the father is domiciled at the home of his father at the time of his death, then the residence of the child is that of the grand parents. *In re* Murray, 8 C. C. (N.S.) 498; 28 O. C. C. 652 4 N. P. (N.S.) 233; 16 Dec. 612.

her children may retain the residence which they had during the mother's widowhood.[21]

If the minor is within the county for a temporary purpose only, and has an established residence in some other county in the State, of course, no appointment could be there made. But there might be circumstances where, if a minor domiciled in another State, was actually residing in this State, and there was necessity for a guardian, such appointment might be made, the appointment holding good only until set aside by the court. But an appointment can not be secured where an infant is brought into the State by strategy.[22]

While it is admitted that a father, or, in case of his death, the mother, may change the residence or domicile of the infant children, yet there has been some question whether the guardian can legally change the residence of his ward. In an early Ohio case, the Court makes use of this language: "He may remove from the State where he was originally appointed, to any other, and, although it was once a greatly controverted question, yet it is now settled, that he has even a right to change the domicile of his ward.[23] The reason of the doubt was that the exercise of the right would put it in the power of a guardian to change the succession to the personal property of his ward — a reason which, although it seems to have had great weight with some of the civil law lawyers, has never entitled itself to much with English or American jurists." [24]

[21] Lamar vs. Micou, 112 U. S. 452; Freetown vs. Taunton, 16 Mass. 51; Johnson vs. Copeland, 35 Ala. 521; Mears vs. Sinclair, 1 W. Va. 185.

[22] Woerner on Guardians, 82; citing *In re* Hubbard, 82 N. Y. 90.

[23] Potinger vs. Wightman, 3 Merivale, 67.

[24] Pedan vs. Robb, 8 Ohio, § 227. In this case the guardian was the father.

Jacobs, in his valuable work on Domicil, § 260, gives the following as the general results of the American cases. "The doctrine which we may extract from the American cases may be thus stated. (1) That a guardian has the power to change the municipal domicil of his ward. (2) That the domicil of the ward is not necessarily that of his guardian. (3) That the natural guardian certainly, and the testamentary guardian probably, has the power to change the national or *quasi*-national domicile of his ward, unless expressly prohibited by a competent Court. (4) That the power of an appointed guardian to change the national or *quasi*-na-

Woerner, after reviewing the authorities, comes to the conclusion that the authority conferred upon a guardian by virtue of his appointment, does not include the power to change the ward's national or State domicile, and that guardians have the power to change the municipal domicile to the extent only in which it is granted by statute. And further, that the right of a natural or testamentary guardian to change either the national or municipal domicile of their wards does not rest upon their being appointed guardians, but upon the fact that they stand in relation of a parent to the child, and that therefore even a testamentary guardian could not change the domicile unless he in fact occupied the position of a parent or the will gave him power to so change the domicile.[25]

Our statutes contain no express provision conferring such power on the guardians. No doubt, if the guardian is appointed for the estate of his ward only, or if the ward have a father or mother living, the guardian could not change the residence of the ward; where the guardian is guardian of both the person and the estate, he may perhaps change the residence of the ward to another place in the State, the Court making the appointment, however, retaining jurisdiction of such guardian. If a ward move to another State, then the statute provides that the local guardian shall be removed.[26] But this seems to be discretionary. If the guardian moves from the State, this of itself terminates the guardianship. While the matter is not free from doubt, the rule in Ohio probably is that where a guardian, being guardian of the person, or person and estate, of such ward, furnishes a home in his own family for the ward, and thus stands in the relation of a parent, in the absence of fraud, he may change the domicile of his ward, otherwise not.

The domicile or residence of the parent at the time of his death is the domicile of the minor, and remains such until he legally acquires another; and, as the law conclusively presumes that an infant cannot, acting for himself, change the same during minority, it cannot be changed by the infant's act until he

tional domicil of his ward is, to say the least, very doubtful." 5 Am. & Eng. Ency. of Law, 867.

[25] Woerner on Guardians, 85.

[26] § 10940 G. C.

becomes of age. The law being that the domicile of the husband is always the domicile of the wife, it would follow that if a female marry before she arrive at the age of majority, her domicile might by this act be changed to that of her husband's. The Court, however, making the original appointment, would retain jurisdiction of her estate until she arrived at the age of majority. If a guardian were to be appointed after her marriage, he must be appointed in the county of the domicile of her husband.[27]

§ 1323. **Statement of ward's estate to be filed and bond given. Mortgage in lieu of freehold surety. Oath.** "Before a person is appointed guardian of the person and estate, or of the estate only, of a minor, he shall file in the office of the court having such appointment to make, a statement of the whole estate of the minor, its probable value, and also the probable annual rents of the minor's real estate, verify it by affidavit, and give bond, with freehold sureties, resident of the state, one of whom shall reside in the county where such guardian is to be appointed, payable to the state, in double the amount of the personal estate, belonging to the minor, and of the gross amount of rents that probably will be received from such real estate during his or her minority." [R. S. § 6259.][28]

§ 1323a. **Surety in lieu of freehold.** "Instead of the freehold surety, so required on his bond, such person may execute to such minor a mortgage upon unencumbered real estate. But first an abstract of his title thereto must be furnished to the court and it must be shown by affidavits to its satisfaction, that, exclusive of improvements thereon, such real estate is in value sufficient to secure the bond. The mortgage also shall be duly recorded in the county where the property is situated, and filed with such court." [R. S. § 6259.][28*]

§ 1323b. **Oath.** "Such bond shall be conditioned for the faithful discharge of the duties of the person, as such guardian, and be approved by the court making the appointment. Such person also shall take an oath that he will faithfully and honestly discharge the duties devolving upon him as such guardian." [R. S. § 6259.][28†]

[27] Woerner on Guardians, 81; 6 Am. & Eng. Ency. of Law, Sub. Domicile.
See § 1502, Lunatic, etc.
See § 1369, Custody of ward.

[28] § 10920 G. C.

[28*] § 10921 G. C.

[28†] 10922 G. C.

§ 1324. Application for appointment.

By the provisions of our law, as set forth in the previous sections, no appointment can properly be made unless a proper application is made in writing for that purpose, and this application must give a statement of the whole estate of the minor, the probable value thereof, and the annual probable value of the rent of real estate, and must be verified by affidavit. These are the statutory requirements, but there are other matters which it is equally important that the application should contain. It ought to show, *first,* that the person for whom the application is made is a minor; second, it should show that the minor is a resident of the county in which the application is made; third, it ought to show whether the ward has a parent living, and, if the father be alive, his name should be given; if dead, the name of the mother should be given; and if it is sought to have a person other than the father or mother appointed guardian of the *person* of the ward, a statement should be made as to the unsuitableness of such parent to be guardian. It is sometimes the practice in such an application to make a suggestion as to certain persons for sureties on the bond. The omission to file a statement as required by statute has been held not to avoid the appointment.[29]

The statute contemplates that the application shall be made by the person who expects to be appointed guardian, but I apprehend it would be sufficient if made by any person interested, if it contain the necessary or proper statements. The object of the statement is to acquaint the Court with all the facts, and particularly the value of the property, so that the Court may fix the penalty of the bond. The following may be used as a form:

§ 1325. Form of application for appointment of guardian.

The State of Ohio,
.....County, ss.
In the Probate Court.
The undersigned....., a resident of the State of Ohio, and whose postoffice address is....., in.....

[29] Lee vs. Ice, 22 Ind. 384. In this case a statement was filed afterwards in the form of an inventory. But if not then filed, the guardian might be removed.

county, Ohio, hereby makes application for guardianship of .....
....., aged ..... years, ..., 190...., minor.. and heir..
of ....., deceased; and being duly sworn, say that said
minor ..... resident.. of ..... county, aforesaid, and that
the condition, situation and amount of all the property of said minor
....., as I verily believe, is as follows, to-wit: Personal estate, con-
sisting of ....., amounting to ..... dollars, and real
estate ..... situate in ....., valued at .....
dollars, the annual rents of which amount to ..... dollars.

The following freeholders are offered as sureties: .....
.....
.....

The State of Ohio, ... County, ss.
..... being first duly sworn, says the foregoing statement
is true as ..he verily believes.

.....

Sworn to before me and signed in my presence, this ..... day of .....,
A. D. 19...

....., Probate Judge.

§ 1326. Notice to parties.

The statute nowhere provides that notice must be given to any person when an application is made for the appointment of a guardian. Our Supreme Court has said that "proceedings for the appointment of guardians are not *inter partes* or adversary in their character, that they are properly proceedings *in rem*, and are instituted ordinarily by application made on behalf of the ward for his benefit.[30] And it is further held that it was not essential to the jurisdiction of the Court that the ward be actually before the Court unless by reason of his right to choose a guardian. It has, however, been held, and rightfully so, that if it is sought to have a guardian appointed for the care and custody, or as commonly said, of the *person* of the ward, or for both the person and estate, then it is necessary to notify the parent, if living; and that an appointment made without such notice would be void.[31]

The Court ought to be satisfied, before an appointment is made, that such persons as have the welfare of the minor at

[30] Shroyer vs. Richmond, 16 O. S. 466.

[31] Boescher vs. Boescher, 7 N. P. 184; 5 Dec. 184; Fisher vs. Madden, 12 Dec. 83; Woerner on Guardians, 107.

It is supposed that the court will look after the interests of the infant; and no one else can have any interest in him in so far as his property is concerned. Appeal of Gibson, 154 Mass. 378; S. C. 28 N. E. Rep. 296; Kurtz vs. St. Paul, etc., Ry. Co., 48 Minn. 339; S. C. 51 N. W. Rep. 221.

If the minor is the child of divorced parents, or where under Juvenile Court, etc., it may be necessary to notify the court granting the divorce.

heart have knowledge of the proceedings. A valid appointment could be made for the *estate* of a minor without notice to any one. But the better practice is in all cases where the parents are living, that the father, if living, or the mother, where the father is dead, be notified and assent in writing to the appointment.

§ 1327. When minor may choose guardian; or court may appoint. "A male infant overe the age of sixteen years, or a female infant over the age of fourteen years, may select a guardian, who, if a suitable person, must be appointed. If such minor fails to select a suitable person, an appointment may be made without reference to his or her wishes. A minor shall not select one person to be the guardian of his or her estate only, and another to be guardian of the person only, unless the court which appoints is of the opinion that the interests of such minor will thereby be promoted." [103 v. 264.] [32]

§ 1328. How made, etc.

A previous section provides the ages at which a minor may make a choice of a guardian. If the minor is of the age at which he can exercise a choice, and he neglects to make such choice, it would be proper for the Court to cite him to appear for that purpose, and if he fail to appear, then proceed to make an appointment.[33]

A minor shall not have the right to choose one person as guardian of his estate and another as guardian of his person, unless the Court is of the opinion that such separate guardians would be for the best interest of the ward. The Court is not obliged to appoint the person selected by the ward unless he be a suitable person. But, if the person is a suitable one, the Court must make the appointment.[34] If the ward has once ex-

[32] § 10918 G. C.

[33] The forms and entries providing for the citation of an executor to take or renounce administration, might be used for requiring a ward to appear. §§ 101, 103.

[34] Adams' Appeal, 38 Conn. 304; Estate of Lewry, 12 Phila. 120; Kelley vs. Smith, 15 Ala. 687.

ercised a choice, and the Court has confirmed the same, the ward cannot choose again at pleasure.[35]

If a guardian has been appointed for a minor before he reaches the age of choice, he has a right then to exercise a choice similarly as if he were of the required age when the guardian was first appointed. The guardianship of a former guardian, however, does not terminate until the choice is actually made and confirmed by the Court. Then it is the duty of the former guardian to file his account and settle with his successor. The right to choose another guardian, upon reaching the required age, does not extend to testamentary guardians.[36] If the minor's father or mother be living, he has no right to choose some other person to be guardian of his person if such father or mother be a suitable person to have the care and custody of such ward. Then he can only make choice of some one to be guardian of his estate. The right of choice should, for obvious reasons, says Woerner, be exercised in open Court, and in the presence of the judge who is to make the appointment.[37] He further states that some Courts apply this rule stringently.[38]

Some States have statutes to this effect; ours does not provide that the ward must make the choice in open Court — yet the Court ought to know in some satisfactory manner that the person sought to be appointed is the actual choice of the ward. The judge should consider the interests of the ward generally rather than his wishes.[38*]

FORM OF CHOICE OF GUARDIAN.

Probate Court,.....County, Ohio.

In the Matter of the Guardianship of ....

No.....

Choice of Guardian.

The undersigned hereby make..choice of A. D., a resident of..... .....in this county, as guardian of the person and estate of the persons hereafter designated, all of whom are residents of this county, and re-

[35] Lee's Appeal, 27 Pa. St. 229. In case of death or resignation of guardian the ward might again choose.

[36] Woerner on Guardians, 94.

[37] Woernor on Guardians, 94.

[38] Burrows vs. Bailey, 34 Mich. 64.

[38*] Compton vs. Compton, 2 Gill. 241.

spectfully petition the Court to appoint h....as such guardian. And the undersigned parent.....of said minors join in said choice and petition.

In witness whereof.....hereunto subscribe.....name.., this..... day of.....A. D. 190...

....., Parent, or child beyond age of choice.

Witness:

.....

.....[39]

§ 1329. Parent's choice.*

The right of guardianship by nature gives to the father, if living, and if dead, the mother, the right to the care and custody of the minor, and, if suitable, no one can therefore be appointed for the person of the minor. The statute gives the right to a father, or, in case of his death, the mother, to appoint a guardian of both the person and estate of his minor children by last will and testament. But in no other way has the parent the absolute right to make a choice of a guardian for his children. If the parent is a suitable person, as the law provides that no one else can be appointed guardian of the *person,* and recognizes that it is usually for the interest of the ward that one person be both guardian of the *person* and the *estate* of the ward, Courts are inclined in such cases to always give the appointment of the estate to such parent. Recognizing also the fact that the parent's interest in the welfare of the child is usually superior to that of any one else, Courts are inclined to appoint the person, if otherwise suitable, who is recommended by the parent. Our Courts have held that a choice made by an ante-nuptial contract as to religious teachings of the children should be respected, and a guardian appointed that would carry them into effect.[40] Dying requests of a parent, for the very strong reason that a person in that condition would only have the welfare of the child in view, are usually followed, other things being equal.[41]

[39] This form should always be used where there is a living parent or child under the age of choice. And children over twelve if female and fourteen years of age if male.

*Cited, Hare vs. Sears, 4 N. P. (N. S.) 566; 17 Dec. 593.

[40] *In re* Minors of Luck, 7 N. P. 49; 10 Dec. 1.

[41] Watson vs. Warnock, 31 Ga. 716; Bennett vs. Byrne, 2 Barb. Ch. (N. Y.) 216; Cozine vs. Horn, 1 Bradf. (N. Y.) 143; Underhill vs. Dennis, 9 Paige (N. Y.) 202; *In re* Turner, 4 C. E. Green (N. J.) 433; Badenhoof vs. Johnson, 11 Nev. 87;

The right of the parent to exercise the guardianship himself, or select some one else for that purpose, should not, for the reason that it is made by the *parent,* escape the scrutiny of the Court. Unnatural as it is, the fact sometimes becomes developed after an appointment has been made, that the parent did not have the welfare of the child as the sole object in view.

§ 1330. Court's choice.

No power that the Probate Court possesses is equal in delicacy and importance to the power given over the appointment and control of guardians. The march of civilization has completely demolished the rule that a parent, or any one else, has any right to either the custody of the minor's person or the control and management of his estate which will conflict with the sole and best interests of the child's welfare. Society demands that every other consideration shall be subservient to the child's interest. Our Supreme Court has recognized this rule in its full force when it has decided that a parent has no right to even the custody of the child unless such custody is in accord with the interest and welfare of the child.[42] Defenseless by want of strength of body, as well as of mind, to properly care for its physical wants, forbidden by law to assume a contractual relation for the care for its estate, the child appeals to the Court in this hapless state that some one be appointed who will assume the discharge of these duties in such a manner as will best protect it in all its rights. Not even able to discern who would be a proper person for this important trust, the appeal comes with great force. The Court should in all cases recognize the responsibility that is placed upon it and select the very best person that can be procured for this important duty. In no case should a guardian who is not of high moral character, and of sufficient mental acumen to recognize the duties that might be incumbent upon him, be appointed for the custody

Knott vs. Cotte, 2 Phillips, 192; Kaye's Case, L. R. 1 Ch. 387; Matter of de Marcellin, 31 N. Y. Supr. 207 and 4 Redf. (N. Y.) 299; Smith vs. Smith, 2 Dem. (N. Y.) 43; 9 Am. & Eng. Ency. of Law, 93; Tyler on infancy, 251.

[42] Clark vs. Bayer, 32 O. S. 299.

and control of the person of a minor. The guardian ought to be a person who is in accord with the civilization in which we live, and would endeavor to inculcate such moral principles into the child as will make him a good, useful citizen. If he is also the guardian of the estate, his business capability, as well as his financial responsibility, should be taken into consideration. The Court should inquire into these matters, and if the applicant has been successful in his own private affairs this fact will not be in his disfavor. In all cases the Court should further fully satisfy itself that the guardian has no sinister motive in being appointed.[43] It may be difficult to always find persons that will fill these ideals, but it should be a sincere object to approach them as near as possible in every case.

§ 1331. **Who ineligible by law.** "No person who is or has been an administrator, or executor of a last will, shall, prior to the approval of his final account as such executor or administrator, be appointed a guardian of the person and estate or of the estate only of a minor who is interested in the estate administered upon or entitled to an interest under or by virtue of such will. But an executor or administrator may be appointed a guardian of the person only of a minor." [108 v. 1162.][44]

In addition to the prohibition contained in the above section of the General Code, may be added that a Probate Judge could not be appointed as guardian during his incumbency of the office.[45] And while the statute does not in direct terms say that an appointment of a non-resident of the State is void, yet the conclusion is irresistible that such is the fact resulting from the statutory provisions that a removal of a guardian, already appointed, from the State terminates the guardianship.[46]

The statute also provides that a removal from the country is a good cause for a guardian to be removed from his trust. Of

[43] The guardian's standing in the community, his character as to sobriety and morality, his disposition and habits, and his love of home life and children should not be overlooked.
See § 1512, Lunatics.
See § 1896, Adoption.

[44] § 10917 G. C.

[45] §§ 1589-90 G. C., § 9.

[46] § 10936 G. C., § 1358.
See Scobey vs. Gano, 35 O. S. 550.

course, a minor, an idiot, lunatic, or imbecile, should not be appointed. If an appointment is made of a person ineligible by the statute to be the guardian, such appointment is void, and can be attacked in a collateral proceeding.[47]

It was formerly the law that a married woman could not be a guardian. Later, this was a subject of considerable controversy, but now the law is settled that a married woman occupies the same relation as a single woman, and therefore there is no legal impediment to her appointment.[48]

§ 1332. Who should not be appointed.

In addition to the statements made in the previous sections, no one should at any time be appointed for either guardian of the person or estate of the minor who has not the interest and welfare of such minor at heart. No person ought to be appointed who is of such a character that if he were appointed a good cause for his removal would exist. That is, he ought not to be an habitual drunkard; he ought not to be a man who would neglect his duties, or be incompetent, or a non-resident, or guilty of any fraudulent conduct.[49] He ought not to be a person whom the Court would refuse to appoint if such or similar reasons exist which would warrant the Court in not appointing an administrator or trustee of an estate.[50]

In addition to these matters, the guardian ought to be a person who has the confidence of the child and who can place himself in *loco parentis*. Therefore, other things being equal, the child's own wishes should be consulted, even though it has not arrived at the age of choice, and so ought the wishes of friends and relatives. In any case, the Court will be very derelict of its duties if it appoints a person of irresponsible character to have either the control of the estate or person of the ward.

[47] Scobey vs. Gano, 35 O. S. 550.

[48] See § 1307, Testamentary Gdn. See Wilson vs. Wilson, 17 O. S. 151, as to settlement where a person occupied the position of administrator and guardian.

[49] See § 10936 G. C., § 1358.

[50] As to who are proper persons to be appointed administrator, see § 115, and Trustees, see § 1252.

The very best person that can be secured to accept the trust should always be obtained.[51]

§ 1333. Must give bond.

At common law, the natural guardian had a right to receive property without giving a bond, but by the law of our State no guardian can be appointed or perform any legal act as a guardian without having given a bond. With us the giving of a bond is a condition precedent to his right to act, and although letters of guardianship were issued, he would still have no more power or authority than before, which was none at all.[52] An exception is made in the case of a testamentary guardian where the matter is left in the discretion of the Court,[53] and the rightful tendency of the Courts is to require a guardian in every case to give a bond. This bond must be secured by freehold sureties resident of the State, one of whom shall be a resident of the county.[54]

The general statute provides that sureties must reside in this State and worth in the aggregate double the sum to be secured beyond the amount of their debts.[55] The language of sec. 10920, G. C., gives ground for the practice that two sureties should be required on each bond, but it is held that one is sufficient.[56] Even a guardian of the person only must give a bond.[57] The amount of the penalty of the bond in the case of a guardian for the estate shall be double the amount of the personal estate belonging to said minor, and also the gross amount of rents that will be received by the guardian from the

[51] "The Court upon which it devolves to determine the guardianship will pronounce upon that question in accordance with what appears to be for the best interests of the minor, taking into view not merely his temporary welfare, but the state of his affections, attachments, his training, education and morals." Bradford, Sur., in Foster vs. Mott, 3 Bradf. Sur., 409. See Red. Sur. Prac., 481.

[52] Ranney, Judge, in Carpenter vs. Sloane, 20 O. 327.

[53] § 85.

[54] §§ 10920-1-2 G. C., § 1323.

[55] § 10219 G. C., § 11248 G. C., § 241.

[56] Arrowsmith vs. Gleason, 129 U. S. 86; Slagle vs. Enterkin, 44 O. S. 637.

[57] § 10923 G. C., § 1314.

real estate during the ward's minority.[58] And in the case of a guardian of the person, it shall be double the probable expense in maintaining and educating such minor during one year.[59]

An exceedingly responsible duty rests upon the Probate Judge in the acceptance of sureties on guardian's bond. Not only for the reason that it is difficult sometimes to ascertain the true financial standing of persons, but also from the fact that a guardianship usually runs a period of years. For these reasons the acceptance of trust companies for sureties is meeting with considerable favor.[60] What was said about bonds generally, in previous chapters, may be applicable here.[61] As a rule of precaution, it would be well to have the sureties qualify as to their financial standing and sign in open Court.[62]

§ 1334. Form of guardian's bond.

Know all Men by these Presents:

That we,....., are held and firmly bound unto the State of Ohio, in the sum of.....dollars, for the payment of which we hereby jointly and severally bind ourselves, our heirs, executors and administrators. Signed by us, and dated at....., Ohio, this.....day of.....A. D. 190..

The condition of the above obligation is such, that whereas, the above bound.....has been appointed by the Probate Court of..... .....county, Ohio, guardian of the person and estate of..... ....., minor child....of....., deceased, late of..... ....., which appointment the said.....has accepted.

Now, if the said.....shall faithfully discharge all h.... duties as such guardian, as is required by law, then this obligation to be void, otherwise to remain in full force.

Executed in presence of

.....

.....

.....

This bond approved in open Court, this.....day of..... A. D. 190..

....., Probate Judge.

The State of Ohio,.....county, ss.

I,....., guardian of....., minor.., do

[58] § 10920 G. C., § 1323.

[59] § 10925 G. C., § 1314.

[60] § 710-150 *et seq.* See chapter 13a on administration by trust companies.

[61] § 18; § 124; § 233 *et seq.*

[62] The amount of the bond is determined by that statement required of the guardian; but if a statement is not filed, then the amount should be sufficient to secure all amounts which may come into the guardian's possession during such guardianship. Potter vs. State, 23 Ind. 550, 607; West vs. Forsythe, 34 Ind. 418; Allen vs. State, 61 Ind. 268; Matter of Hedges, 1 Edw. Ch. (N. Y.) 57.

solemnly swear and affirm that I will faithfully and honestly discharge the duties devolving upon me as such guardian, as I will answer to God.

.....

Sworn to before me, and signed in my presence, this.....day of..... .....A. D. 190...

....., Probate Judge.

PROPERTY STATEMENT OF SURETIES.

The State of Ohio,.....county, ss.

....., one of the sureties on the bond of..... as guardian of....., being duly sworn, says that he is a resident of.....county, Ohio; that he is worth beyond the amount of all his debts at least double the penalty of the within bond .....and that he has real estate liable to execution in the State of Ohio amounting in actual value at least to the sum of..... .....dollars, beyond the amount of all his debts, legal exemptions and liabilities as surety or otherwise.

.....

Sworn to and subscribed before me this.....day of..... A. D. 190...

.....

The State of Ohio,.....County, ss.

....., one of the sureties on the bond of..... as guardian of....., being duly sworn says that he is a resident of.....county, Ohio; that he is worth beyond the amount of all his debts at least double the penalty of the within bond .....and that he has real estate liable to execution in the State of Ohio amounting in actual value, at least to the sum of..... .....dollars, beyond the amount of all his debts, legal exemptions and liabilities as surety or otherwise.

.....

Sworn to and subscribed before me this.....day of..... A. D. 190...

.....

§ 1335. Mortgage in lieu of freehold sureties.

The statute further provides that instead of giving freehold surety on the bond, the guardian may execute a mortgage upon good and unincumbered real estate. First satisfying the Probate Court by furnishing an abstract of title to the property, and also showing by affidavits that the property is of sufficient value exclusive of all improvements thereon to secure the bond. The inconvenience of this proceeding detracts from its popularity, and yet it is one of the best kind of surety that can be taken. After the mortgage is properly executed, it must be recorded in the county in which the real estate is situate, and thereafter filed with the papers in the Probate Court.[63] The following is given as a proper form for a mortgage in such cases:

[63] § 10920 G. C., § 1323.

Know all Men by these Presents:

That whereas, A. B., of.....county, Ohio, having applied for appointment as guardian of the person and estate (or, estate only, if so) of C. D. (and if more than one minor is named in the bond, here name them all), child (or children) of E. F., deceased. Now therefore the said A. B., in lieu of freehold surety and in pursuance of the statute in such case made and provided, and in consideration of the trust to be imposed upon said A. B., by reason of said appointment, does hereby grant, bargain, sell and convey to the said (here name the said minor or minors) his (or, her, or their) heirs and assigns forever, the following described real estate, situate in the (city, or village, or township, as may be) of....., in the county of....., and State of Ohio, to-wit: (Here describe the property by metes and bounds, or in other suitable way.) And all the estate, title and interest of the said A. B., either in law or in equity of, in and to the said premises; together with all the privileges and appurtenances to the same belonging, and all the rents, issues and profits thereof; to have and to hold the same to the only proper use of the said (here name the said minor or minors) his (or her, or their) heirs and assigns forever. And the said A. B. for himself and for his heirs, executors and administrators, does hereby covenant with the said (here again name said minor or minors) his (or her, or their) heirs and assigns, that he is the true and lawful owner of the said premises, and has full power to convey the same; and that the title, so conveyed, is clear, free, and unincumbered; and further, that he will warrant and defend the same against all claim or claims of all persons whomsoever. Provided, nevertheless, that if the said A. B. shall faithfully discharge all of his (or her) duties as said guardian, then these presents shall be void.

In witness whereof, the said A. B. (and if he has a wife, here add, and W. B., his wife, the latter of whom hereby releases her right and expectancy of dower in the said premises) has hereunto set his hand and seal (or, have hereunto set their hands and seals) this.....day of....., in the year of our Lord, one thousand nine hundred and.....

Signed, sealed and acknowledged in the presence of us.

.....A. B. (seal)

.....W. B. (if so) (seal)[64]

§ 1336. Oath.

The statute is equally explicit that in all cases a guardian shall, before entering upon the discharge of his duties, take an oath that he will faithfully and honestly discharge the duties devolved upon him as such guardian,[65] and this same oath must be administered whether the person be guardian of the person or estate of the ward.[66]

The form of such oath will be found upon the form of bond previously given. It is usually the practice for the Probate Judge to administer this oath, but I apprehend it may be administered by any person who is qualified to administer oaths generally.

[64] Giauque Manual for Guardians and Trustees, 37. It must be acknowledged the same as any other mortgage.

[65] § 1323.

[66] § 10923 G. C., § 1314.

§ 1337. Bond not void on account of informality. "No bond executed by a guardian shall be void, or held invalid on account of any informality in it, or of informality or illegality in the appointment of such guardian. Such bond shall have the same force and effect as if the appointment had been legally made and the bond executed in proper form." [R. S. § 6262.][67]

§ 1338. One bond for two or more wards, etc. Fees. "When a person is appointed guardian of several minors, children of the same parentage and inheriting from the same estate, separate bonds shall not be required. In such cases only one application is necessary, and the letters of guardianship issued to such guardian shall be in one copy, and not one for each minor. The court approving and recording such bond, and issuing such letters, shall charge the fees allowed by law for such services, to be charged but once and not once for each ward." [R. S. § 6263.][68]

§ 1339. Order of Appointment.

The Court having ascertained that the person for whom application is made is a minor, and that he is a resident of the county in which the application is made, and that it is proper and necessary that a guardian should be appointed, and that the applicant is a proper and suitable person, and has filed a statement of the property of the ward, and given a bond of sufficient amount with good freehold sureties, should proceed and enter upon his journal the order of appointment. The Probate Court being a Court of record, this order imports absolute verity, and cannot be impeached in a collateral proceeding,[69] and this would be true although the record might

[67] § 10926 G. C.

See Discussion of bonds, § 233.

A bond with a condition as follows is sufficient:

"If the said guardian shall discharge with fidelity the trust aforesaid in him aforesaid, shall render an accurate settlement of his transactions, with a just account of the profits arising and accruing from real and personal estate of his said ward and shall deliver up the same to the court when thereunto required." Eichelberger vs. Gross, 42 O. S. 549.

One free-holder surety, if he has enough property, may be sufficient. Arrowsmith vs. Gleason, 129 U. S. 86.

[68] § 10927 G. C.

[69] Schroyer vs. Richmond, 16 O. S. 456.

be silent as to the particular ground upon which the appointment was made.[70] It is, however, proper in order to prevent a collateral attack, that the entry appointing should show the jurisdictional facts.[71] But the guardian himself will not be allowed to deny the legality of his appointment, although it might otherwise be void.[72] And even where such entry does not show jurisdiction, it has been held that after a great lapse of time, proof will not be allowed to show that the minor, at the time of the guardian's appointment, was not a resident of the county.[73]

§ 1340. Form of Entry.

The form of entry will vary, depending somewhat upon the fact whether the parents are living, or the minor is of the age of choice. The following may be used as general form:

In the Matter of the Guardianship of C. D.

This day came A. B. and made application to be appointed guardian of C. D., and filed a written statement duly verified by his affidavit of the whole estate of said C. D. and the probable value thereof, and the probable annual rents of the real estate of said C. D.; and also made an affidavit as to the age and the residence of said C. D.; and also filed with his said application a written consent of said minor (or if the minor is under the age of choice, of E. F., the parent of said C. D.).

Whereupon the Court being satisfied that said C. D. is a minor of the age of.....and is a resident of this county, and that it is necessary that a guardian be appointed for said C. D., and that said A. B. is a proper and suitable person to receive said appointment, it is ordered that said A. B. file herein his bond conditioned according to law in the sum of.....dollars, with surety thereto as required by law; and thereupon came the said A. B. and filed in Court his bond and accepted said trust, and the Court finding that said bond is executed and conditioned according to law and in an amount equal to double the amount of the personal estate of said minor and the probable amount of the rents of the real estate of said ward during his minority, and that the sureties thereon are freeholders and sufficient. The said bond is approved and said A. B. is hereby appointed guardian of the person and estate of said C. D., and it is ordered that letters of guardianship be issued to him.

§ 1341. Letters of Guardianship.

The statute nowhere expressly directs that letters of guardianship shall be issued, yet it is a practice to do so, and it may be inferred from the provision of one section of the General

[70] King vs. Bell, 36 O. S. 460.

[71] Commercial vs. Dean, 25 Bull. 250; Scoby vs. Gano, 35 O. S. 550.

[72] Woerner on Guardians, 111.

[73] Sprague vs. Litherberry, 4 McLean (Ohio) 442.

§ 90.

If the minor has a living parent, this entry should show that such parent has given his consent—or that he has been notified and is evidently unsuitable, etc.

Code that the law contemplates that letters be issued.[74] However, the order making the appointment is the one that authorizes the person to act, and if letters of guardianship be issued before such order is made, or before a bond is given, they confer no power and have no legal effect whatever.[75] And if a proper order be made by the Court, the person empowered by such order to act may do so, although no letters have in fact been issued.[76]

Woerner says: "The letters of guardianship may be looked on as an instrument in the nature of a certificate or commission, and is *prima facie* good and admissible to prove the authority of the appointment, although it does not recite the fact of nomination by the minor.[77] So the appointment may be entered of record *nunc pro tunc* at a subsequent term, if the clerk has omitted to make the entry at the proper time.[78] But the appointment cannot relate back, so as to validate his prior act in respect to the property and estate of the ward; nor is parol evidence admissible to show an oral appointment and approvement of his bond prior to the date of the appointment as shown by the record.[79]

The following is a common form:

Form of Letters of Guardianship.

The State of Ohio,.....County, ss.
To All to Whom these Presents may Come, Greeting:

Know ye, that the Honorable, the Judge of the Probate Court of the county of.....and State of Ohio, has appointed, and by these presents does appoint.....guardian to the person and estate of....., child.....of....., deceased; hereby granting to said guardian all and singular the power necessary, and by law required, to enable.....fully to do, act and perform all and singular the duties of guardian for the aforesaid minor.. according to the statute in such case made and provided.

In testimony whereof I have hereunto affixed my signature and the seal of said Probate Court, at....., this.....day of..... .....Anno Domini one thousand nine hundred and..... ....., Probate Judge.

[74] See § 10685 G. C., § 1338.

[75] Carpenter vs. Sloane, 20 O. 327.

[76] Maxon vs. Sawyer, 12 O. 195.

[77] The statute not requiring such recital. Burrows vs. Bailey, 34 Mich. 66.

[78] Sprague vs. Literberry, 4 McLean, 442.

[79] Woerner on Guar., 110; Holden vs. Curry, 85 Wis. 504.

The State of Ohio,.....County, ss.

I,....., Judge and Clerk ex-officio of the Probate Court in and for said county, do hereby certify that the foregoing is a full and true copy of the original letters of guardianship issued by said Court to..... .....as guardian of said minor..therein named. And that said .....on the.....day of.....190.., in said Court, accepted of said appointment, and gave bond according to the laws of the State of Ohio, and that.....is now the lawful guardian of said minor...

In witness whereof I have hereunto subscribed my name and affixed the seal of said Court, at....., Ohio, this.....day of..... .....190...

.....

Probate Judge and Clerk ex-officio of the Probate Court.

§ 1342. Appeal and Error.

The statute now gives a right of appeal from an order making an appointment of a guardian for imbeciles, lunatics, idiots and drunkards, but does not cover minors, etc. Sec. 11206, G. C. (§ 39). The order can be set aside by a proceeding in error prosecuted from the court which made the appointment. A very wide discretion is conferred upon the judge in the exercise of a choice of a person to serve as guardian, and a reviewing court will very rarely, perhaps never, interfere with the same. Likewise a wide discretion exists in the Probate Court in determining whether it is *necessary* that a guardian be appointed. For either one of these causes a reviewing court would only, if at all, set the appointment aside when there was a manifest abuse of the court's discretion, or where there had been a fraud practiced in making the appointment or a positive rule of law disregarded.[90a]

See § 11206 G. C., § 39, giving right of appeal.

An uncle of a child may make a motion to remove a guardian and may appeal from an order of the court dismissing the motion. *In re* Murray, 28 O. C. C. 652.

The Circuit Court may review the order of Common Pleas Court made on appeal from the Probate Court, removing a guardian for cause. North vs. Smith, 73 O. S. 247.

There must be an actual appointment made before any one can appeal. *In re* Brutenstein, 17 Dec. 71.

This decision was made before *In re* Oliver, 77 O. S. 474, and here the court holds that a case can be taken up on appeal even if no appointment has been made, and the Common Pleas Court may make the appointment.

Order making the appointment is reviewable on error. Hare vs. Sears, 17 Dec. 590.

[80a] Since the text was written I find the following in 21 Cyc. 44: The selection of a guardian is within the discretion of the court appointing and unless there is a clear abuse of their discretion the Appellate Court will not interfere. Citing *In re* VanMeter, 115 N. Y. 666; Lunt vs. Autens, 39 Me. 392; Adams vs. Sprecht, 40 Kans. 387; *In re* Johnson, 87 Ia. 130; *In re* Lewis, 137 Cal. 682; Ohrms vs. Woodward, 134 Mich. 596; 106 Pa. St. 574; Pates appeal; and six other states.

CHAPTER LXXII.

BOND. NEW. ADDITIONAL. SURETY.

§ 1343 Additional bonds.
§ 1344 Who may file exceptions, etc.
§ 1345 Entry ordering notice, etc.
§ 1346 Notice and form.
§ 1347 Entry ordering additional bond.
§ 1348 New bond. Release of surety.
§ 1349 Application, etc.
§ 1350 Notice, etc.
§ 1351 Entry ordering release.
§ 1352 When action may be brought.
§ 1353 Liabilities of sureties, etc.

§ 1343. Additional Bonds.

There may exist during a guardianship four different kinds of bonds, differing not as to the liabilities of the principal thereon, but as to the sureties and given on the occurrence of various conditions. First there is the bond given before an appointment can be made;[1] second, the additional bond given when the former becomes insufficient;[2] third, the bond required when a surety is released;[3] and fourth, the bond given when real estate of the ward is sold.[4] In examining the question of liabilities on bonds, the treatment of the same in previous chapters may be referred to with profit.[5]

It will be the province of this chapter to discuss particularly the giving of new and additional bonds, and the rights of the parties thereunder. The statute referring to additional bonds is as follows:

"Exceptions may be filed in the proper court, by any person on behalf of a minor for whom a guardian has been appointed, to the bond of such guardian, as to the sufficiency of the amount

1 § 10920 G. C., § 1323.
2 § 10924 G. C., § 1343.
3 § 10927 G. C., § 1338.
4 § 10950 G. C., § 1423.
5 § 233 *et seq.* and § 243 *et seq.*

of its penalty or the sureties therein. Thereupon notice shall be given to such guardian to appear before such court within a reasonable time, not exceeding ten days, and show cause against the allowance of the exceptions. Upon the hearing of such exceptions, the court may dismiss them or require the guardian to find additional sureties or security in a larger amount, or make such other order as the case requires." [R. S. § 6261.][6]

Additional bond. "The court by which a guardian is appointed, of its own motion shall require him to give additional bond whenever, in its opinion, the interests of the ward of such guardian demand it." [R. S. § 6261.][6*]

§ 1344. Who May File Exceptions, Etc.

By the provisions of the above section of the General Code it becomes the special duty of the Court on its own motion, whenever it is of the opinion that the bond originally given by the ward is insufficient, to require an additional bond. This duty ought to be closely attended to, and any rumors that come to the ears of the Court ought to receive investigation. If the Court has not sufficient information, then any person may file an application for a new and additional bond. This application is termed in the statute to be exceptions to the bond. The exceptions may be taken to either the sufficiency of the penalty of the bond or of the qualification of the sureties. The following may serve as a form of exception:

(Title)

Now comes A. B., on behalf of said minor, and excepts to the bond of said guardian because, first, the amount of the penalty is not sufficient; second, the sureties are not sufficient, and asks that the Court may require that the guardian give an additional bond, as required by statute.

(Sign.)

§ 1345. Entry ordering notice, etc.

Either when the Court of its own motion requires an additional bond or when application is made for that purpose, the guardian is entitled to notice, and it has been held that if no notice be given the proceedings are at least irregular.[7] Yet I

[6] § 10924 G. C.

[6*] § 10925 G. C.
See § 1534, Gdn. of drunkard.

[7] Dupor vs. Mayo, 56 Ga. 304.
See King vs. Bell, 36 O. S. 460; Pummell vs. Baumgarden, 4 Dec. 69; 3 N. P. 40.

doubt very much whether they would be void. The law requires that the notice should be reasonable, but not exceed ten days from the time that the application is made. The regularity of the proceedings would suggest that when the application is filed an entry be made reciting such fact and fixing a day for hearing and ordering a proper notice to be given, which entry may be as follows:

(*Title*)

On this day came A. B. and filed herein his exception to the bond heretofore given in this Court by C. D. as guardian of E. F.; and prays that an additional bond may be ordered given, and the same is set for hearing on the.....day of.....; and it is ordered that notice thereof be given to said guardian at least five days before said day of hearing.

§ 1346. Notice and form.

The notice should be served a reasonable time before the day set for hearing, which day of hearing must not be more than ten days from the time that the exceptions are filed. Affidavit as to the service of notice ought to be made on the original notice and filed with the Court. This notice may be served by any one, and may be in the following form:

To..... guardian of. .....

You are hereby notified that on the.....day of.....190.., or behalf of said ward,....., filed in the Probate Court of .....county, Ohio, exceptions to your bond as guardian of ....., and prayed that an additional bond be required. You are therefore notified to appear before said Court on the.....day of .....190.., at.....o'clock and show cause, if any you have, why said exceptions should not be allowed by the Court, and you be required to give further sureties.

Witness my hand and seal of this Court this.....day of..... .....190..

....., Probate Judge.[8]

§ 1347. Entry ordering additional bond.

If on the day set for hearing the Court is of the opinion that there exist good reasons for granting the prayer of the application, it should be done without delay. The entry may be as follows:

(*Title*)

This day this matter came on to be heard upon the application heretofore filed, excepting to the bond of the guardian of....., and was heard upon the testimony. Whereupon the Court finds that the allegations of said application excepting to said bond are true and that the

[8] See § 1350.

same is insufficient in penalty and that the sureties thereon are not qualified to serve in that capacity.

Wherefore it is ordered that the said guardian within.....days from this date, file in this Court an additional bond as guardian of his said ward, conditioned according to law in the amount of.....dollars and with surety thereon as provided by statute. And it is further ordered that if said guardian shall fail or refuse within the required time to give said additional bond, then his appointment as such guardian shall be and stand absolutely revoked, and his power and authority as such guardian shall thenceforward cease and determine. Except that said guardian shall be required to file forthwith in this Court his account administering said estate.

It is further ordered that the costs taxed at.....dollars, be paid by (here insert the estate or the guardian, as the Court may think proper).

§ 1348. New Bond. Release of surety.

The other instance in which an additional bond can be given, or is required by statute, is where real estate is sold, and will be more particularly referred to when treating of the sale of real estate. It may be said, however, that the bond given in the sale of real estate differs from others required of guardians in this, that the condition limits the liabilities of sureties to the proceeds arising from the sale of real estate. The only bond which the statute recognizes as relieving the previous sureties is one which provides the method of releasing such surety, which is as follows:

How surety of guardian released. Sec. 10937. A surety of a guardian, or the executor or administrator of a surety, at any time may make application to the proper probate court to be released from the bond of such guardian, by filing his written request therefor with the judge of such court, and giving at least five days' notice, in writing, to such guardian. If, upon the hearing, the court is of opinion that there is good reason therefor, it shall release such surety. The death of a surety always shall be good cause. [107 v. 356.]

Application by guardian for release of surety; hearing. Sec. 10937-1. A guardian at any time may make application to the proper probate court for the release of his sureties, by filing his written request therefor with the judge of such court, and giving at least five days' notice, in writing, to such sureties. If, upon the hearing, the court is of opinion that there is good reason to release said sureties it shall order said guardian to file an account, as provided by law, and said sureties shall be released upon said guardian filing a new bond and its approval by the court. [107 v. 356.]

Removal on failure to give new bond. Sec. 10937-2. If such guardian fails to give new bond, as by such court directed, he must be removed and his letters superseded. Such original surety or sureties shall not be released until the guardian so gives bond, but the original surety or sureties shall be liable for said guardian's acts only from the time of executing the orig-

inal bond to the filing, and approval by the court of the new bond. [107 v. 356.][9]

The question sometimes arises whether the court has a right to release one surety on the bond and not release the other. While the above statute refers to surety in the singular number, yet considering the contractual nature of the bond and the sureties thereon, several of our inferior courts have held that one surety could not be released without the other.[10]

Woerner[10*] gives authority for holding the contrary, and that where the court orders one surety to be released, a different rule should be applied than where a surety is released by act of the parties. But it seems that the rule adopted by the Ohio courts is the better one, and that the practice to be followed is that where an order is made requiring a new bond that such order releases all the sureties on the old bond.

§ 1349. Application, etc.

The above section recognizes only the right of a surety to make an application thereunder, and it is not for the purpose of giving additional security, but for the purpose of releasing the surety. It seems that no reason need to be assigned other than a mere request or desire upon the part of the surety. Differing in this somewhat from the section relating to administrator's bond,[11] the statute seems to give no discretion to the court. Therefore no cause need to be assigned in the application, and the following would answer as a form of such application:

(*Title*)

The undersigned as surety on the bond of A. B. as guardian of E. F., requests to be released from said bond and that action may be taken by the court to that effect. (Sign.)

§ 1350. Notice, etc.

No order releasing a surety and requiring a new bond to be given can be made unless ten days' notice has been given to such guardian. The form of notice provided in a previous section in this chapter[12] can easily be adopted for a notice required to be given for the release of a surety, and the entry there given can also be used in ordering such notice, and the time when the matter will be heard.[13]

[9] § 10937 G. C.
Presumed that new bond is not an additional bond. Pummell vs. Baumgarden, 4 Dec. 69; 3 N. P. 40.

[10] Pummill vs. Baumgardner, 3 N. P. 40; 4 Dec. 69; Dowell vs. Guion, 3 Bull. 735; 7 Rec. 273.

[10*] Woerner on Guardians, 145. Statute now gives right to surety, executor of deceased surety, and the guardian himself. The statute also gives the court a discretion—except where the surety is deceased.

[11] §§ 10861-2-3 G. C., § 243.

[12] § 1346.

[13] The giving of this notice is jurisdictional and an order made without is void.

§ 1351. Entry ordering release.

If the court is satisfied that the guardian has had ten days' notice previous to the time the request is made, the entry ordering a new bond might be made at that time. The better plan, however, is first to file the request and then give the notice, and after that is done, there seems to be nothing for the Court to do but to order a release of the surety and order a new bond, which entry may be as follows:

(*Title*)

This day this matter came on to be heard upon the request of A. B. as surety on the bond of C. D., guardians of E. F., and the Court being satisfied that said guardian has had at least ten days' notice of this request, it is ordered that said guardians shall give a new bond in the sum of.....dollars, as guardian aforesaid, conditioned according to law and with surety thereon to be approved by the Court within..... .....days; and on failure to so do, it is ordered that the appointment heretofore made shall stand revoked, and said guardian be removed from said trust, except that said guardian shall forthwith file his final account unto this Court. It is further ordered that the sureties on said original bond shall be relieved from all further liability thereon as provided by statute when said new bond is filed and approved by the Court, and the amount in the guardian's possession turned over to the persons entitled thereto.[14]

§ 1352. When action may be brought.

It was formerly held by the Courts in our State that any breach of the conditions of the bond would be sufficient to sustain an action thereon.[15] But the law is now settled that where an accounting in the Probate Court can be obtained such accounting must first be had before an action can be maintained on the bond.[16]

The fact that the guardianship has expired by reason of the ward becoming of age, does not fix the time for the accrual of the right to begin an action on the bond.[17] And if the ward neglects to compel the filing of a final account for several years, during which time the principal becomes insolvent, it will not affect the matter.[18] If the guardian is beyond the jurisdiction

[14] The bondsmen are released when new bond is given without an order to that effect. Pummill vs. Baumgardner, 3 N. P. 40; 4 Dec. 69.

A release of one surety releases all. Id. Dowell vs. Guion, 3 Bull. 735; 7 Rec. 273.

This is denied in Woerner on Gdns. 145.

[15] Case vs. State, 10 W. L. J. 163; State vs. Humphreys, 7 Ohio (1 pt.) 223.

[16] Newton vs. Hammond, 38 O. S. 430; Braiden vs. Mercer, 44 O. S. 339; Gorman vs. Taylor, 43 O. S. 86; Gilbert vs. Gilbert, 13 C. C. 29; 7 C. D. 58; Netting vs. Strickland, 18 C. C. 136; 9 C. D. 841; Shwab vs. Rappold, 12 Bull. 197.

[17] Newton vs. Hammond, 38 O. S. 430.

[18] Where a ward neglected for 22 years to bring an action irrespective of the statute of limitations she was

of the Court, the Probate Court should proceed and compel an accounting, making service upon the absent guardian by publication.[19] But a final account does not so fix the sureties' liability that they cannot be affected by a correction of the account made during the ward's minority by striking out credits.[20]

A finding of the Probate Judge of the amount due from the guardian is conclusive, as a general rule, upon the sureties on the bond.[21] If the finding is wrong, the account should be corrected in the Probate Court. If for any reason an accounting could not be had in the Probate Court, and a basis thus ascertained for bringing the suit, a Court of equity would interfere and compel an accounting that might likewise sustain an action on the bond. But even in such cases it should be shown by the petition that the Probate Court is unable to give proper relief. The general statute of limitations applies, and an action cannot be maintained unless it be brought within ten years from the time that the Probate Court passes upon the account.[22]

§ 1353. Liabilities of sureties, etc.

The liabilities of sureties on new or additional bonds has been considered in a previous chapter in discussing administrator's bonds.[23] As a general proposition of law, it may be stated that the guardian is liable on his bond for all property belonging to the ward that comes into his possession, and for the amount which is found to be due by the judgment of the Probate Court, limited, however, to the penalty in the bond.[24]

Our Courts having established the rule that an accounting must first be had in the Probate Court, and that a finding of the Probate Court on such account is the basis for the bringing of the suit on the bond, it therefore follows that whether or not a

held to be barred. Brandes vs. Carpenter, 71 N. W. Rep. 402; 2 Prob. Rep. An. 233.

[19] Netting vs. Strickland, 18 C. C. 144; 9 C. D. 841; Schwab vs. Rappold, 12 Bull. 197.

[20] Scoeby vs. Gano, 35 O. S. 550.

[21] Braiden vs. Mercer, 44 O. S. 339.

[22] See Gilbert vs. Gilbert, 13 C. C. 29; 7 C. D. 58.

Where jurisdiction was denied because of laches of the ward.

See § 1486, Account — barred by time.

[23] §§ 250, 258.

[24] Woerner on Guardian, 129.

certain act was one for which the guardian is liable cannot be raised in a suit on the bond. All questions as to the guardian's wrongful or negligent acts must be raised in the Probate Court and there adjudicated. Whether a certain act is a breach of the bond cannot be a subject of adjudication in an action on the bond. In a suit on the bond the amount is limited to the finding of the Probate Court. With us, therefore, the questions most likely to arise are as to the liability sureties generally incur where there is more than one bond given. Where the new bond given is an additional bond, then all the sureties are bound for whatever default there may have been in the principal.[25] And in our State it has been held, in the case of administrator's bond, that even where a new bond was given and a default had occurred before such bond was given, that the new bondsmen would be liable for such defalcation, but that they might recover from the persons who were sureties at the time the defalcation actually occurred.[26] But the Courts say that this matter always depends upon the conditions mentioned in the bond. In such a case the ward might sue either the sureties on the first bond,[27] or those on the second bond.[27*] Where there has been a new bond given and a defalcation occurs, which is discovered first when the final account is filed, and there is nothing showing that the defalcation occurred during the period that the first bond is given, it will be presumed that the defalcation occurred under the last bond.[28]

The liabilities of the sureties of a guardian upon an additional bond given to sell real estate, which is conditioned to account for the proceeds of the sale of real estate, cannot be extended beyond its terms, although the guardian commingles such proceeds with money of his ward derived from other sources; and although the proceeds of the real estate are exceeded by general payments made by the guardian from such commingled fund, his sureties are liable in an action by the

[25] Woerner on Guardians, 147. See §§ 250-258.

[26] Corrigan vs. Foster, 51 O. S. 225.

[27] Eichelberger vs. Gross, 42 O. S. 549.

[27*] Foster vs. Wise, 46 O. S. 20.

[28] Pummill vs. Baumgardner, 3 N. P. 40; 4 Dec. 69.

ward after majority for all the proceeds that came into the hands of the guardian.[29]

Where a new bond is given, the sureties on such bond will be held liable, although a defalcation may be for assets that were received from the sale of real estate for which special bond had been given.[30]

No doubt the sureties on the special bond given for the sale of real estate would also be liable. As to which set of sureties is ultimately responsible, there may be some question. Of course, where a surety asks to be released, and such release is granted and a new bond given, the surety on the original bond can never be held responsible for a defalcation that did not occur prior to the time of his release. But a surety on a former bond is never released until a valid new bond is given,[31] even where the same is approved by the Court.[32]

Considerable difficulty is always experienced in determining the primary liability of sureties on various bonds where a defalcation has occurred at different times. In order to simplify these questions as much as possible the Probate Court ought never to release a surety and require a new bond without compelling the guardian to file an account; and likewise where an additional bond is ordered it would not be a bad rule to enforce. A receipt by the ward on becoming of age to the guardian for the balance due filed in Court, but not seen by or influencing the sureties is held to be no defense for them if it was without consideration or payment.[33]

The fact that the guardian moved to another State, resigned his trust and was reappointed there, upon the application of the ward, will not release the sureties on the first bond with respect to money which was unlawfully converted while he was guardian in this State.[34]

[29] McWhinney vs. Swisher, 58 O. S. 378.

[30] Tuttle vs. Northrop, 44 O. S. 178.

[31] Woerner on Guardians, 145.

[32] Howenstine vs. Sweet, 13 C. C. 239; 7 C. D. 498.

[33] Meier vs. Herancourt, 8 Bull. 29.

[34] Penn vs. McBride, 1 C. C. 285; 1 C. D. 157.

See § 1424, Requirement of bond.

CHAPTER LXXIII.

DURATION OF GUARDIANSHIP. REMOVAL, ETC.

§ 1354 How long powers of guardian to continue—his settlement.
§ 1355 Termination of trust.
§ 1356 Marriage of ward.
§ 1357 Resignation.
§ 1358 Removal of guardian by the Court.
§ 1359 Jurisdiction and procedure.
§ 1360 Causes, etc.
§ 1360a Appeal and error.

§ 1354. How long powers of guardian to continue. His settlement. "When a guardian has been appointed for a minor before he or she attains the age for making a selection, his powers shall continue until the ward arrives at the age of majority, unless sooner removed for good cause, or such ward selects another suitable guardian. After such selection is made and approved by the court, and the person so selected is duly appointed and qualified, the powers of the former guardian shall cease. Thereupon his final account as guardian shall be filed and settled in the proper court." [R. S. § 6258.][1]

§ 1355. Termination of trust.

The above section was probably enacted for the reason that previously the Courts held that when a minor arrived at the age of choice that then, without further action on the part of the minor or of the Court, the guardianship terminated.[2] By the provisions of the above section the powers of the guardian do not terminate until the minor has arrived at the age of majority, or when the guardian has been removed either for cause or by reason of choice of the minor, when the succeeding guard-

[1] § 10919 G. C. The minor can not make choice where the appointment is made by direction of a will.
See § 10928 G. C., §§ 1366, 1534.
See § 1309, as to removal of testamentary guardian.
§ 1534, Gdn's of Drunkards.

[2] English vs. Campbell, Wright, 119; Lessee, etc., vs. Brainard, 11 O. 442; Favorite vs. Booher, 17 O. S. 548; Sch. Dom. Rel. 311.

ian has been duly appointed and qualified. One cause of termination of the trust exists which is not mentioned in the above section, and that is the death of the ward or the death of the guardian. In case of the death of the ward, the trust would be terminated in the same manner as if the ward had arrived at the age of majority. In such a case it would be the duty of the guardian to make his settlement with the Court, and if there are any funds in his hands, pay them over to the administrator of the estate of the deceased ward.[2*] If the guardian dies, then it would be the duty of the executor or administrator of his estate to file an account as soon as the same could reasonably be done.[3]

Although a guardian may have time and be required to file his account after the guardianship terminates, yet his power as guardian ceases at the date of the death of the ward, or when the ward became of age, or when a succeeding guardian had filed his bond and qualified.

In a recent case it was said: "The guardianship terminates upon the death of the ward and thereafter the guardian was without any authority to do any act which could affect or be binding upon the estate. He no longer held the property as a guardian, but as a custodian merely; quoting from a previous case,[4] 'That a guardian or man that has been guardian after his guardianship expires has no more power than if he had never been appointed.'" [5]

If a suit be pending, it is not abated by the termination of

2* 15 A. & E. Ency., 2d Ed. 73.

3 See § 6175*a* R. S., § 707.

§ 6291 R. S., § 1499.

4 English vs. Campbll, Wright, 116.

5 Sommers vs. Boyd, 48 O. S. 659.

Under a similar statute it was held that the guardian's power did not extend in any case beyond the ward's majority. Curtis vs. Devoe, 121 Cal. 468.

Likewise it has been held that the guardianship could not continue even by agreement after the age of majority. Matter of Kincaid, 120 Cal. 203.

As to termination by minor's choice, see § 6357 R. S., § 1327.

See § 1484 *et seq.* on guardian's accounting.

Woerner on Guardians, 334.

the guardianship,[6] and he may generally reduce to possession choses in action standing in his name.[7]

The guardian is not discharged from liability until he has paid over the balance found, either in cash or securities, to the ward or his legal agent.[8]

§ 1356. Marriage of ward.

It is said that in England, the Court of chancery never appoints a guardian to a female after her marriage, nor discharges an order of a guardian because of marriage.[9] The rule at common law, however, was that upon the marriage of a female infant the guardianship of both her person and estate ceased. Of her estate, for the reason that the husband was entitled to the possession of the same; of her person, for the reason that the husband was likewise entitled to the care and custody of his wife and the guardianship would be incompatible with the marriage relation. Our statute has definitely settled the question in this State by the following provision:

"The marriage of a ward, if a female, shall determine the guardianship as to the person, but not as to the estate of such ward." [R. S. § 6265.][10]

It is laid down as a general rule of law that the marriage of a male ward terminates the guardianship over his person,[11] but not over his estate.[12]

§ 1357. Resignation.

Guardians of minors were not in England allowed to resign their offices.[13] But by statute this rule is not in force in our State. The provisions relating thereto are as follows:

[6] Gard vs. Neff, 39 O. S. 607.
[7] 15 A. & E. Ency., 2d Ed. 73.
[8] 15 A. & E. Ency., 2d Ed. 113.
§ 1500, By Extrs. of Gdn.
§ 1485, Accounting.
[9] Woerner on Gdn., 336.
[10] § 10929 G. C.
[11] Reeves on Domestic relations, 328; 2 Kent. Comm. 226.
[12] Woerner on Guardians, 337.

"The marriage of a woman will not disqualify her to act as a guardian whether such marriage occurred before or after her appointment and qualification, and all acts in such capacity shall have the same validity as if she were unmarried." § 10958 G. C.

[13] Woerner on Guardians, 117.

"The court by which a guardian is appointed, for reasons satisfactory to it, may accept his resignation, and appoint another in his stead." [R. S. § 6274.][14]

While the above section confers ample authority upon the Probate Court to accept the resignation of a guardian at any time, yet the Court should never accept the resignation of a guardian unless he has filed his account. Even if a resignation was accepted, the guardian should not be relieved of the responsibility until an account was filed and passed upon as provided by law.[15]

§ 1358. Removal of guardian by the court. "The probate court may remove any guardian, he having not less than five days' notice thereof, for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, removal from the county, or other cause which, in the opinion of the court, renders it for the interest of the ward that he be removed. Removal from the state of a person, appointed guardian, of itself shall determine the guardianship of such person." [R. S. § 6272; 102 v. 97.][16]

§ 1359. Jurisdiction and procedure.

Clause 4 of sec. 1049, G. C.,[17] provides that the Probate Court shall have exclusive jurisdiction to appoint and remove guardians, to direct and control their conduct, and to settle their accounts. This provision fixes exclusively the power to remove a guardian in the Probate Court, and from the provisions of a subsequent section,[18] which gives the Probate Court exclusive jurisdiction over a matter that is once brought within its jurisdiction, the removal can only be made by a Court that made the appointment. The causes for removal are very much similar, and the power of the Court is very much like that

14 § 10938 G. C.

15 See § 10627 G. C., § 210, as to resignation of administrators.
§§ 10991-2 G. C., § 1300, as to resignation of administrators.

16 § 10936 G. C.
See § 1558, Removal of assignee.

17 § 27.

18 § 527, § 29.
See Collins vs. Collins, 22 Dec. 345, where the subject of habitual drunkenness in divorce cases is discussed.
Power ceases when removal from state occurs. Pank vs. Shick, 5 O. C. C. 136; 9 C. D. 125.

given in the removal of administrators or executors, and therefore the procedure for the removal of administrators or executors can be applied with very little change or alteration to the removal of a guardian; and the discussion of the subject of removal of administrators and executors is applicable largely to the removal of guardians. It therefore seems to be unnecessary to give forms and directions as to such procedure here. The reader is referred to the chapter on revocation of letters of administrators and executors.[19]

In addition to the general provisions given, the Probate Court, in reference to the appointment and removal of guardians, another section[20] makes it the duty of the Court to enforce the return of inventories and accounts and the performance of any other duty that may devolve upon the guardian either with or without complaint, and it would necessarily follow that if the Court has the power to compel the performance of a duty, it would have the power to remove the guardian if he failed to perform any order of the Court made in the requirement of the performance of any such duty.[21]

§ 1360. Causes, etc.

The statute gives certain grounds for removal which are very similar to those providing for the removal of executors and administrators,[22] and for the removal of trustees.[23]

Thus habitual drunkenness, incompetency and fraudulent conduct are mentioned alike in all the statutes. While a "gross neglect of duty" is required for the removal of executors or administrators, a "neglect of duty" is sufficient for the removal of a guardian or trustee. The removal from the State of an executor or administrator may be sufficient cause to remove him from a trust, but a removal of a guardian from the State is a cause for which a guardian *must* be removed from his trust. Another ground for removal is a removal from the

19 § 208 *et seq.*

20 § 10939 G. C., § 1362.

21 See § 1514, Proceeding for removal of assignee.

22 §§ 10629-30 G. C., § 213.

23 §§ 11035-6-7 G. C., § 1300.

county of the guardian. The general clause that the guardian may be removed for " any other cause which in the opinion of such Court renders it for the interest of the estate that the guardianship be terminated," is exactly similar to that providing for the removal of an executor. This last clause is very broad and gives the Court absolute discretion in determining the fact whether a guardian should be removed or not, and the reviewing Court will not set the same aside. As a general rule it may be said that whenever the interests of the estate of the ward, or of the ward himself, in any manner are not properly attended to by the guardian, then he ought to be removed. The causes for a removal of a trustee generally, are causes sufficient to remove a guardian.[24] In addition, there may be some which are particularly applicable to guardianship. A guardian might be removed for a failure to give such religious teachings as the parent of the child would have demanded if living. Or, if by harsh or unfair means he attempts to erase the impressions made by the parents on the mind of the child, or puts its conscience to any kind of torture,[25] thus ill treatment of the ward,[26] taking the ward from school at the age of nine and marrying her to a guardian's son, who had no property,[27] and fraud on the ward by corrupt and conclusive acts,[28] and trying to alienate the affections of the ward from her mother, who was a good character,[29] have been held sufficient causes for removal.

In addition to causes above set forth, the statute specifically declares that a guardian shall be removed if he fail to give a new bond,[30] or fail to file an inventory.[31] As the statute makes it the duty of the Court[32] to enforce all orders that may be necessary for the welfare of the minor, it therefore follows that it is the duty of the Court to likewise remove any guardian who

[24] § 1302.

[25] Woerner on Gr. 114.

[26] Rouhs vs. Backer, 6 Heisk (Tenn.) 395; 19 Am. Rep. 598; Lefever vs. Lefever, 6 Md. 472.

[27] Goodall vs. Harris, 2 P. Wms. 561.

[28] Marks vs. Witkouski, 16 La. Ann. 341.

[29] Perkins vs. Finnegan, 105 Mass. 501; Tyler on Infancy, 252.

[30] § 10937 G. C., § 1384.

[31] § 10889 G. C., § 984.

[32] § 10939 G. C., § 1362.

does not perform his duty so as to result to the best interests of the ward. A guardian is under the statutory duty of obeying and performing all orders and judgments touching the guardianship.[33] Therefore, if he disobeys the court, he should be removed. Of course, a guardian should never be removed merely to satisfy the whimsical idea of the ward or any one else, but it always rests upon the sole question whether the best interests of the ward demand the removal or not. And no removal should be made without a cause shown.[34]

§ 1360a. Appeal and Error.

The statute expressly gives the right of appeal from the order removing a guardian.[35] However, the statute places a very large discretion in the Probate Court, and there ought to be strong reasons before the order made by the Probate Court should be disturbed.[36] After the termination of the guardianship, by confirmation of his account, the relation of the guardian and ward is that of debtor and creditor.[37] The guardian himself may in the interest of the trust take an appeal [38] or any one affected thereby.[39]

[33] §§ 10933-10935 G. C., §§ 1367, 1313.

[34] Sch. on Dom. Rep. 316.

Removal from state *ipso facto* terminates authority. Merchants & Clerks Sav. Bank vs. Schirk, 5 C. C. (N.S.) 569; 27 O. C. C. 138.

[35] § 11206 G. C., § 39.

[36] § 10936 G. C., § 1358.

[37] Lambkin vs. Robinson, 10 N. P. 1; 21 Dec. 13.

[38] *In re* Keanen, 8 N. P. (N.S.)] 217; 19 Dec. 444.

[39] See *In re* Oliver, 9 N. P. (N.S.)] 178, for extended discussion of matters pertaining to exceptions to inventory and account and removal, etc.

CHAPTER LXXIV.

POWERS AND DUTIES OF GUARDIANS GENERALLY.

§ 1361 Guardian's relation to his trust.
§ 1362 Guardian's duties enforced.
§ 1363 Power of Court over guardians in the execution of their trust.
§ 1364 Procedure when Court directs the manner of execution of the trust.
§ 1365 Application of guardian for direction as to the management of his trust.
§ 1366 Powers of guardian of person and estate — rights of parents.
§ 1367 Duties prescribed by statute.
§ 1368 Inventory.
§ 1369 Duties as to custody of ward.
§ 1370 Wards may be bound out upon approval of Probate Court.
§ 1371 Form of indenture to bind out a ward.
§ 1372 Rights to services of his ward.
§ 1373 Duties as to maintenance.
§ 1374 When parent may receive compensation for maintenance and education.
§ 1375 Duties as to education.
§ 1376 Religious instruction.
§ 1377 Fixed allowance made by the Court for ward's maintenance, etc.

§ 1361. Guardian's relation to his trust.

The relation that a guardian sustains to his ward is one peculiar to itself. In some respects in the holding of title of property the guardian's relation is very much similar to an administrator, unless he should be a testamentary guardian, then his powers are more nearly allied to an executor or testamentary trustee. He must then look to the will of the deceased for the construction of many of his powers. While in the strictest sense of the term it has been doubted whether he is a trustee,[1] yet it is now generally conceded that in the ordinary sense of the term he is a trustee, and the law applicable to trustees is generally applied in the determination of a guardian's proper relations to his trust.[2]

[1] Sch. Dom. Rel. 321.

[2] Redf. on Wills, 440 note; Bouv. Law Dic. 616; Hill on Trusts 49; Lewin on Trust 279; Woerner on Gdns. 172, 197.

Judge Owen in Mannix Assignee

Assuming that the guardian occupies the relation of a trustee what has been heretofore said in the discussion of the rights and duties of trustees in the management of an estate, etc., will be applicable here.[3] Likewise the discussion of the care and management of an estate by an administrator will throw some light upon the general duties of a person occupying a fiduciary relation.[4]

But these chapters discuss more particularly the powers and duties of trustees where there is an estate. But in the case of guardians, we have the additional matter, which attaches to the guardianship of the person, to-wit, maintenance, education and protection of the ward. In the discharge of their duties, provided they are honestly made, guardians, are regarded with great liberality by the Courts. Common skill, common prudence and common caution is all that is required of them in the administration of their trust. Ordinary men are to be compared with and adjudged by the standard of ordinary men.[5]

By reason of the helpless condition of infants, the king and through him the Chancery Court was regarded as the universal guardian of all the infants in the English kingdom, and this matter was carried out with great strictness, and the guardian occupied a position more as agent of the Court than as one occupying a position where he could exercise his own discretion.[6]

Bearing in mind that a ward in chancery was in all cases under the special protection of the Court and that no act could be done affecting the minor's personal property or estate, unless

vs. Purcell, 46 O. S. 102, says: "A trust is where property is conferred upon and accepted by one person on the terms of holding, using or disposing of it for the benefit of another. Wherever such a trust is shown, it is cognizable by a Court of Equity. The law knows no trust which simply binds the conscience. An alleged trust which is cognizable only in the Court of morals or the forum of conscience, is no trust at all; it is an absurdity. The law does not acknowledge a trust over the exercise of which it will not, through its tribunals, assume control, to avert its destruction, perversion or abuse. Morice vs. Bishop of Durham, 9 Ves. 400."

[3] See § 1250 *et seq.*; § 1273 *et seq.*; § 1287 *et seq.*

[4] § 506 *et seq.*

[5] Blk. Comm. Shaswood's Ed. 463. Woerner on Gdns. 197-205.

[6] Sch. Dom. Rel. 323.

by its express or implicit direction,[7] and the helpless condition of infancy, our Legislature has in addition to the authority conferred by the general statute,[8] given a special supervision over guardians by the following provision.[9]

§ 1362. Guardian's duties enforced. "The court by which a guardian is appointed, shall enforce the return, at the prescribed times, of all inventories and accounts required to be filed therein by him, and enforce the performance of all other duties devolving upon guardians appointed by it, either with or without complaint first made; and thereupon make and enter such judgments and orders as are requisite in any case to promote the faithful and correct discharge of such duties, or to preserve the estate of minors for whom guardians were appointed." [R. S. § 6275.][10]

[7] Blk. Com. Shaswood's Ed. n. 462.

[8] § 10492 G. C., § 27.

[9] Guardianship imposes purely a personal trust, under no circumstances are its peculiar functions to be delegated to another. Rice Pro. Law, 489, citing Lynch vs. Rotan, 39 Ill. 14; Dorman vs. Ogbourne, 16 Ala. 759; Berry vs. Johnson, 53 Me. 401; 2 Kent. Com. 224; 2 Story's Eq. § 1333.

Where the guardian of the person and estate of a minor, a female just entering womanhood, ignorant, chaste, of weak mind and without living parents, took control of her person and placed her in his family as a servant, and, knowing her to be such a person, took indecent liberties with her person, thereby exciting her passion, telling her that it was not improper for her to permit him to do so, and that the act of sexual intercourse would not injure her, and thereafter, while she still so remained in his family, he, knowing her to be still ignorant and weak-minded, negligently suffered and permitted his son, a well-grown lad, to sleep with her and to have sexual intercourse with her, whereby she became pregnant, the guardian is liable to the ward for the injury so suffered by her. Brattain vs. Cannady, 96 Ind. 266.

See § 1022, Power ward to make will.

§ 1378, Management of estate.

§ 1489, Credits entitled to.

§ 1484, Duty to account.

§ 1534, Gdns. of drunkards.

[10] § 10939 G. C.

The Court may enforce orders other than for the payment of money by proceedings in contempt. §§ 1958 and 1910 G. C.

See White vs. Gates, 42 O. S. 109; *In re* Rowekamp, 27 Bull. 289.

§ 1363. Powers of court over guardians in the execution of their trust.

The above section is *sui generis* and has had but very little adjudication. The question naturally presents itself, to what extent may the Court after having appointed a guardian, direct the guardian as to the manner in which he shall execute his trust. It unquestionably means that the Court shall enforce with or without application, the performance of the ordinary duties devolving upon the guardian as set forth in the statutory law. Such as the filing of inventories,[11] filing accounts, investment of money and any other duty which plainly devolves upon the guardian. But can it control the discretion of the guardian as to the education of the ward, or the persons with whom the ward shall live or what church the ward shall attend, or what kind of clothes the ward shall wear, or as to the manner in which the ward's farm is to be tilled or to whom the ward's real estate shall be rented and things of that character present a matter not free from difficulty.[12] If it is once shown that it was the intention of the Legislature to maintain in the Probate Court a supervision in all cases over the guardian's powers in reference to the ward's person, or estate, then the question whether or not the power shall be exercised would rest in the discretion of the Court, and the Court could require the guardian to act in a certain manner whenever it was of the opinion that such action was necessary or proper to promote a faithful and correct discharge of the duties of the guardian, or to preserve the ward's estate. The only case reported in our Supreme Court,[13] was where the Probate Court had made an order directing a ward to pay a preferred claim for the support of the guardian and his family, and the amount was undisputed. The Court held that the Probate Court had jurisdiction to make such an order.

[11] § 10933 G. C., § 1367.

[12] The guardian must exercise a sound discretion in the discharge of his duties in the support and education of his ward; in cases of doubt or difficulty in this regard, he must apply to the court for direction. Tyler on Inf. 257.

[13] Loudon vs. Patterson, 41 O. S. 206.

22 Cyc. 1177.

It would seem that the above section is broad enough in its provisions to authorize the Court to make any order that it deems proper in reference to the action of the guardian in the management of his trust, whenever the Court is of the opinion that such is proper to promote the correct discharge of the duties of the guardian or preserve the estate of the minor. This leaves the Court certainly with very extensive jurisdiction in such matter, and perhaps a jurisdiction that is not subject to review by a superior Court, for the only way in which the Court could enforce its order would be by removal of the guardian; and a removal of a guardian rests in the sole discretion of the Court and is not subject to review by a higher Court.* It would, therefore, seem that the power to direct the guardian as to the management of his trust rests in the sole discretion of the Probate Court and would never be reviewed except for a manifest abuse of such discretion. The Probate Court should not assume to direct the guardian in the management of the matters pertaining to the guardianship, unless there is a manifest cause for so doing. The guardian has given bond for his faithful performance, and if he fails to properly discharge his duties, there is a remedy provided in that way. If the Court has power on its own motion or application of some interested party to direct the guardian to perform certain acts, it would likewise have the power to authorize and direct a guardian to perform certain duties pertaining to his trust upon the application of the *guardian,* and such is the practice. During the term of guardianship, many questions arise where the guardian does not feel that he wishes to assume the responsibility of giving a final answer. In such cases it is proper for him to file an application in the Probate Court, setting out all the facts and have the Court pass upon them and make an order accordingly. Whether the guardian's actions in conformity with an order of the Court could be reviewed when passing upon his account, is a more serious question. Conceding that it can, it would not be of any practical benefit, for if the Court made an order upon a fair presentation of the facts, and the guardian honestly obeyed

*See § 39 as to appeal. Also § 1342. The statute has been changed since first edition and there is now an appeal from a removal, etc.

such order, the Court would certainly refuse to hold him to any further responsibility.

Of course no order should be made by the Court on its own motion or on the application of some one unless the guardian had full notice, and if the application is made by the guardian, notice should be given to the ward, or some one interested in his behalf, so that the Court may be fully advised.[14]

§ 1364. Procedure when court directs the manner of execution of the trust.

While sec. 10857-8 G. C. allows the bringing of an action in the Court of Common Pleas, asking the direction of the Court in the management of a trust, it is doubtful whether that section could be applied exclusively if at all, to cases where the power is clear, but the manner in which it is to be executed is the matter upon which information is desired. The previous section is important [15] to the Probate Court, from the fact that it makes it the duty of the Court without application to look after the

[14] In a case recently decided in the Circuit Court, (Jones vs. Green, 21 C. C. 96; 11 C. D. 548), in which it was sought to have an order of the Probate Court, directing an administrator to cancel a mortgage, it was held that the Probate Court did not have such jurisdiction over an administrator or executor. But it was so held, not for the reason that the Probate Court *could not* have such power conferred upon it, but that it *did not* have such power. The reason that it did not have such power, was founded upon the fact that the statutes gave to an administrator or executor, the right to reject claims against an estate and compel a suit at law, in order to recover thereon. There are no such statutes in relation to guardians, and there seems to be no barrier in the statutory law to prevent the Probate Court from ordering the guardian to pay any debt which is justly due, and which the interests of the estate demand should be paid.

The view heretofore advanced, that the Probate Court retains a supervision over a guardian in the management of his trust, is further enforced from the fact that two different sections of the General Code, § 10933 G. C. (§ 1367), and § 10816 G. C. (§ 1313), make it the duty of the guardian to obey and perform all the orders and judgments of the Court touching the guardianship.

It has been assumed that the guardian can ask the Common Pleas Court for directions as to the payment of a claim under § 6202 R. S. Wing vs. Hibbert, 7 N. P. 124; 8 Dec. 65.

The Court can now review an order removing a guardian. See § 52.

[15] § 10939 G. C., § 1362.

management of the trust and enforce the guardian to do that which is to the best interests of the estate. Where the Court of its own motion makes an order, it should be by an entry which may be in the following form:

(*Title*)
It appearing to the Court that A. B., guardian of C. D., has failed and neglected to file his account (or inventory, or has failed to invest funds in his hands, or is not properly maintaining his said ward, etc.,) in this Court as required by law, it is ordered that a citation be issued notifying said A. B. to appear forthwith, or on the.....day of..... in this Court and show cause why he has not filed said account as provided by law, and show cause why he should not be removed from his guardianship, for the failure to comply with the law.

The following may be used as a form of citation:

The State of Ohio,.....county, ss. Probate Court.
To....., guardian of.....:
You are hereby notified to appear forthwith (or on the.....day of....., 190.., at.....o'clock A. M.) at the office of the Probate Court of said county, to answer why you have not filed your accounts as guardian as aforesaid, according to law (or according to the order of said Court heretofore made, if such order has been made and not complied with, or why you have not loaned the money of your said ward, according to law, or state any other failure of duty), and to show cause why you should not be removed from such guardianship.
Witness my hand and the seal of said Court, this.....day of....., 190...
(L. S.) .....
.....
Probate Judge of said Court.[16]

§ 1365. Application of guardian for direction as to the management of his trust.

Guardians should not for trifling matters go to the Court for instruction, for the guardian is presumed when the appointment is made, to have sufficient judgment and discretion to pass upon all ordinary matters. But a guardian should rather be encouraged than discouraged to make application to the Court and secure its direction. In making an application, a disposition is manifested to do that which is for the best interests of the ward. No particular form can be given for applications of this charac-

[16] Whittaker's Prob. Code.
If the guardian fails to answer the citation, or other order of the Court, it should immediately order him to file his account and remove him. If he appears and files his account, or obeys the law or order of the Court, no further action under the citation is necessary.

ter. The application should, however, set out fully, all the facts surrounding the matter upon which the judgment of the Court is asked. If it is a matter upon which the facts are in doubt, the Court ought not to make an order, unless notice is given to the ward, or to some one who sustains such relations to the ward as would incline him not to favor the guardian as against the ward. The Court should be cautious in making the order and only do so when satisfied that in the language of the statute, the order is "requisite to promote the faithful and correct discharge of the duties of the guardian or to preserve the estate of a minor." In such cases it would be advisable to have the application filed, a day set for hearing and after the same is heard, a journal entry made containing the finding of the Court in full.[16a]

§ 1366. Powers of guardian of person and estate. Rights of parents. "Each person appointed guardian of the person and estate of a minor, shall have the custody and tuition of his ward, and the management of such ward's estate during minority, unless removed or discharged from such trust, or the guardianship sooner determines from any of the causes specified in this chapter. But the father of the minor, or if there be no father, the mother, if a suitable person, respectively, shall have the custody of the person and the control of the education of such minor." [R. S. § 6264.][17]

The necessity of the above section of the General Code is not very obvious. A previous section,[18] provides for the duration of the powers of a guardian, and another section,[19] provides that no one shall be appointed as guardian of the person of a minor if they have a living parent, who is suitable to have the custody and tuition of the minor. The only purpose, therefore of this section would be, that if a person were appointed the guardian of both the person and estate of the ward, yet if

[16a] Court orders in such cases are only advisory. Error can not be predicated on them. If the power vests in the guardian, independent of the order of the court, and is wrongful, the ward must raise the question in exception to accounts, or possibly, in case of fraud or mistake, in a separate suit in a Court of Equity. In an unreported case where the guardian compromised a doubtful claim by accepting a certain amount, the income to be paid to ward (a drunkard) for life, afterwards the guardianship was lifted, and the ward sought to have the order set aside in the Probate Court, which the court refused to do. The case was taken to the Court of Common Pleas and there the court held, that the proper remedy would be in an action in a Court of Equity.

[17] § 10928 G. C.

[18] § 10919 G. C., § 1354.

[19] § 10916 G. C., § 1311.

the father or mother were suitable persons, he would in effect be only guardian of the estate. It would prevent a testamentary guardian from having the custody, etc., in preference to the surviving parent.

§ 1367. Duties prescribed by statute. "The following are the duties of every guardian appointed to have the custody and take charge of the estate of a minor.

"1. Within three months after his appointment to make and file a full inventory, verified by oath, of the real and personal estate of his wards, with its value and the value of the yearly rent of the real estate. Failing so to do for thirty days after he has been notified of the expiration of the time by the probate judge, the judge shall remove him and appoint a successor;

"2. To manage the estate for the best interest of his ward;

"3. On oath, to render to the proper court an account of his receipts and expenditures, verified by vouchers or proof, and as part of the account, a full, itemized statement of the funds of his ward's estate, the date and nature of their investment, the security thereof, and the rate of interest or income accruing thereon, once in every two years, or oftener, upon the order of the court, made on motion of any person interested in such ward or his or her property, for good cause shown by affidavit. Failing so to do for thirty days after he has been notified of the expiration of the time by the probate judge, no allowance shall be made for his services, unless the court enters upon its journal that such delay was necessary and reasonable. But when the whole estate of such ward, or of several wards jointly, under the same guardianship, does not exceed two hundred dollars, in value, the guardian shall only be required to render such account upon the termination of his guardianship, or upon the order of the court made upon its own motion, or the motion of a person interested in the ward or wards, or in his, her or their property, for good cause shown, and set forth upon the journal of the court;

"4. At the expiration of his trust, fully to account for and pay over to the proper person all of the estate of his ward in his hands;

"5. To pay all just debts due from such ward out of the estate in his hands, and collect all debts due to the ward; in case of doubtful debts, to compound them, to appear for and defend, or cause to be defended, all suits against his ward;

"6. When a ward has no father, or has one who is unable or fails to educate the ward, his guardian shall provide such education for him as the amount of his estate justifies;

"7. Within a reasonable time after he receives it, to loan or invest the money of his ward, in notes or bonds, secured by first mortgage on real estate of at least double the value of the money loaned or invested. The buildings thereon, if any, must be well insured against loss by fire and so kept by the mortgagor for the benefit of the mortgagee, until the debt is paid. On failure so to do, the mortgagee shall insure them and the expense to him be repaid by the mortgagor and be a lien on the property concurrent with the mortgage. Or he may invest such money in bonds of the United States, or of a state on which default has never been made in the payment of interest, or bonds of a county or city in this state, issued in conformity to law; or with the approval of the probate court, in productive real estate within this state, the title to which must be taken in the name of the ward. He also shall manage such investments and when deemed proper, change them into other investments of the above classes. No real estate so purchased shall be sold by the guardian, except with the approval of the probate court. If the guardian fails to loan or invest money of his ward within such reasonable time, he must account on settlement for such money and interest thereon, calculated with annual rests;

"8. To settle and adjust, when necessary or desirable, the assets which he may receive, in kind, from an executor or administrator, as may be most advantageous to his wards. Before such settlement and adjustment shall be valid and binding, it must be approved by the probate court, and such approval entered on its journal. With like approval, to hold the assets as received from the executor or administrator, or what may be received in the settlement and adjustment of such assets. Where personal injury is caused to a minor by wrongful act, neglect or default, such as would entitle the minor to maintain an action and recover damages therefor, the guardian of such minor is authorized to adjust and settle said claim with the advice, approval and consent of the probate court, and in such settlement, parents may waive all claim for damages on account of loss of service of said minor, and such claim may be included in such settlement;

"9. To obey all orders and judgments of the proper courts touching the guardianship. The filing of the statements of the investment of the trust funds mentioned in this section shall not entitle the court to any fees in addition to those allowed by law for filing and recording accounts without such statements." [R. S. § 6269; 108 v. 366.][20]

[20] § 10933 G. C.

It is the duty of the court either with or without complaint to enforce the performance of the duties required by the section. *In re* Strickland, 7 N. P. 233; 1 Dec. 702.

The first six clauses of the above section are almost identical with

§ 1368. Inventory.

What has been heretofore said,[21] as to the importance of an administrator or executor in filing an inventory is fully applicable to a guardian. The statute recognizes its importance when it prescribes as a penalty for failure to file — the removal of the guardian. It must be a full inventory; what is meant by this is, that it must contain in detail a full and complete statement of the assets of every nature and character, which will come into the guardian's possession. It has been held that it must include the distributive share of a ward in an estate.[22]

But where the management and control of property is given to the executor during the minority of the ward, the guardian should not include it in his inventory.[23] If he fails to file an inventory, the statute is imperative that he shall be removed.[24] Before a removal can be had, however, the guardian must be notified, and thirty days must have expired from the time of the notification, until the order of removal could be made.

The inventory is only *prima facie* proof, that the guardian has received the property therein described, and may be given in evidence against him and the sureties on his bond, but neither

the statutes of Indiana, (R. S. 1894, § 2685), and the decisions of the Court of that State will therefore be pecularly applicable to our statute. The first and sixth clauses will be considered further in this chapter. The second, fifth and seventh clauses will be considered when treating of the rights of guardians as to personal property; and the third and fourth will be under the chapter of accounting. Section 10933 G. C. is not intended to cover all the duties of a guardian, but contains the essentials of such various duties.

See § 515, Investments by administrators.

[21] § 280 *et seq.*

[22] Tapley vs. McGee, 6 Ind. 56; Burtch vs. Thorn, 7 Ind. 508.

[23] Branch vs. Holecroft, 14 Ind. 237.

In Indiana, the failure to report in time, renders him liable to ten per cent. penalty. (Eiceman vs. State, 75 Ind. 46.) But with us the only penalty seems to be the removal.

[24] Wood vs. Black, 84 Ind. 279; Johnson vs. Metzger, 95 Ind. 307.

The order might probably be enforced by contempt. § 543 R. S.

The case of *In re* Oliver, 9 N. P. (N.S.) 178, the court reviews an inventory on exceptions.

himself nor any one liable to the estate of the ward is precluded from showing that the inventory was not correct.[25]

The inventory must be under oath. Where the estate is very large it may be advisable to have two or three disinterested persons make an appraisement. Otherwise, the guardian fixes the value himself in his return. A guardian appointed to take the place of a guardian that has been removed or resigned, need not file an inventory, unless such former guardian did not file one, and even then, it might not be necessary if the former guardian has filed an account.[25a] In order that the inventory may show the exact condition of the estate, if there are judgments, mortgages, or other liens on the real estate, the inventory should contain a statement of such fact. The following may be used as a general form:

GUARDIAN'S INVENTORY.

Inventory of the real and personal estate, with the value of the same, and the value of the yearly rent of the real estate belonging to.....
....., minor child.....of....., deceased.
Description of personal estate and value thereof.....
Value ..... $.....
Description of real estate.....
Value ..... $.....
Yearly rents ..... $.....

RECAPITULATION.

Total value of personal estate..... $.....
Total value of real estate..... $.....
Yearly rent of real estate..... $.....
The State of Ohio,.....County, ss.
....., guardian of....., being duly sworn, says that the foregoing is a full inventory of the real and personal estate of said ward.., with the value of the same, and the value of the yearly rent of said real estate, according to the best of.....knowledge.

.....

Sworn to before me, and signed in my presence, this.....day of.....
.....A. D. 190..

....., Probate Judge.
By....., Deputy Clerk.

§ 1369. Duties as to custody of ward.

In no case in our State can a guardian whether testamentary, or otherwise, have the custody of the minor unless the parents of such minor are unsuitable. If either the father or mother is unsuitable, then a guardian is entitled to the custody of the ward

[25] Woerner on Gr. 319, citing State vs. Stewart, 36 Miss. 652; Green vs. Johnson, 3 Gill & J. 389; Sanders vs. Forgasson, 3 Baxt. 249.

[25a] This is the method followed in administrations of estates.

as a general rule. But even then as to the guardian, the right is not absolute, and if the best interests of the child, which is the sole question to be considered, demands that some other person should have the custody, the Court will so order. The guardian may enforce his right by habeas corpus, or by action of trespass, for taking away the ward, and the prevailing doctrine seems to be, that he may maintain an action for the seduction of his female ward.[26]

The custody of a ward's person is never regarded as illegal and his refusing to surrender such guardianship, even to the parents, does not constitute unlawful imprisonment or restraint.[27] The right of the guardian to change the domicile of his ward has been spoken of heretofore.[28] Our statutes provide that the guardian may apprentice his ward.

§ 1370. Wards may be bound out upon approval of Probate Court. "If it be necessary, the guardian of a female under twelve, or a male under fourteen years of age, may bind such minor to a suitable person, until such minor reaches the age of twenty-one if a male or eighteen if a female, or for a shorter period. No identure shall be executed unless the probate court appointing the guardian first approves such binding and the terms and conditions of the indenture, and evidences that approval by a certificate under the seal of the court indorsed thereon." [R. S. § 6293.][29]

It will be observed that no indenture of apprenticeship shall be executed, unless the Probate Court appointing the guardian shall first approve such binding and the terms and conditions of the indenture. After the indenture is made, which should be executed in accordance with secs. 8007 to 8012, G. C., the guardian does not relinquish all his duties by an apprenticeship,

[26] 15 Am. & Eng. Ency. of Law, 2 Ed. 51.

[27] Woerner on Gr. 159, citing Townsend vs. Kendall, 4 Minn. 412; People vs. Wilcox, 22 Barb. 178.

[28] § 1322.

Testamentary guardians cannot be controlled in their rights by expressions, in other parts of the will appointing them, which amount to a mere recommendation. Sch. Dom. Rel. § 333, p. 465; Knott vs. Cotter, 2 Ph. 192.

[29] § 10959 G. C.

but still inquires into the usage of the minor.[30] If the minor is being ill-treated, he shall complain before a justice of the peace.[31] If the apprentice becomes immoral and dissolute, and fails to obey his master or mistress, proceedings may be had to annul the apprenticeship.[32]

§ 1371. Form of indenture to bind out a ward.

Articles of agreement made this.....day of....., A. D., 190.., by and between....., as guardian of....., a male (or female) minor of the age of.....years, on the.....day of ....., A. D. 190.., (the age should be specified as near as can be, because, as to the time of service, the age here named will govern as being the true age, whether it is so or not), and.....witnesseth, that the said....., as guardian as aforesaid, hereby binds the said..... unto the said....., until the said .....shall arrive at the age of twenty-one years (or eighteen years, as the case may be; or if for any shorter period, name either the number of years that is agreed upon or the age up to which the minor is agreed to be bound), to learn the art of a stone cutter (or whatever art or business is agreed upon); and the said....., as guardian as aforesaid (or if it be agreed that he is to be individually liable, say, instead of "as guardian as aforesaid," individually) hereby covenants and agrees with said....., that the said..... shall faithfully serve the said....., and work under his direction at the employment aforesaid, during the term aforesaid, and conduct himself in a proper, becoming and respectful manner towards the said ....., and obey all his reasonable requests and demands.

And the said.....hereby covenants and agrees with the said ....., as guardian as aforesaid, that he will this day (or if another day be fixed, when the minor is to commence the service, say, on the .....day of....., A. D. 190..) receive the said..... into his service for the term and for the purposes aforesaid, and that he will, faithfully and in good faith, teach or cause him to be taught the art and mysteries of the trade of stone cutting (or such other business or art as is agreed upon), so that said.....shall be as thoroughly instructed and learned therein as his capacity will permit; and will send said.....to a common school for at least twelve weeks in each school year during his apprenticeship after the said..... is eight years of age and at the expiration of the said term of service, will furnish said.....with a new Bible and two good suits of wearing apparel; (and if any money or property agreed to be paid to the minor, say, and will pay the said.....the sum of..... dollars, or will give the said.....a set of good tools of said trade, etc., at the expiration of the term aforesaid, or add any other agreement between the parties).

In witness whereof, we have hereto set our hands.

(Signed.)

....., Guardian of.....

.....

[30] § 8012 G. C.

[31] § 8013 G. C.

[32] § 8016 G. C.

FORM OF JUDGE'S CERTIFICATE.

The State of Ohio,.....County, ss.
I,....., Probate Judge of.....county, Ohio, hereby certify, that on the.....day of....., A. D. 190.. the, Probate Court of said county examined the indenture, hereto attached, and approve the terms and covenants therein, as also....., as a suitable person to whom to bind the said....., as will fully appear by the records of said Court.
Witness my hand and the seal of said Court, this.....day of..... ....., A. D. 190...
(L. S.) ....., Probate Judge, etc.

ENTRY OF APPROVAL OF COURT.

(*Title*)
This day came the said....., guardian of....., and produced to the Court articles of indenture duly made and executed on the.....day of....., A. D. 190.., by the said....., as guardian as aforesaid, and the said....., whereby the said .....is bound unto the said....., and upon the terms and covenants in said indenture named, and the Court being satisfied that said.....is a proper person for the purposes aforesaid, and that the terms and covenants of said indenture are legal, proper and just, the person, and terms and covenants aforesaid are, by the Court, hereby approved.[33]

§ 1372. Right of services of his ward.

Although a guardian may occupy the position of a parent to his ward, yet he is not entitled to the ward's personal services. Whatever wages may be earned for work done either to the guardian or for another person, constitute a trust fund, for which the guardian is bound to account. If the ward lives with the guardian and occupies the position of a member of his family, the guardian would have the right to offset the board and services rendered for the benefit of the ward as against the services that the ward had rendered for him.[34]

And the general rule of parent and child has been applied to cases of guardian and ward, where the ward is a member of the guardian's family. That is, that the guardian cannot recover from the ward for services rendered to the ward, neither can the ward recover for services rendered to the guardian.[35] This rule could only be applied where from all the circumstances surrounding the case, the ward actually occupies the position and relation of a child to his parent. A guardian

[33] Whit. Pro. Code.

[34] Woerner on Gr. 160; Sch. Dom. Rel., § 335.

[35] Woerner on Gr. 161, citing Starling vs. Balkum, 47 Ala. 314; Moyer vs. Fletcher, 56 Mich. 508.
The doctrine that where two persons sustain to each other a family relation, one can not recover from the other on account of services except on proof of contract to make compensation therefore, does not apply to a claim by a guardian for services rendered an imbecile ward. Scattergood vs. Ingraim, 86 O. S. 76.

should not rear his ward in idleness, but should in some manner keep him engaged in services, either in making earnings, or fitting himself for the duties of life which may afterwards devolve upon him.[36]

§ 1373. Duties as to maintenance.

If the guardian is guardian of the person, or the person and estate of his ward,[37] it is his duty to maintain the ward, and if he should be guardian of the estate, and there is no guardian of the person, and there is no other person who would attend to the matter, it would likewise be his duty to look after the maintenance of the ward.[38]

Two matters are to be taken into consideration in determining the amount to be expended. First, the value of the ward's estate, and second the position in society that the ward's parents or friends have occupied. That method of expenditure should be adopted which taking into consideration all the surroundings of the ward, will result to the best possible advantage of the ward.[39]

No rigid rule can be adopted. In some cases it would be better to expend all the income and principal in the maintenance of the ward, where in other cases, such expenditure might not be considered for the ward's best interest. Whatever may be considered such necessaries for which the ward would be personally held liable, are assuredly such things as the guardian ought to provide. But he should not be limited to this rule, as the ward's welfare may demand that which is not a necessity. The guardian cannot be held personally liable for even necessaries that have been furnished to his ward, unless he contract for the same. But in such cases the creditor might procure an

[36] If a guardian has knowledge of an agreement between his minor ward and her mother and a third person that such ward shall serve such person at a certain price to be paid to the minor, and allows such agreement to be executed, and the amount to be paid to the minor without objection, he is estopped from collecting the amount as guardian. Boulton vs. Black, 68 Ind. 269.

[37] §§ 10933, 10935 G. C., §§ 1367, 1313.

[38] § 6270 R. S., § 1316.

[39] Woerner on Gr. 169.

A stepfather is obliged to maintain his minor stepchildren but upon necessity being shown, may be allowed for same. *In re* Ledig, 21 Dec. 712. See under next section.

Where the child's estate exceeds that of the parent it should be supported out of its own estate. Wing vs. Hibbert, 20 C. C. 404; 11 C. D. 192.

order of the Probate Court and in that mannner compel the guardian to pay the debt.[40]

If the guardian contracts for an article for the use of the ward, he will be liable although he may not have sufficient funds in his hands. for it is his duty to know the condition of the estate.[40*]

The English rule was, that the expenditures of a guardian should be limited to the income,[41] unless the Court specifically allowed the principal to be used. While a guardian should practice a reasonable degree of economy, yet in our State, the law does not recognize this English rule, and if the welfare of the ward demands an expenditure, it may be made by the guardian without direct authority, from the Court, although in this way the entire estate may be expended. In questions of doubt, the guardian should go to the Court for instructions.[42]

Where the guardian is guardian of the person, or person and estate of the ward, he may not be liable financially beyond the estate in his hands, yet as he stands somewhat in the relation of a parent, he cannot desert the ward entirely, he should either look after the interest of the ward or resign.[43]

[40] Louden vs. Patterson, 41 O. S. 206.

[40*] Woerner on Gr. 168.

[41] As to what is income, see § 1288, Trustees.

[42] Woerner on Gr. 167; *In re* M. J. Hough, 2 N. P. 382; 1 Dec. 699.

The Probate Court of Clark Co. approved expenditures which were not absolutely necessary, as follows: Where a boy eighteen years of age was the owner of one hundred acres of land, his guardian was authorized to purchase him a horse and buggy, at a cost not to exceed $250, it being made to appear, others boys in the community had such articles. Another case where a girl fourteen years of age had an estate of $3.000, the guardian was authorized to purchase a piano at a cost not to exceed $250. In another case where a minor had an estate of the value of $200,000, the Court approved an expenditure of $5,000 a year, to be applied towards education and maintenance of the ward.

In another case where a boy had an estate of $500, was eighteen years of age, the guardian was authorized to purchase him a watch not to exceed $30 in value. See 15 Am. & Eng. Ency. of Law, 2 Ed. 105.

[43] Sch. Dom. Rel. 337.

A guardian should be permitted to exercise some discretion in allowing small sums of money to his ward for personal expenses. Brown vs. Mullin, 24 Miss. 204; Speer vs. Tinsley, 55 Ga. 89. Thus where the guardian of a girl, whose whole estate was in his hands, amounted to $170, advanced to her during the

§ 1374. When parent may receive compensation for maintenance and education.

If the guardian be also the ward's father, he will not ordinarily be allowed to charge for the expenditures made for the support or education of the ward, since it is his duty, himself, to support his minor child.[44] And the same rule would prevent a guardian from allowing the ward's father for expenditures made for maintenance and education.[45] An exception to this rule is, when the father is poor, or comparatively poor, when compared with the estate of the ward. This exception has been stated as follows:[46]

"Where the estate of children is abundant for their support and education in a reasonable manner, and that of the parent is limited, and his income much less than that of the children, it would be unreasonable to require him to maintain his children out of his own comparatively limited means. Under such circumstances, where he has not the pecuniary ability to support and educate his children in a manner suited to their fortunes and expectations, and the children have an income or estate ample for this purpose, the parent would be allowed, by a Court having jurisdiction of such matters, the expenses incurred by him for these purposes, out of the estate of such children."[47]

period of about six years and a half while she was between eleven and eighteen years of age, the whole of the amount in sums of $5 at a time, it was held that there was no abuse of discretion on the part of the guardian, though during that period the ward was gratuitously furnished by her relatives with the actual necessaries of life in the matter of boarding, clothing and schooling. Karney vs. Vale, 56 Ind. 542.

The guardian may be allowed for expenditures for necessaries furnished before the guardianship begun. *In re Miller*, 34 Hun. 267; Rooker vs. Rooker, 60 Ind. 550.

[44] *In re* Gould, 2 Dec. 398; Burk vs. Turner, 85 N. Cas. 500; 2 Am. Prob. R. 489.

[45] 15 Am. & Eng. Ency. of Law, 2 Ed. 102.

Does not include a stepfather. Wing vs. Hibbert, 7 N. P. 124; 8 Dec. 65.

[46] *In re* Gould, 2 Dec. 398.

[47] In this case the ward had a piano, about $375 in money and a gold watch, which she received from her mother's estate. Her father had about an equal estate and he was engaged in an occupation that earned a moderate livelihood and had no other persons dependent upon him for support except this minor. He made a charge for board paid to the

But a mother is usually allowed for support of her child. Even though she has an estate of her own, for it is not the duty of the mother like that of a father to furnish means for maintaining and educating a child.[48] The courts have also refused to sanction the payment of board, etc., to other persons who have sustained the relation of a parent to a ward.[49] As a general rule a stepfather may be allowed maintenance furnished to his stepchildren.[49a]

The guardian will not be allowed to pay a claim to a person who is occupying the relation of a parent to a child, unless such person makes a claim to be reimbursed, and that it further appears, that it was the intention of the parties to charge for the board, etc., at the time it was furnished.[50]

§ 1375. Duties as to education.

The guardian is under the same duty to educate his ward, as he is to furnish maintenance. The statute provides that when any ward has no father, and having a father who is unable or fails to educate his ward, it shall be the duty of his guardian to provide for him, such education as the amount of his estate may justify.[51] From this it appears that it may be the duty of the guardian to furnish education for the ward, although he

ward's brother of $122.50 and made some further charges of $50.60 for clothing. The court refused to allow him for the expenditures made, holding that it was his duty to furnish his daughter with the means of support and education.

[48] The following cases are cited in the encyclopedia of law to sustain this proposition: Stewart vs. Lewis, 16 Ala. 734; Englehardt vs. Yung, 76 Ala. 534; Matter of Beisel, 110 Cal. 267; Osborne vs. Van Horn, 2 Fla. 360; Mowbry vs. Mowbry, 64 Ill. 383; Chapline vs. Moore, 7 T. & B. Mon. (Ky.) 150; Tutorship of Crane, 47 La. Ann. 896; Whipple vs. Dow, 2 Mass. 415; Dawes vs. Howard, 4 Mass. 97; Melanefy vs. O'Driscoll, 164 Mass. 422; Gladding vs. Follett, 2 Dem. (N. Y.) 58; Matter of Winsor, 5 Dem. (N. Y.) 340; Wilkes vs. Rogers, 6 Johns (N. Y.) 567; Bellas' Estate, 6 Kulp (Pa.) 189.

[49] *In re* M. J. Hough, 2 N. P. 382; 1 Dec. 699.

See cases cited, 14 Am. & Eng. Ency. of Law, 2 Ed. 104; Horton's Appeal, 94 Pa. St. 62; 2 Am. Prob. R. 151.

[49a] However, there have been cases where it was not allowed. *In re* Ledig, 21 Dec. 712.

But there seems no good reason why a stepfather should support the child of his wife by a former husband if such child has an estate and such we believe to be the law. See Gay vs. Ballow, 4 Wend. 406; Sharp vs. Cropsey, 11 Barb. 227; Garber vs. Bauerline, 17 Or. 115; 19 Pac. 849.

At common law a stepfather was under no obligation to support his stepchild.

[50] Folger vs. Heidel, 60 Mo. 285; Davis vs. Roberts, Sled Smed. M. Ch. Miss. 543; Lafferty's Estate, 147 Pa. 283; Woerner on Gr. 170; see also 162.

[51] §§ 10932, 10935 G. C., §§ 1310, 1313; 1 Bl. Com. 446.

See 2 Kent's Com. 196; Sch. Dom. Rel. 235; §§ 7767, 12976 G. C., § 308, Compulsory education.

does not stand in the relation of a parent. As a general rule it may be said, that the guardian is the proper judge as to the school or university at which his ward shall be educated, and the Court will compel the obedience of the ward to the selection, unless some reasonable objection is shown.[52] In this matter, the guardian must exercise a sound discretion and in case of doubt or difficulty, he may apply to the Court for instructions.[53]

Parole evidence of a deceased father's wishes has been admitted, and an order made accordingly.[54] Whether the guardian should give the ward a collegiate education or not will depend upon the estate and inclinations of the ward, if so inclined and the estate warrants it, such education should be given; if not, then an ordinary good education will suffice. If the estate warrants and the ward has an inclination, a special education may be given in music or any particular branch which will result to the best interest of the ward.

§ 1376. Religious instruction.

Chancery Courts in England have recognized the rights and duties of guardians in respect to the religious education of their ward, but there is no religious test for qualification of guardians in our State. It is said that it has been laid down as a rule, that where one has left in his will no direction as to the religion in which his children are to be educated, it will be presumed that his wishes were that they should be educated in his own religion, and that a child's preference will not be consulted on the subject who is only ten years of age.[55]

In another case, it was said, the guardian can only be removed from his management for misconduct, and certainly man's religious opinions are neither the one nor the other. But if he should attempt by any harsh or unfair means, to erase the impressions made by the parents on the mind of the child,

[51] Tremain's case, 1 Str. R. 168; Hall vs. Hall, 3 Atk. 721.

[52] Harris vs. Richardson, 4 Dev. R. 279; Lyles vs. Thorp, 4 B. Mon. R. 313; Tyler on Infancy, 256.

[54] Sch. Dom. Rel. 340.

[55] White, J., *in re* Luck, 7 N. P. 49; 10 Dec. 1.

and much more, if he should put its conscience to any kind of torture, the law would not only justify, but demand his removal.[56] In such cases, the welfare of the child is again, the sole question to be considered. That kind of religious teachings should be given to the child, which accords with that of its relatives and friends, where no particular reason exists to the contrary.[57]

§ 1377. Fixed allowance made by the court for ward's maintenance, etc.

It was common in English chancery practice, for the Court to fix an amount which might be applied towards the maintenance and education of the child. This rule is not general in our Courts,[58] yet it is a commendable and safe practice, especially where the ward is a member of the guardian's family, or a member of the parents' family, for the guardian to make an application to the Probate Court as to the amount which can be allowed for the maintenance and education of the child. This practice is also one of convenience, as by this method, a necessity for vouchers and receipts for a large number of the incidental expenditures is avoided. This allowance can be changed from time to time as the necessities of the ward require. The authority for such order of the Court is found in sec. 10939, G. C.[59] The application should be made in writing and the Court should put its finding in an entry properly placed upon the journal so that no misunderstanding could arise in the future.

[56] Nicholson's Appeal, 20 Pa. St. 50.

[57] Woerner on Gr. 170; Sch. Dom. Rep. 340.

[58] Sch. Dom. Rel. 461.

[59] § 1362.

CHAPTER LXXV.

POWERS AND DUTIES IN RELATION TO ESTATE.

§ 1378 Management of estate.
§ 1379 Carrying on business of the ward.
§ 1380 Must pay debts of the ward.
§ 1381 Collection of debts, etc.
§ 1382 Arbitration and compromise of claims.
§ 1383 Actions for the ward.
§ 1384 Actions against the ward.
§ 1385 Investment of funds.
§ 1386 Investment of funds in land.
§ 1387 Form of Application, Entry, etc.
§ 1388 Interest on funds.
§ 1389 Deposit of funds.
§ 1390 Personalty received from administrator, etc., in kind.
§ 1391 Sale of personal estate.
§ 1392 Management of real estate, etc.
§ 1393 Rents.
§ 1394 Repairs.
§ 1395 Release of ward's tax title by guardian. Effect of tender of deed.
§ 1396 Partition and dower.
§ 1397 Easement. Appropriation.
§ 1398. Completion of real estate contract. Additional bond.
§ 1399 Contracts between ward and guardian.
§ 1400 Ward's right of action against the guardian.
§ 1401 Guardian's right of action against the ward.
§ 1402 Employment of attorneys, agents, etc.
§ 1403 Guardian can not purchase property of the ward, etc.
§ 1403a Discovery of assets.
§ 1403b Imprisonment for disobeying citation.
§ 1403c Examination reduced to writing.
§ 1403d Costs.

§ 1378. Management of estate.

It is made the statutory duty of the guardian to manage the estate for the best interest of the ward.[1] This statutory provision places no additional duty on the guardian other than that which he already had. It makes the guardian a trustee of the estate of his ward and as such trustee, the ordinary rights and liabilities attach, and he is liable for such degree of negligence as a trustee ordinarily is.[2] There has been a great deal of dis-

1 § 10933 C. C., § 1367.

2 See § 1361, Gdns. relation to trust; § 1289, Dividends, etc.
See § 506 *et seq.*, as to care and management of estate by administrators and executors; Sch. Dom. Rel. 342.

cussion whether the legal title vests in the guardian or whether he merely has a naked power not coupled with an interest.[3]

But this is not a very practical question, for it is now generally agreed that the guardian has absolute control and entitled to reduce to possession all the personal property and choses in action belonging to his ward, and that he has no power over the real estate except to collect the rents, make ordinary repairs, pay taxes and insurance, etc., unless where special authority is given for that purpose.[4] Carrying with it, the right to manage the estate, follows the principle that all acts done in that respect redound to the benefit of the estate, and that the guardian cannot act in any capacity which is beneficial to himself, or which will result injuriously to the estate. While ignorance will some times excuse a guardian, dishonesty never will.[5]

If a guardian exceeds his authority, the ward may, after he becomes of age, justify the act by enjoying the fruits of such unlawful or illegal acts of the guardian.[6] Various particular matters in the management of the estate of a ward will be the subject of the remaining sections of this chapter.[7]

[3] Woerner on Gr. 172.

15 A. & E. Ency. of Law, 2 Ed. 54.

[4] State vs. Commissioner, 39 O. S. 58.

[5] Sch. Dom. Rel. 348.

The case of Miller vs. Procter, (20 O. S. 442), is important, as exemplifying the law, that where a trustee acts honestly but through ignorance, the estate suffers a loss for which the trustee is not held responsible. Advice of counsel will not always protect. Cogbill vs. Boyd, 10 Bull. 285.

The following is from Woerner. "Since a fiduciary relation requires vigilance as well as honesty, indifference and carelessness is culpable in a guardian and renders him liable for losses incurred in respect to his ward's money." "It matters little to an orphan child," says Black, C. J., in Nicholson's Appeal (20 Pa. St. 50, 54), "whether his interests are sacrificed and his prospects blighted by well-meaning ignorance or by wilful malice. Either is within the definition of misconduct, a word which applies not to motive, but to the act." "Mere good faith, while requisite and commendable, is not all that is required of such a fiduciary. He must be competent also." Woerner on Guardians, 199.

[6] Woerner on Gr. 175; 15 A. & E. Ency. of Law, 2 Ed. 75.

[7] See § 838, Service of summons;
§ 1287, Duties of trustees.
§ 1488, Accounting of Gdn.
§ 1489, Credits entitled to.
§ 1534, Gdn. of drunkards.

If a guardian lease his ward's estate for saloon purposes he is liable for certain fines, etc. §§ 6209, 1011 G. C.

§ 1379. Carrying on business of the ward.

It is difficult to imagine a case where a minor ward would have any trade or business to be carried on by a guardian, as the minor never having been able to conduct a business of his own, there is none such in existence at the time of the appointment of the guardian, and there is no provision of law anywhere, that justifies a guardian in establishing a business for an infant. In reference to guardians for imbeciles, lunatics, drunkards, etc., it is somewhat different. There the guardian may come into possession of a running business at the time of his appointment, and it may be to the interest of the estate that such business be continued, at least a reasonable length of time. But if it is continued by the guardian, he does so on his own responsibility. If the business is successful he must account for the profits, if unsuccessful, he must individually bear the loss. The only exception to this rule might be, where the business is conducted under an order of the Court, and there has been some discussion whether the Court which makes the appointment can also make an order to continue the business.[8]

The author is of the opinion, that under and by virtue of the provisions of sec. 10939 G. C. (§ 1362), and the general statutory laws of our State that the Probate Court has authority to direct the continuation of the business. There is a wide difference between the duties of an administrator and those of a guardian in reference to the estate of their beneficiaries. It is an administrator's duty to convert the personal property into money and distribute the estate as rapidly as possible. It may be the duty of a guardian to preserve the property in the condition he finds it, or convert it into money, which ever will result most beneficially to his ward. The Court should be extremely cautious about granting the order, and should require frequent reports from the guardian, and maintain such supervision over the trust as will unquestionably prevent the estate from being squandered. In an Ohio case it was said that the guardian could continue the business if in his judgment it was desirable

[8] Woerner on Gr. 472.

and that it was error for the Court to order the business continued by some other person.[9]

§ 1380. Must pay debts of the ward.

It is the duty of the guardian to pay all just debts due from such ward out of the estate in his hands,[10] and this duty may be enforced by an application to the Probate Court for an order to that effect.[11] Considerable discretion in this matter, however, must be allowed to the guardian. If he admits that the debt is due, the Probate Court may well make the order, but if the guardian denies the validity of the debt, then the Probate Court should not interfere, unless the guardian is manifestly wrong, but should permit the debt to be collected as provided by law. If a guardian paid a debt which was manifestly wrong, he could not be allowed for the same in his settlement. Our law does not provide for any such thing as the filing of a claim against the estate of the ward.[12]

The estate and not the guardian personally is liable for all debts which exist at the time the guardianship begins or for necessaries which may be contracted for by the ward.[13] The guardian is liable for debts not contracted by him only to the extent of the amount of property he has in his possession belong-

[9] Hagneny vs. Cohen, 1 Bull. 104; Sch. Dom. Rel. 349; Woerner on Gr. 472, 473.

If the guardian advance money to his ward to go into business, he, on final settlement, is not entitled to credit for the amounts thus advanced, unless it can be shown to have been beneficial to the ward. *In re* Mells, 64 Ia. 391; Eichelberger's Appeal, 4 Watts, 84; Shaw vs. Coble, 63 N. C. 377.

But if a guardian carries on a business for his ward, and after the termination of the guardianship the ward accepts the benefit of the investment, he cannot hold the guardian liable. Hoyt vs. Sprague, 103 U. S. 613.

See § 518, as to carrying on business of deceased.

§ 11125 G. C.

See § 1519, Duty as to existing contracts. The form might be similar to an application for an assignee to continue business, etc. §§ 1589 and 1590.

[10] § 10933 G. C., § 1367.

[11] Loudon vs. Patterson, 41 O. S. 206.

[12] McNabb vs. Clips, 5 Ind. App. 204.

[13] Brown vs. Chase, 4 Mass. 436; Willard vs. Fairbanks, 8 R. I. 1; Raymond vs. Sawyer, 37 Me. 406; Bentley vs. Torbert, 68 Ia. 122; Coombs vs. Janvier, 31 N. J. L. 240.

ing to the estate.[14] An infant is not personally liable for necessaries when they have been furnished him with the permission of his guardian and charged to him.[15] The promise of a guardian to pay the debts of a ward is not collateral within the meaning of the statute of frauds, and need not be in writing.[16]

§ 1381. Collection of debts, etc.

The guardian should collect all debts due such ward.[17] "Among the most obvious powers and duties of guardians in respect of the estates of their wards, is the collection of legacies, distributive shares, and other dues coming to them; as well as to take and hold property settled upon the wards without the interposition of trustees, and collect dividends, interest, and income generally, and moneys due on bonds or mortgages." [18]

In this matter he must act with that degree of diligence which all things considered, will result to the best interest of the ward. He may follow his ward's money wherever he can find it and recover it from any one who had obtained it from any

[14] Stumph vs. Goepper, 76 Ind. 323; Wainright vs. Burroughs, 1 Ind. App. 393.

[15] Simms vs. Norris, 5 Ala. 42.

[16] Our statute provides otherwise as to executors and administrators. § 8621 G. C. Roach vs. Chaplin, 1 Bailey L. (S. C.) 419.

An action cannot be maintained against a ward after the guardianship has ended and he has received his property on an implied promise to pay the debts of his guardian contracted in his behalf during the guardianship, even though the guardian has not kept back out of the property enough to pay the debt. Westmoreland vs. Davis, 1 Ala. 299.

See § 1520, Insolvency of lunatics.

[17] § 10933 G. C., § 1367.

See § 440 *et seq.*, Collection of assets by Admr.

[18] Woerner on Gr., 180, citing Sch. Dom. Rel. 352.

If he permit the administrator of the ward's ancestor to retain the ward's estate he does it at his peril, and will be liable for any loss to the estate inflicted by such administrator. Well's Appeal, 22 Pa. St. 325; Clark vs. Tompkins, 1 S. C. 119; Covington vs. Leak, 65 N. C. 594.

He is entitled to his ward's distributive share in an estate (Tapley vs. McGee, 6 Ind. 56; Burtch vs. Thorn, 7 Ind. 508; Warwick vs. State. 5 Ind. 350; *In re* Moody, 2 Dem. (N. Y.) 624, unless by will the executor is to have possession until the ward arrives at full age. Branch vs. Holcraft, 14 Ind. 237.

former guardian.[19] And he is entitled to the possession of a note payable to a third person for the ward's benefit.[20]

A guardian is not bound to sue in all directions at once, he must use a proper discretion. An extraordinary effort is not required where in the general opinion, the money is in safe hands.[21] A guardian is liable not only for what he does receive, but for what he ought to receive; and if he ought to receive a certain amount in money, and does not, but takes something else in the place of money, he is liable.[22]

A guardian who receives in payment of a solvent debt due to his ward the note of a third person instead of money, receives the same at his peril.[23] If he takes a note in payment, and it is afterwards paid, that will be a sufficient satisfaction of the original debt and relieve the guardian from liability.[24] But if the guardian cannot secure money in payment, he may accept property, acting in good faith.[25] It has been held that a guardian must collect debts, although the debtor lives in another State.[26] The guardian has no right to pay debt barred by the statute of limitations.[27]

§ 1382. Arbitration and compromise of claims.

In case of doubtful debts, it is the duty of the guardian to compound the same.[28] Unlike the statute relating to the settlement of an estate of deceased persons, the law applying to guardians does not give any general direction as to the manner in which a claim that is doubtful may be compounded or compromised. It would seem, therefore, that the guardian may make such a settlement of a claim against the estate as in his judgment appears to be for the best interests of the estate. In

[19] Fox vs. Kerper, 51 Ind. 148; Boaz vs. Milliken, 16 Bull. 109; 22 The Reporter 43.

[20] Carrillo vs. McPhillips, 55 Cal. 130.

[21] Woerner on Gr. 182.

[22] State vs. Womack, 72 N. C. 397.

[23] Lane vs. Mickel, 46 Ala. 600; Bescher vs. State, 63 Ind. 302; State vs. Greensdale, 106 Ind. 364; Huff vs. Walker, 1 Ind. 193; Brenham vs. Davidson, 51 Cal. 352.

[24] Jones vs. Jones, 20 Ia. 388.

[25] Mason vs. Buchanan, 62 Ala. 110.

[26] Potter vs. Hiscock, 30 Conn. 508.

[27] Woerner on Gdn. 173.

[28] § 10933 G. C., § 1367.

this matter he will be held responsible for the exercise of that discretion which a reasonably prudent man would exercise under like circumstances. "Guardians may submit controversies," says Woerner,[29] "respecting the property and interests of their wards to arbitration and awards made in pursuance thereof are held binding on all the parties thereto, leaving open the question of liability to their wards, if these should subsequently repudiate the awards, which it seems, they have a clear right to do."

It would, therefore, seem that the only safe way in which a guardian can compound or arbitrate a claim is to do so under an order of the Probate Court. In all matters of compromise, the guardian must act not in his own interest, but in the interest of his ward. If he acts otherwise, he will be held responsible.[30]

§ 1383. Actions for the ward.

To appear for and defend or cause to be defended, all suits against such ward,[31] is another statutory duty of the guardian. This right follows from the right of the guardian to collect the debts due his ward or liability to pay claims against his ward. One section of our General Code provides that,[32] "The action of an insane person must be brought by his guardian. The action of an infant must be brought by his guardian, or next friend; and when the action is brought by his next friend, the court may dismiss it, if it is not for the benefit of the infant, or substitute the guardian, or any person, as the next friend."

And another section provides that "An executor, administra-

[29] Woerner on Gr. 185.

[30] Sch. Dom. Rel. 343.

It is said, however, that he can not bind his ward by a consent decree (Bearinger vs. Pelton, 78 Mich. 109; S. C. 43 N. W. Rep. 1042), or submit an agreed case. Robbins vs. Swain, 7 Ind. App. 486; Coughlin vs. Ins. Co., 63 Hun 521; S. C. 22 N. Y. Supp. 1005.

On the principle of compromise a guardian may release a claim or cause of action for damages (Torey vs. Black, 58 N. Y. 185; Pine vs. Marshall, 3 P. Wms. 381), if made in good faith. Underwood vs. Brockman, 4 Dana, 309; Lunday vs. Thomas, 26 Ga. 537; Darby vs. Stribling, 22 S. C. 243.

See § 450 *et seq.*, for Admin. compounding claim.

[31] § 10933 G. C., § 1367.

[32] § 4998 R. S.

A guardian can not bring an action of divorce for his ward. Birdsall vs. Birdsall, 20 Civ. Law J., 348. In this case the ward was insane.

He may now settle a claim for wrongful death. § 10933 G. C., § 1367. In such cases the same method of procedure should be followed as where administrators compromise such claims. See § 538.

tor, or guardian, a trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted; and officers may sue and be sued in such name as is authorized by law."[33]

It, therefore, appears that a guardian in all cases when he brings an action for the benefit of his ward may bring it in his own name. In the absence of statutory provision, certain actions, such as actions in ejectment, for waste or trespass on the ward's land, or for partition,[33*] must be brought in the name of the ward.[34] The general principle being that the guardian must sue in his own name for any injury to the possession, but in the name of his ward for any right of the ward lying in action.[35]

The suit of an insane person must be brought by his guardian. It cannot be brought by a next friend; if the guardian fails to act, the Court should remove him.[36] Possibly an action might be permitted by a next friend where the guardian was acting adversely.[37] If a guardian commences a suit of his ward upon a note made payable to him as such guardian and the ward becomes of age while the suit is pending, the action does not abate.[38] A guardian may act in all matters in a partition proceeding the same as if the ward was not under a disability.[39]

§ 1384. Actions against the ward.

Our statute provides, that the defense of an infant must be by a guardian for the suit, who may be appointed by the

33 § 11244 G. C.

33* § 12044 G. C.

34 Woerner on Gr. 188.

35 Woerner on Gr. 173.

36 Row vs. Row, 53 O. S. 249.

37 Johnson vs. Meyer, 2 Cleve. L. R. 81; Long vs. Milford, 17 O. S. 485.

38 Gard vs. Neff, 39 O. S. 617.

See §§ 10988-9 G. C. (§ 1521), as to actions pending where guardian of an idiot is removed or resigns.

If an action be brought by a next friend, the petition must show the minority of the person for whom suit is brought. Hanly vs. Levin, 5 O. 225.

39 § 12044 G. C. See § 1879, Petition, etc.

When the guardian contracts for services to be rendered in behalf of his ward, he can not be sued in his representative capacity. Payne vs. Resht, 33 O. C. C. 258.

Court in which the action is prosecuted, or by a judge thereof, or by a Probate Judge.[40] This statutory provision is general and must be followed in every case where the statute does not make other provisions. It is somewhat in conflict with clause five of sec. 10933 G. C. (§ 1367), where it makes it the duty of a guardian to defend or cause to be defended, all actions against his ward. If it is the duty of the guardian to defend the action, it would seem that there is no reason for appointing a guardian *ad litem* where there is an acting guardian, or where the guardian has no adverse interest to the ward; and it has been held under the provisions of sec. 10933 G. C., that where a guardian appears for an infant and answers, and his answer is received and acted on by the Court, the effect is the same as though he had been expressly appointed guardian *ad litem*.[41]

But more recently it has been held, that in actions affecting the ward's interest, a guardian can not waive the issue and service of summons, nor dispense with the appointment of guardian *ad litem*[42] *unless authorized by statute*. It follows, therefore, that the only safe rule for bringing a civil action against an infant is to have a guardian *ad litem* appointed to make the defense. Whether the appointment of such guardian *ad litem* releases the general guardian of the duty of defending the suit is questionable. The better way in such cases is to appoint the general guardian as guardian *ad litem*. In reference to the defense of an insane person, the statute is more consistent when it provides that such defense must be by his legally appointed guardian or if there is no guardian or the guardian has an adverse interest, by a trustee, etc. It has also been held that a judgment cannot be collaterally impeached because minor defendants had had no guardian *ad litem* appointed for them.[43] A guardian cannot sue in his capacity as guardian, so as to render the estate of his ward liable.[44] The defense of an insane person must be made by his

[40] § 11252 G. C.

Judgment cannot be rendered by default—it must be upon proof. Massies Heirs vs. Donaldson, 8 O. 377; Randall vs. Turner, 17 O. S. 262; Sturges vs. Longworth, 1 O. S. 544.

[41] Rankin vs. Kemp, 21 O. S. 651.

[42] Roberts vs. Roberts, 61 O. S. 96.

In a suit in tort against an insane person it is proper to make the guardian a party defendant, and the county in which the ward had his residence at the time he became insane, is the proper place to bring the action, the insane person himself should also be served. Steward vs. Porter, 79 O. S. 1.

[43] Morgan vs. Burnet, 18 O. 535.

[44] Weigand vs. Kylius, 8 A. L. Rec. 100; 15 A. & E. Ency. of Law, 2d ed. 56.

A guardian *ad litem* cannot ac-

legally appointed guardian, or if there is no guardian or the guardian's interest are adverse, by a trustee for the suit.[45]

§ 1385. Investment of funds.

The investment of the funds of the ward is one of the most important duties that a guardian has to perform, it requires not only the most perfect good faith and diligence, but also great circumspection and prudence on the part of the guardian, both for his own safety and for the interest of the ward. The object to be accomplished is to so invest that the fund shall be safe, and yield a reasonable rate of income to the ward.[46]

Testamentary guardians should follow the direction of the testator in making investments, for losses arising from such a course they are not responsible, but where the will is silent or the directions are in general terms, the statutory rules of investment must prevail.[47]

Our statute provides that he must loan or invest the money within a reasonable time after he receives it and provides three kinds of securities that may be taken. *First,* it may be loaned on notes or bonds secured by first mortgage on real estate of double the amount of money invested, and that buildings thereon shall be kept insured.[48]

The *second* kind of investment permitted is in bonds of the United States, or of any State in which a default of interest

quire the ward's property, pending litigation—and a decree can be impeached. Massie vs. Matthews, 12 O. 351.

An action for tort committed by a lunatic must be brought against the lunatic, it will not be against the guardian alone. Stackers vs. Keiper, 35 O. C. C. 4.

It is not within the authority of a guardian to avoid a beneficial contract made by his ward, or to waive any benefit to which his ward is entitled, or to release any security belonging to the ward, or to revive a debt against the ward which is prescribed or barred by limitation, or to confess judgment against the ward, unless thereto authorized by statute. Woerner on Gr. 173, 174.

The current of authority, however, is decidedly to the effect, that in the absence of statutory provision on the subject, the appointment of a guardian *ad litem* is improper where the infant has a general guardian. Woerner on Gr. 256.

See § 1417 as to sale of lands by gdn., and § 844, as to sale of lands by admin. and gdn. *ad litem*, etc.

[45] § 11249 G. C.

This applies to divorce proceedings. Wolcott vs. Wolcott, 32 O. C. C. 587; Kerlish vs. Kerlish, 30 O. C. C. 274; 24 O. C. C. (N.S.) 492. See § 1522b, note 64.

[46] Woerner on Gr. 207; Sch. Dom. Rel. 353.

[47] Sch. Dom. Rel. 353.

[48] § 10933 G. C. (§ 1367).

has never been made or bonds of any county or city in this State, issued according to law. *Third*, with the consent and approbation of the Probate Court, investment in productive real estate may be made. If the guardian invested the funds of the ward in either of these ways as provided by statute, he would not be held liable for injury or losses accruing, provided he acted with diligence and prudence.[49]

But if he makes loans in disregard of the statute, he does so at his peril; and he cannot excuse himself by showing that he acted in good faith or that the security was good when taken.[50]

Another section of our General Code,[51] provides, that guardians, administrators, etc., may invest funds in bonds of United States government or in such other security as may be approved by the Court having control of the administration of the trust; and therefore, if the guardian wishes to escape responsibility for an investment made, he must either make investments in the way provided by the statute or must secure an order of the Court for that purpose. The guardian should never make application to the Probate Court for authority to invest the funds unless there is no reasonable opportunity to invest them in such security as the statute provides. When convinced that they cannot be so invested, then he should file his application in writing setting out in detail the kind of securities that it is proposed to invest the funds in and such other matters surrounding the securities as will give the Court full information. If the sum to be invested is a very large one, the Court might very well require that the matter be set down for hearing and some one who is interested in the ward's welfare be notified to appear and give testimony as to the advisability of making the investment. It has been held that in order to be binding, the assent of the Court must be entered upon its journal and a mere assent given by parol is not sufficient.[52]

[49] Woerner on Gr. 218, citing Newman vs. Reed, 50 Ala. 297; Brown vs. Wright, 39 Ga. 96, 101; Nelms vs. Summers, 54 Ga. 605; Ashley vs. Martin, 50 Ala. 537; Haddock vs. Planters' Bank, 66 Ga. 496; Watson vs. Holton, 115 N. C. 36.

[50] Woerner on Gr. 218.

[51] § 11214 G. C. (§ 514).

[52] Newman vs. Reed, 50 Ala. 297; Sch. Dom. Rel. 354; Carlisle vs. Car-

If an order to invest funds is obtained by fraud, it has been held that it may be impeached collaterally.[53] Where an order of the Court is procured, it might be well for the guardian after the investment is made to report to the Court that fact, especially is this true where the investment is a large one.[54]

§ 1386. Investment of funds in land.

It is a principle well established that a guardian has no right to change the character of the property in his hands, unless he does so by order of the Court. That is, he has no right to convert personal property into realty, or realty into personalty.[55]

The statutory law,[56] provides, that with the consent and approbation of the Probate Court, funds may be invested in productive real estate within this State, the title of which shall be taken in the name of the guardian as such; and furthermore, that the guardian may manage such investments and when deemed proper, change the same into other investments of the classes provided by statute. But no real estate purchased shall be sold by the guardian, except with the consent and approbation of the Probate Court. The only limitation as to the kind of real estate in which investments may be made is, that it be *productive real estate situate in this state.* In procuring such an order of the Court, the guardian should file an application for that purpose which should give a full statement, showing *first,* that the guardian has the funds on hands. *Second,* that the property is situate in this State. *Third,* that it is productive real estate. *Fourth,* its value and annual rents. *Fifth,* that the title is good

lisle, 10 Md. 440; Woerner on Gr. 219.

53 Woerner on Gr. 219, citing Skelton vs. Ordinary, 32 Ga. 266.

54 Where a guardian used the money of his ward, in his business with the honest intention to account for the same with proper interest, and such money is lost without any fault or fraud on his part, he is not guilty of embezzlement. Meyers vs. State, 4 C. C. 570; 2 C. D. 712.

See § 1488, With guardian should be charged.

55 *In re* Spencer's Appeal, 3 W. L. M. 408; Woerner on Gr. 175, citing 2 Kent, § 230; 2 Sto. Eq. Juris. § 1357; Attridge vs. Billings, 57 Ill. 489; 2 Perry on Trusts, §§ 606, 605; *ex parte* Crutchfield, 3 Yerg. 336.

56 § 10933 G. C. (§ 1367).

and mercantile. This application should be sworn to and it may be as follows:

§ 1387. Form of application, entry, etc.

APPLICATION TO INVEST FUNDS IN REAL ESTATE.

(*Title*)

Now comes A. B., guardian of C. D., and respectfully represents that he has in his possession as such guardian, and uninvested, the sum of..... .....dollars, which he desires to invest in productive real estate, and asks that the Court may give its consent and approbation to the same. Said real estate is situate in the county of....., State of....., and city of....., and bounded and described as follows (here give description). That said real estate is listed on the tax duplicate at..... .....dollars and that it is reasonably worth in the market the sum of.....dollars. That the title thereto is safe and mercantile, and that the annual income of said property will be about..... .....dollars, and deducting therefrom the reasonable repairs and taxes will leave a net income of.....dollars. (And insert any other reason that may exist for the order.)

Said guardian further represents to the Court that said property can be purchased for the sum of.....dollars and he believes that it would be for the best interest of said ward to invest the sum of..... .....dollars in the purchase of said real estate.

(Sign.)

The State of Ohio,.....County, ss.

A. B., being first duly sworn, says that the above statements are true as he verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of ....., A. D. 190..

.....

The guardian having filed the above application, and the Court being fully advised in the premises and being satisfied that it would be for the best interest of the estate to make such investment, it should do so by making a journal entry, which may be in the following form:

(*Title*)

This day this matter came on to be heard upon the application of A. B., guardian of C. D., for an order of this Court, giving its consent and approbation to said guardian, to invest certain funds in productive real estate, described in said application; and it appearing to the Court that it would be for the best interest of said ward to so invest said funds, the consent and approbation of the Court is hereby given to said A. B. to purchase the real estate described in his said application for the sum of..... dollars and take the title to said real estate in the name of the ward.*

If the guardian wishes to sell the real estate so purchased by him, he need not file an application similar to that required for the sale of real estate belonging to his ward. But he should file an application setting out the fact of his ownership of the property, when purchased and that the same was purchased by an order of the court, the reason for the sale, and how the pro-

* § 10933 G. C., § 1367.

ceeds are to be invested, so that the Court may be fully advised. This form of application may be as follows:

(*Title*)

Now comes A. B., guardian of C. D., and respectfully represents to the Court that on the.....day of.....by an order of said Court, he was authorized and directed to invest certain funds belonging to said ward in the following described real estate (here describe), and that thereafter on the.....day of....., he did so invest said funds, amounting to.....dollars in said real estate and placed the title thereto in his own name as guardian.

He further represents that said guardian is now in need of said funds for the purpose of maintaining and educating said ward (or state such other reasons as may exist for the desirability of changing the investment), and further represents to the Court that he has an offer of $..... for said real estate.

Wherefore he asks that the Court may give its consent and approbation to the sale of said real estate for the sum of.....dollars.

(Sign.)

The State of Ohio,.....County, ss.

A. B., being first duly sworn, says that the within statements are true as he verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of ....., A. D. 190..

.....

The Court being fully advised that it is necessary to sell the real estate or for the benefit of the ward so to do, should make a journal entry, which may be in the following form:

(*Title*)

This day this matter came on to be heard upon the application of A. B., guardian of C. D., for an order of this Court, giving to him its consent and approbation that the real estate described in said application may be sold to.....for the sum of.....dollars; and it appearing to the Court that it is for the best interest of the estate of said ward that said sale be made, said guardian is hereby authorized and directed to convey the premises in his application described to said..... by a proper deed, upon receipt of payment to him of the purchase price of.....dollars.[56*]

§ 1388. Interest on funds.

The guardian must invest the money within a reasonable time after he receives it, and if he fails to loan or invest the money

56* These entries should be drawn with some care, and the statute should be strictly complied with, as failure so to do may seriously affect the title to real estate.

A query has been made as to what the guardian should do with the property if it remains on hand at the time the ward becomes of age. In such cases if the guardian makes a satisfactory final settlement the real estate no doubt becomes that of the ward, and then is vested in the ward both the legal title and equitable title. However, as the property appears in the name of the guardian, such guardian ought, before his account is finally approved, be required to convey the same to the ward. If the guardian fails to do this, the court should provide in the entry that the guardian make such conveyance, within a certain time, that this order should stand as and for a conveyance of the same, and that the legal title be, and the same is, thereafter in the said ward.

If the title is taken in the name of the ward as the statute now requires, this would be obviated.

of his said ward, within said reasonable time, he must account on settlement with interest thereon calculated with annual rests.[57]

Authors have considerable discussion about the rate of interest that should be charged against a guardian, but the above statutory provisions, state the method for calculation in our State. As to the time within which investments should be made, the guardian is only responsible like, in other matters connected with the trust, with a reasonable degree of diligence on his part to secure interest, he must not make unauthorized investments. "This liability," says Woerner,[58] "does not, of course, attach if it be shown that the guardian could not, with reasonable diligence, loan out his ward's money with safety, and that he in no wise himself used or obtained any profit from the same." [59]

Where a guardian has had opportunity to show by his own oath or otherwise his inability to invest the money of his ward, but omits to do so, the Court will not presume him unable to invest it, and excuse him from accounting for interest; it will take judicial notice of the fact that money could be readily loaned at six per cent.[60]

But if a guardian carelessly suffers cash balances to remain idle in his hands, or mingles the ward's money with his own, he is chargeable with interest. Schouler says [61] that it remains a disputed question whether the guardian should be charged with compound interest for mere delinquency, but it seems that he should not." The general practice in our State is, that if a guardian does not invest the funds, that he will be charged with the legal rate of interest provided he does not show that he had no opportunity to invest the same. If he uses the funds him-

[57] § 10933 G. C. (§ 1367).

Where not specified in contract the legal rate is 6 per cent.

[58] Woerner on Gr. 220.

[59] If he fail to invest the funds productive, when he could do so, he is chargeable with interest. Richardson vs. Richardson, 6 O. 125.

If a loss accrue to the trust fund, the guardian will not be liable if he acted in good faith and with ordinary prudence. Spencer's Appeal, 3 W. L. M. 408.

[60] Armstrong vs. Miller, Wright, 562.

See McCrea vs. Martien, 32 O. S. 38.

[61] Sch. Dom. Rel. 354.

self, he will be charged with the same rate of interest. While Courts do not approve of guardians using the funds, yet it is not such a misapplication of the funds as will of itself cause the guardian to be removed, especially so long as the sureties on his bond are good and make no application for release from liability.[62] The guardian is also justified in keeping enough funds on hands to meet ordinary expenditures which are necessary in behalf of his ward.

The ward is entitled to simple interest on the amount due him from the time he is entitled to receive the fund on final settlement or until its actual receipt.[63] It is sometimes held that where the guardian invests the fund in his own business, that the ward has a right to elect whether he will take the profits or the interest but he cannot take both.[64]

§ 1389. Deposit of funds.

The same rule would apply to a guardian, as to the custody or disposition of funds while in his possession, as is applied to an executor or administrator; and reference is had to the discussion of that subject when treating of the care and management of estates by executors and administrators.[65]

§ 1390. Personalty received from Admr., etc., in kind.

When treating of the subject of administrators and executors in the settlement of estates, we have heretofore seen that certain assets may be distributed in kind.[66]

A part of clause eight of sec. 10933 G. C.,[67] authorizes a guardian to receive assets in kind from an executor or administrator. But before such settlement shall be valid and binding it shall be approved by the Probate Judge, and such approval

[62] For a guardian to convert the money of his ward to his own use, is of itself not breach of the bond. Case vs. State of Ohio, 10 W. L. J. 163.
See § 1488, With what charged.
See James vs. West, 47 Bull. 750.

[63] Olson vs. Thompson, 77 Wis. 666.

[64] Seguin's Appeal, 103 Pa. St. 139.

[65] See §§ 512, 513.

[66] § 750 *et seq.*

[67] § 1367.

shall be entered on its journal; and it is also further provided that by like approval of the Probate Court, the guardian may hold such assets in kind. By this I presume it is meant that if the guardian desires to retain the property in the same kind as it was when delivered to him by the executor or administrator, he may do so by receiving the approval of the Court. But that if he does not receive such approval, it would be his duty to convert such assets into money the same as any other property belonging to his said ward.[68]

§ 1391. Sale of personal estate.

The statute gives to a guardian, full and exclusive power to sell the personal estate of his ward at any time that he may deem proper.[69] For that purpose he needs no order of the Court.[70]

It seems to be the policy of our law to allow the guardian full control over the disposition of his ward's personal property, holding him responsible on his official bond for a wrongful act. He may sell either at public or private sale, for cash or on time. If he sells on time, he would be held personally responsible if the notes were for any reason uncollected. Where there is a large amount of personal property that comes into the hands of the guardian it would be advisable to sell the same promptly and make a report to the Probate Court in the same manner as executors and administrators are required to do. If a guardian sells such property to a purchaser who deals fairly, the purchaser has a right to presume that he acts for

[68] A distinction exists between loans made by the guardian of funds in his hands, and simply retaining investments previously made by a former custodian or owner of them, the rule of liability being more stringent in the former than in the latter case. Woerner on Gr. 209.

[69] § 10945 G. C. (§ 1405).

[70] Field vs. Schieffelin, 7 Johns Ch. 150; Woodward vs. Donally, 27 Ala. 198; Wallace vs. Holmes, 9 Blatch. 65; Humphrey vs. Buisson, 19 Minn. 221; State vs. Morrison, 68 N. C. 162.

It is said, however, that it is not prudent for the guardian to make any important change in the character of the ward's estate, without first obtaining for his protection an order of the Court, permitting or directing him to do so. Giauques Manual for Gr. & Trustee, 94.

the benefit of his ward and he is not bound to inquire into the state of the trust, nor is he responsible for the faithful application of the money unless he knew or had sufficient information at the time that the guardian contemplated a breach of trust.[71]

Where, however a guardian sold a note that was made payable to him as guardian of A. K. and C. K. and E. K., it was held that one who buys such notes bearing on their face the marks of a trust fund is put upon inquiry; and if he buys them from the guardian, under circumstances fairly indicating that they were sold against the interest of his ward, he gets no title from the guardian.[72]

It is not usual to sell family pictures, plates, watches, ornaments, etc., but to keep them (as they are not of a perishable nature) by which to remember their former proprietors.[73] The power to sell personal property, however, does not permit a guardian to pledge the ward's property for his own debt,[74] neither can he pledge his ward's notes so as to prevent his successor from maintaining a suit against the pledgee to recover them.[75]

§ 1392. Management of real estate, etc.

The title to the ward's real estate is never vested in the guardian. But the guardian is entitled to the possession of the real estate and may expel therefrom objectionable persons whose influence over the ward is unfavorable.[76] He may enter into his ward's premises even against the latter's wishes.[77]

While the guardian's right to the possession of the premises is supreme, yet he cannot convey title to the same without an order of the Court,[78] neither can he lease it for a period be-

[71] Strong vs. Hope, 4 Bull. 1034; Engle vs. Ortman, 3 Dec. (re) 237.
[72] Strong vs. Strauss, 40 O. S. 87.
[73] Rice Pro. Law, 497; Tyler on Infancy, 261.
[74] Villalonga vs. Hicks, 13 S. C. 163.
[75] Hardy vs. Citizens' Bank, 61 N. H. 34.
[76] Wood vs. Gale, 10 N. H. 247.
[77] State vs. Hyde, 29 Conn. 564.
[78] See § 1404 *et seq.*
The principle that where one of two innocent persons must suffer from the wrongful acts of a third person, the one who put it in the power of such party to commit the wrong must suffer the loss rather than the other innocent party, cannot be invoked to the prejudice of guardian's wards in a matter in which their guardian was acting without warrant or authority of law. Bank vs. Schirk, 5 C. C. (N.S.) 569; 17 Cir. D. 125; 27 O. C. C. 125.

yond fifteen years,[78*] nor can he subject it to a mortgage, even though it be for the benefit of the ward.[79]

As incidental to the right of possession of real estate, the guardian is obliged to insure the property and see that the taxes are paid.[80]

Chief among the duties of a guardian as to real estate, are those of rents and repairs.[81]

§ 1393. Rents.

As a matter of course, it is the duty of a guardian to collect all the rents of the ward's real estate,[82] and if it is the custom he may employ an agent for that purpose.[83] If the guardian occupies the ward's lands, he is liable for the rents.[84] If the guardian cultivate the land of his ward himself, he must care for it prudently and will be liable for any depreciation or any losses occurring to it through his bad management.[85] If he negligently permit his agent to retain rents collected, any loss arising therefrom must be borne by him, the ward is held harmless,[86] and it is said that he is liable for the difference caused by his negligence between the amount of rents received

[78*] See § 1432 *et seq.*

[79] § 1446 *et seq.*

[80] Woerner on Gr. 202.

See §§ 2845, 2851, 2848 R. S. as to listing personal property. See § 511.

[81] These statutes show that the intention was to invest the guardian with the control of the estate of his wards, for purposes of taxation; and to hold him responsible to his ward for an abuse of that power. They show further, that it was not intended to impose any responsibility on minors, nor clothe them with any authority over their own lands in relation to taxation. In the management of the ward's lands, the guardian has power to do all acts reasonable and proper for the preservation and use of the real estate. This includes all duties relating to listing and payment of taxes, as well as renting and keeping the real estate in proper condition. Campbell vs. Park, 32 O. S. 544.

[82] Will's Appeal, 22 Pa. St. 325; Chark vs. Burnside, 15 Ill. 62; Spelman vs. Terry, 74 N. Y. 448; Bond vs. Lockwood, 33 Ill. 212; Hughes' Appeal, 53 Pa. St. 500.

[83] *In re* Flinn, 31 N. J. Eq. 640.

[84] *In re* Kopp's Estate, 2 N. Y. Supp. 495; Royston vs. Royston, 29 Ga. 82.

Text quoted in *In re* McCray, 22 Dec. 699. See also 56 Bull. 142.

[85] Willis vs. Fox, 25 Wis. 646; Sch. Dom. Rel. 350.

[86] Wills' Appeal, 22 Pa. St. 329.

and the amount which might have been obtained by proper diligence.[87]

A guardian may authorize others to cut timber and carry it away,[88] so long as it is not a waste of the ward's estate.[89]

§ 1394. Repairs.*

It is the duty of the guardian to keep the ward's real estate in good repair and a tenantable condition, if the means in his hands are sufficient, and if in consequence of his neglect in this respect, the premises are not rented, he is liable for the loss.[90]

But this duty to keep the ward's premises in repair does not extend to the right or duty to make expensive improvements or the erection of new buildings on their lands.[91]

It seems that the law does not contemplate that a guardian of a minor should erect expensive improvements on real estate, if it did so, there would probably be a statute relating thereto. This is so, perhaps for the reason that the duration of a guardian's authority over a minor must necessarily terminate in a great many instances in a few years. While the guardian might have authority to make proper improvements not very expensive without an order of the Court, yet it would be advisable in all cases to make an application to the Court for that purpose. If made without an order, the guardian might be in some risk of not having the expenditure allowed in his account. Of course, the mechanic furnishing the material could

[87] Knothe vs. Kaiser, 5 Thomp. & C. 4; Thackray's Appeal, 75 Pa. St. 132, 137; Shurtleff vs. Rile, 140 Mass. 213, 214; Woerner on Gr. 202. Sch. Dom. Rel. 350.

[88] Thompson vs. Boardman, 1 Vt. 367; Bond vs. Lockwood, 33 Ill. 212.

[89] Torry vs. Black, 58 N. Y. 485; Truss vs. Old, 6 Rand. 556.

See §§ 370, 371, 372, as to rents generally.

[90] Green vs. Winter, 1 Johns Ch. 26; Cornell vs. Vanartsdalen, 4 Pa. St. 364; Smith vs. Gummere, 39 N. J. Eq. 271; Willis vs. Fox, 25 Wis. 646; Irvine vs. McDowell, 4 Dana, 629.

[91] Woerner on Gr. 176.

There is a special statute providing that a guardian may improve the real estate of imbeciles, but none such in reference to minors. § 11004 G. C. (§ 1530) R. S. Except where it may be found necessary for the ward's interest to make a lease for fifteen years. § 10962 G. C. (§ 1433).

* Cited, *In re* Connell, 56 Bull. 143. Order of court required to use principal for repairs where income is insufficient. *Id.* 12 N. P. 311; 22 Dec. 699, If insufficient order of court may have. *Id.*

not have a lien on the premises, but must look to the guardian personally for his recompense.[92]

A guardian has no right to remove valuable improvements even if done so for the purpose of improving the premises.[93]

§ 1395. **Release of ward's tax title by guardian. Effect of tender of deed.** "When a minor has title to real estate by tax title only, if he deems it advisable, the guardian, by deed of release and quit claim may convey such minor's interest or title to the person entitled to redeem such real estate, upon receiving from him the amount paid for such tax title with the penalty and interest allowed by law in that behalf. If the guardian tenders such deed to the person entitled to redeem such real estate and he refuses to accept it and so pay, he shall not recover costs in any proceeding thereafter instituted to redeem or recover such real estate." [R. S. § 6294.][94]

§ 1396. Partition and dower.

In proceedings for partition, the guardian of a minor, idiot, imbecile or insane person may act on behalf of his ward, and may do and perform any act the same as the ward could if not under disability.[95]

The guardian of an heir may assign dower in real estate;[96] the ward, however, is not bound where an assignment is made by fraud or collusion,[97] and in actions of partition, the guardian may act for a widow or widower who has been adjudged insane and may answer and appear for such insane person.[98]

[92] Sch. Dom. Rel. 351.

[93] Johnson vs. Meyer, 2 Cleve. L. R. 81.

The making of improvements may be authorized by the Probate Court; and if that Court orders improvements to a certain limit, the limit fixes the extent of the guardian's authority, but is not an absolute prohibition to go beyond it, and if the guardian exceeds the limit, and the Court finds the excess to have been necessary and useful, it will be allowed. May vs. Skinner, 149 Mass. 375; 152 Mass. 328; 15 Am. & Eng. Ency. of Law 106 (2 Ed.).

[94] § 10960 G. C.

[95] § 12044 G. C. (§ 1383). See Art. in Vol. XIX, O. L. R.; Vol. LXVI, Bull., Function of legal guardian in partition suits.

[96] § 12004 G. C. (§§ 951, 957). See § 457, § 10997 G. C.

[97] § 12016 G. C. (§ 957).

[98] § 12020 G. C.; Woerner on Gr. 203. See § 1879 *et seq.*, Partition.

It is the duty of a guardian *ad litem* to investigate the appraisement of the property before one of the petitioners will be allowed to take it at the appraisement, and if not the sale may be held to be constructively fraudulent, and the person taking the same held to account to the minor. Murr vs. Murr, 5 O. L. R., 125; 17 Dec. 773.

§ 1397. Easement. Appropriation.

A guardian has no right to dedicate his ward's real estate to a public use or make a deed conveying the right of way over it, for the purpose of establishing a public road except as the same may be provided by statute.[99]

The statute authorizes a guardian, with consent of the Probate Court, to sell land to a corporation where the same might be condemned.[100] In certain road proceedings, the guardian may act for the ward.[101]

§ 1398. Completion of real estate contract. Additional bond. "The guardian of an idiot, imbecile, or lunatic, or an incompetant by reason of advanced age or mental or physical disability or infirmity, appointed by a court in this state or elsewhere, may complete the real contracts of his ward, or any authorized contract of a guardian who has died or been removed, in like manner and by like proceedings as the real contract of a decedent, under an order of court, may be specifically performed by his executor or administrator. When by virtue of such contract or the completion of it, the guardian shall receive or be entitled to receive moneys not amply covered by his bond, the court shall require of him an additional bond with sureties, in respect of such moneys." [R. S. § 6313; 109 v. 74.][102]

§ 1399. Contracts between ward and guardian.

The guardian can make no valid contract with his ward. This results from two reasons. First, the minority of the ward, and second, the fiduciary relation that exists between them; and even after the ward has arrived of age, and the guardianship has been terminated, contracts between a ward

[99] Woerner on Gr. 178.

[100] § 11040 G. C. (§ 1677).

[101] §§ 7259, 7330, 7334 G. C.

The numerous statutes in this State, conferring special powers upon guardians in special cases, do not authorize a sale or conveyance of the realty, or a dedication of any part of it to a public use, either expressly or by necessary implication. Indeed, if any implication arises from them it is rather that such power, which would necessarily include most of the special powers granted by legislation, does not extend. The State vs. Commissioners, 39 O. S. 61.

[102] § 11003 G. C.

This section specifically refers to like proceedings had by an administrator. See § 523.

and the guardian are subject to the strictest scrutiny. In a case before our Supreme Court[103] it was said, "One standing in the relation of a parent and guardian — in fact, of a minor, having the custody and control of such minor and of his property during such minority, is bound to the most scrupulous good faith in the management of the estate, and where, on such minor's coming of age, he attempts to make a settlement of his trust with him, a court of equity will examine the transaction with extreme jealousy, to see that no undue influence has been exercised; that the parties have been put on an equal footing by full disclosures, and that no advantage has been taken."[104] And this same principle applies to a will or a gift made by the ward in favor of the guardian during or soon after the trust relation.[105] In such cases it devolves upon the guardian to show that the contract is entirely free from any doubt or undue advantage, and he must also show that the ward had full and complete knowledge of the affair and the result that would follow to himself and his guardian.[106]

§ 1400. Ward's right of action against the guardian.

During the guardianship, the ward has no right of action against the guardian. Whatever rights he may then have must be worked out through the Probate Court. If the guardian has mismanaged his trust, he should be removed, and then the ward's rights might be enforced.[107]

§ 1401. Guardian's right of action against the ward.

During the guardianship, no action can be maintained by the guardian against the ward, either at law or in equity. The sole remedy that he then has, is in the Probate Court,[108] and it

[103] Berkmeyer vs. Kellerman, 32 O. S. 239

[104] *In re* Strickland, 7 R. P. 233; Perry on Trust, § 200; Sch. Dom. Rel. 387, 512.

[105] 15 Am. & Eng. Ency of Law, (2 Ed.) 87.

[106] Long vs. Mulford, 17 O. S. 484; Berkmeyer vs. Kellerman, 32 O. S. 240; Tyler on Infancy, § 178. See § 1497, as to settlement with ward.

[107] 15 Am. & Eng. Ency. of Law, 2 ed. 80; Woerner on Gr. 152, 330, 331, 478.

[108] Davis vs. Ford, 7 O. pt. 2 104.

is said, that then after a settlement of the account and the fixing of the balance due to the guardian, no right of action could be maintained, since the ward had no right to make an expenditure in excess of the funds in his hands,[109] but it has been held different, where an expenditure was made for necessaries. In such cases an implied promise results on the part of the ward to pay for the same.

§ 1402. Employment of attorneys, agents, etc.[109a]

The guardian has the same right to employ an attorney in the management of an estate as an administrator or executor.[110] The question whether the employment of counsel was a reasonable and proper exercise of the guardian's discretion, is not determined by the test of success or failure; but whether a prudent man would, under all the circumstances, have judged the expenditure a proper and necessary one in the interest of the ward,[111] and the same rule would be applied as to costs in litigation, which might be rendered against the guardian or ward. The guardian, likewise, has a right to employ agents wherever necessary, but allowance for these matters, rests largely if not entirely in the discretion of the Probate Court. No action will lie against the guardian in his representative capacity.

§ 1403. Guardian can not purchase property of the ward, etc.

It is a general rule applicable to all trustees that in all matters, they must act for the best interest of the estate. In the application of this principle it is always held that a guardian cannot make a purchase of his ward's property to his own profit. If he does make such purchase, the entire profits must be accounted for to the ward's estate and what he cannot do directly he is not permitted to do through an agent or attorney.[112]

Purchases made by a guardian of his ward's property are

[109] 15 A. & E. Ency. of Law, 85 (2 ed.)

This is intended to mean that no right of action could be maintained resting on a promise of the ward, if the ward had property during the guardianship he would be liable in a settlement for the balance due.

[109a] Cited, Payne vs. Recht, 38 O. C. C. 258.

[110] See §§ 509, 510.

[111] Woerner on Gr. 351.

[112] Cox vs. John, 32 O. S. 532.

not absolutely void, but voidable at the election of the ward within a reasonable time,[113] but it has been held that a guardian may lawfully become the purchaser of his ward's real estate, sold by a sheriff under a judgment against the personal representative of the ward's ancestor.[114] The rule generally applicable to executors and administrators in this respect would be applicable to guardians.[115]

§ 1403a. Discovery of assets belonging to estate of ward, etc. Upon complaint made to the probate court or to the court of common pleas by a guardian or trustee of the estate of a minor, idiot, imbecile, lunatic, drunkard or of an incompetent by reason of advanced age or mental or physical disability or infirmity, or by any person interested in any such estate as a creditor thereof or otherwise, against any person suspected of being or having been in the possession of any moneys, goods, chattels, things in action, or effects of such estate, the said court shall cite the person so suspected forthwith to appear before it and to be examined on oath or affirmation touching the matter of said complaint. [109 v. 80.][116]

§ 1403b. Imprisonment for disobeying citation. If any person so as aforesaid cited shall refuse or neglect to appear and submit to an examination as aforesaid, or shall refuse to answer such interrogatories as may be lawfully propounded, the court shall commit such person to the jail of the county, there to remain in close custody until he or she shall submit to the order and direction of the court in that behalf. [109 v. 80.][117]

§ 1403c. Examination reduced to writing. All such examinations, including as well questions as answers, shall be reduced to writing, signed by the party examined, and filed in the court before which the same was taken. [109 v. 80.][118]

§ 1403d. Costs, etc. All costs of such proceedings shall be assessed against and paid by the party making the complaint. [109 v. 81.][119]

113 Woerner on Gr. 197.

114 Woerner on Gr. 197, citing Chorpenning's Appeal, 32 Pa. St. 315.

But even in such matter, the action of the guardian must be free from any adverse action to the interest of his ward.

115 See § 492; 15 A. & E. Ency. of Law (2 ed.), 66.

Comments.—§ 1403a G. C., is very much similar to § 10673 G. C. (§ 395), providing for discovery of assets by an administrator, etc., and confers the right upon a guardian or trustee of an estate, or any person interested in the estate as a creditor, to file a complaint against any person suspected of having property in their possession belonging to the estate, and have the person cited to appear before the Probate Court or Court of Common Pleas, and answer concerning the same. Forms given in § 395 to § 407 can be adopted and comments there made will be found useful in an action brought by a guardian, etc. § 1403b G. C. is similar to § 10675 G. C. (§ 402), and § 1403c G. C. to § 10670 G. C. (§ 405).

The act does not go as far as the one relating to administrators, and permit a recovery, or judgment. If any property is discovered, it will be the duty of the guardian or trustee to proceed and recover the same by a separate appropriate action.

116 § 10983-3 G. C.

117 § 10989-4 G. C.

118 § 10989-5 G. C.

119 § 10989-6 G. C.

CHAPTER LXXVI.

GUARDIAN'S SALE OF REAL ESTATE.

§ 1404 Nature of action, etc.
§ 1405 Sale of personal and real estate of minors. One application for sale of real estate of two or more wards. Two or more guardians may join.
§ 1406 In what Court action to be brought.
§ 1407 When action may be brought.
§ 1408 Parties to action.
§ 1409 What may be sold.
§ 1410 Petition for sale of real estate.
§ 1411 Essentials of petition.
§ 1412 Form of petition.
§ 1413 Notice of filing petition, etc.
§ 1414 Ordering notice, etc.
§ 1415 Service of notice.
§ 1416 Form of notice. Publication, etc.
§ 1417 Guardian *ad litem*.
§ 1418 Hearing of petition. Appraisers. Survey into town lots.
§ 1419 When order should be granted.
§ 1420 Order to appraise.
§ 1421 Oath of appraisers.
§ 1422 Guardian to execute additional bond before sale.
§ 1423 Form of Guardian's Bond.
§ 1424 Requirement of bond, sureties, etc.
§ 1425 Order of sale of real estate, private sale when, laying out in town lots.
§ 1426 Entry ordering sale.
§ 1427 Public sale.
§ 1428 Private sale.
§ 1429 Report of sale, confirmation and deed.
§ 1430 Form of Guardian's Deed.
§ 1431 Appeal and Error.

§ 1404. Nature of action, etc.

It was against the policy of the common law to permit, even under an order of Court, a change of a minor's real estate, into personalty,[1] and it has always been the policy of both the common and statute law, not to permit a sale of an infant's real estate without an order of Court for that purpose. The right to sell such property is derogatory to the common law, and must be strictly construed. The guardian has no power to make such a sale except as is provided by statute.[2]

[1] Woerner on Gr. 225.

[2] State vs. Commissioners, 39 O. S. 61. Personal property may be sold without order of the court.

The statute must be followed substantially in all matters in order to permit a guardian to validly exercise the power.[3]

The action provided for by our statute is peculiar and is no doubt to be classed as a special proceeding, and not a civil action within the meaning of the Code. Like the action brought by executors and administrators for the sale of real estate with which it was formerly classed, it was under the former laws of our State a proceeding *in rem* and purely *ex parte*. It is still an action *in rem*, but by reason of a requirement that notice be given to the ward and others,[4] it has assumed some of the characteristics of an adversary proceeding. But the mere fact that notice is required does not make it adversary.[5] These matters will be adverted to again in subsequent sections of this chapter. Suffice to say here that sales of this character should only be made when the law has been strictly complied with.

§ 1405. Sale of personal and real estate of minors. One application for sale of real estate of two or more wards. Two or more guardians may join. "The guardian of the person and estate, or estate only, when for the interest of the ward, may sell all or any part of the personal estate of the ward. Whenever necessary for the education, support, or payment of just debts, or the discharge of liens on the real estate of such minor, or if the real estate of the minor is suffering unavoidable waste, or a better investment of its value can be made, and if satisfied that a sale of it will be for the benefit of the minor, the probate court by which a guardian of the person and estate, or of the estate only, was appointed, on his application may order the real estate of such minor, or a part thereof, situated in this state, to be sold. When a person is such guardian for two or more minors whose real estate is owned by them jointly, or in common, in one application he may ask for the sale of the interest of all or any number of his wards in such real estate; and if different persons are guardians of minors so interested jointly, or in common, in the same real estate, they may join in one application. On the hearing, in either case, the court

[3] Woerner on Gr. 233.

[4] § 10947 G. C. (§ 1413).

[5] Lear vs. Closterman, 3 C. C. 441; 2 C. D. 251.

See § 10945 G. C., §§1392, 1404, 1530, 1522, 1534, 1678.

may authorize the sale of the interest of one or more of such wards, as, in its discretion, seems right. [R. S. § 6280.][6]

§ 1406. In what court action to be brought.

The above section is specific in its provisions that the action for the sale of the real estate of any minor must be brought in the Probate Court in which the guardian for the person and estate, or for the estate only received his appointment. No other Probate Court has jurisdiction.[7]

By a general provision,[8] it is provided that the Probate Court has concurrent jurisdiction with the Court of Common Pleas in the sale of real estate by executors, administrators or guardians. This general provision would seem to retain jurisdiction of the Court of Common Pleas in such actions. The question then suggests itself, has any other Court of Common Pleas than that which exists in the county in which the guardian received his appointment, jurisdiction? This question is answered in the negative by the Supreme Court in the case of Foreman v. Haag.[9] Here it is said, "As therefore, in our opinion, the Court of Common Pleas of Cuyahoga county, at the time of the creation of the Probate Court, was not authorized to order the sale of lands on the application of a guardian appointed in another county, no such authority was vested in the Probate Court of said county by the act conferring jurisdiction on that Court."

In practice, where there are no questions arising as to priority of liens and matters requiring the exercise of equity jurisdiction, it would be better to bring the action in the Probate Court. But where the title is imperfect or there exist conflicting claims and liens which require an exercise of equity

[6] § 10945 G. C.

If real estate is sold and the ward die, it is to be distributed as real estate, but if it is again invested in real estate it loses its former ancestral character, and is to be distributed as real estate acquired by purchase. McCammon vs. Cooper, 12 Dec. 677; 69 O. S. 368.

See §§ 8578, 8579 G. C. (§ 921).

[7] Foresman vs. Haag, 36 O. S. 102.

[8] § 525 R. S. (§ 28).

[9] 36 O. S. 106.

Guardians of different minors jointly interested, can only join in an application, where they are all appointed by the same court, otherwise each guardian must bring an action in the court where appointed.

power, it would be much safer to bring the action in the Court of Common Pleas in the county in which the guardian was appointed.

The action not being a civil action within the meaning of the Code, and no express power being given to the Probate Court to determine a question affecting the title to the land, it is seriously doubted whether the Probate Court has such jurisdiction.[10]

§ 1407. When action may be brought.

The action can only be brought during the existence of the guardianship. An action brought after the ward is of age, or the guardianship terminated, is absolutely void.[11]

The action can be brought by no other person than the legal appointed guardian.[12]

The statute specifically provides that the action may be brought, *first,* when it is necessary for the education, support or payment of just debts. *Second,* whenever it is necessary for the discharge of any liens on the real estate of such minor. *Third,* whenever the real estate of such minor is suffering unavoidable waste. *Fourth,* when a better investment of the value of the real estate can be made and the Court is satisfied that a sale will be for the benefit of the minor. These are the only instances in which an action can be brought. The Court in all cases must be satisfied before the order is granted that the change will be for the interest of the ward. To much caution cannot be exercised in this direction by the Court. Careless or designing guardians frequently endeavor to get control of funds of the ward in order to subserve there own purpose and before the ward arrives of age the estate has vanished.

[10] A foreign guardian may bring the action in any county in which the land is situated—and in either the Probate Court or Court of Common Pleas. § 10955 G. C. (§ 1481). However, there is a section—§ 10783 G. C. (§ 814), which gives the court full power to determine all the equities of lienholders.

[11] Perry vs. Brainard, 11 O. 442; Dengenhart vs. Cracraft, 36 O. S. 549.

[12] Woerner on Gr. 234, 239. See next section.

§ 1408. Parties to action.

The statute certainly confers power on no one to bring the action, except a person who is legally appointed, and acting as guardian of the minor.[13]

Where different persons are guardians of minors who are interested jointly or in common, such guardians may join in the application.[14] This much for parties plaintiff.

As to parties defendant, the statute provides that notice be given, and states[15] "that the ward or the husband or wife of such ward, and all persons entitled to the next estate of inheritance in the real estate to be sold shall be defendants." In the former statute it was provided that only when the estate came by inheritance, devise or deed of gift from an ancestor need the notice be given to all persons entitled to the next inheritance, etc. There is now no such distinction, and all persons entitled to the next estate of inheritance must be notified, no matter whether the estate comes by purchase or descent. The purpose of making the ward defendant is that his friends or those who are interested may know of the pendency of such a proceeding. It is hardly expected that the ward himself will be in a position to know much about the advisability of granting the guardian's application. Formerly such applications were granted without notice even to the ward. "Theoretically," says Woerner,[16] "he has no capacity at all to judge of what is best for him or for his estate, and to summon him into Court is therefore an idle ceremony; practically, however, especially when he is of an age approximating majority, he may suggest facts and views of policy worthy of consideration by the Court in exercising its discretion, and he may appoint an attorney to represent him." The object of making a husband or wife a party is that their dower right may be provided for and released. The persons entitled to the next estate of inheritance are made parties for the reason that being next of kin if the ward should die during the minority they would inherit the

[13] Dengenhart vs. Cracraft, 36 O. S. 572.

[14] § 10945 G. C. (§ 1405).

[15] § 10947 G. C. (§ 1413).

[16] Woerner on Cr. 241.

estate; and although they would inherit the proceeds,[17] yet it might be injudiciously invested or squandered, and that if the order is made they may know of such conversion and protect their interest in the fund. There is no provision for any other person to be made defendant; and considering the nature of the action, I very much doubt if any other person can be a proper party defendant. If there are others interested in the real estate whose rights demand adjudication in order that the best price may be realized, the action had better be brought in the Court of Common Pleas, a court of general jurisdiction. The case of Doan vs. Bitely,[18] in which it was held that it was proper for the Probate Court to bring in all parties and adjudicate all matters pertaining to the title of real estate in a case where an administrator sought to sell real estate, was founded upon the fact that the statute relating to sales by administrators made the action a *civil action* and further particularly provided that any person might be made a defendant who has and claims an interest in the controversy, adverse to the plaintiff or who is a necessary party to a complete determination or settlement of questions involved. Where there is a lien on the real estate which is uncontested, it would be well to give such party notice so that the purchaser might know that the money is applied to such lien. Otherwise the rule of *caveat emptor* applies.

§ 1409. What may be sold.

"The real estate of such minor or any part thereof, situate in this State may be sold," is the language of the statute.[19]

In a case in New York it was held that "the term real estate includes every freehold estate and interest in lands, and that a right of present enjoyment of an estate, or an actual possession, either by a tenant or otherwise, is not necessary to a *seisin* when there is a fixed vested right of future enjoyment, that is, when there is a vested remainder or reversion."[20] And

17 § 6 § 1405; Armstrong vs. Miller, 6 O. 118; *In re* McCabe, 16 Bull. 271; 51 R. I. 330.

18 49 O. S. 388.

19 § 10015 G. C. (§ 14951).

Yet there is a statute which gives the Probate Court full power to determine all the equities of lienholders, and order payment to parties entitled. See § 10783 G. C. (§ 814).

The guardian can not give the property away, even for a public use. State vs. Hamilton, 39 O. S. 102.

Personal property may be sold by the guardian without an order from the court, although there may be times when it is advisable to make formal application to the court. Strong vs. Hope, 4 Bull. 1034.

20 Woerner on Gr. 248, citing

in another case it was held, that the Court might order the sale of an infant's real estate where it existed in the form of a contingent remainder.[21]

The term "real estate" is generally meant to include every estate, interest and right, either legal or equitable in lands of which the person is seized or possessed or in any manner entitled.[22]

These general definitions of *real estate,* seem to be broad enough to include every interest that a minor may hold in such property, and there seems to be no substantial reason why such interest of the minor could not be sold, if the Court finds that the sale is necessary within the meaning of the statute. But it might be unwise to sell or attempt to sell real estate where there was a question as to the title without having such question first settled.[23]

§ 1410. Petition for sale of real estate. "Such application for sale of real estate shall be by petition, which shall set forth, specifically:

"1. The value and character of all personal estate belonging to such ward that has come to the knowledge or possession of such guardian;

"2. The disposition made of such personal estate;

"3. The amount and condition of such ward's personal estate, if any, dependent upon the settlement of a decedent's estate, or the execution of a trust;

"4. The annual value of the real estate of the ward, with a pertinent description thereof;

"5. The amount of rent received, and its application;

"6. The proposed manner of re-investing the proceeds of a sale, if asked for that purpose;

"7. Each item of indebtedness, or the amount and character of the lien, if the sale is prayed for the discharge thereof;

Jenkins vs. Fahey, 73 N. Y. 355, 362. To same effect: Cooper vs. Hepburn, 15 Gratt. 551; Bell vs. Clark, 2 Mete (Ky.) 573, 575; Thaw vs. Richie, 136 U. S. 519, 545.

[21] Dodge vs. Stevens 105 N. Y. 585, 588.

[22] At common law any estate in lands, etc., the date of the termination of which is not determined by or ascertained from or at the date of the act which creates it, is real estate. Century Dic.

See § 820.

[23] Woerner on Gr. 250.

"8. The age of the ward, and where and with whom residing;

"9. If there be no personal estate of such ward, in possession or expectancy, and none has come into the hands of the guardian, and no rents have been received, the fact shall be stated in the petition. If it is desired that the land sought to be sold, or any part of it, be laid out in town lots, that fact must be stated with the reasons therefor, and the manner in which it is to be laid out." [R. S. § 6281.][24]

§ 1411. Essentials of petition.

The petition ought to contain all the facts required to be set forth by the above section. It may be presumed where the petition does not state otherwise, that it contains a description of all the real estate of the minor.[25]

In addition to the facts required by the above section, the petition must state facts sufficient to give the Court jurisdiction. That is, that the person making the application is the acting guardian of the minor, and *second,* that the appointment was made in the Probate Court of the county in which the petition is filed. It ought also to state whether or not the ward has a wife or husband living entitled to dower therein, and if it is desired to plat the land this fact should be stated. The petition should be titled like an ordinary adversary proceeding. It should also allege the reason for the necessity of the sale as provided in sec. 10945, G. C.,[25*] and generally all facts necessary for the Court's knowledge in order to properly pass upon the question whether or not the sale should be ordered. It should be verified, the statute so requires. If there are any liens on the real estate, this matter should be alleged. While the court might not in a collateral proceeding set aside an action founded upon a petition in which some of the facts required by sec. 10946, G. C.[26] were omitted, yet it would be exceedingly dangerous to file a petition in any case and omit any of the matters required by that section.

[24] § 10946 G. C.
See § 1482, Foreign Gdn.

[25] Maurer vs. Parrish, 26 O. S. 636. Must describe all of the lands. See 33 L. R. A. 363.

[25*] § 1405.

[26] § 1410.
If some of the real estate is located in another state, which it is desired to sell, it might be well to include it in the petition, although its sale would have to be made under the order of the court in such state, and according to the laws there governing. The petition must give all the property of the ward, although only a part is desired to be sold. Maurer vs. Parish, 26 O. S. 636.

§ 1412. Form of petition.

(*Title.*)

Your petitioner,.....; represents that he is the duly appointed and qualified guardian of....., now of the age of..... years, and residing with....., at..... ...; that he was appointed as such guardian by the Probate Court of..... county, Ohio, and that it is necessary to sell the real estate for the reason (here give one of the causes set forth in § 6280 R. S.) (§ 1405).

(If there never was any personal property, say:) That no personal estate of any kind, belonging to said ward, ever came to the possession or knowledge of the petitioner. (But if there ever was any personal estate, then say, instead of the above:) That all of the personal estate belonging to said ward, that ever came to the possession or knowledge of the petitioner, consisted of (here describe it generally; as, farming implements, horses, cattle, notes, moneys, bonds and mortgages, state stocks, bank stock, etc., etc.), and was of the value of.....dollars. That the petitioner has disposed of said estate in full (or if in part only, say, to the amount of.....dollars), as follows, to-wit: Expended for said ward, in clothing,.....dollars; boarding,.....dollars; tuition, books, etc.,.....dollars; in payment of a certain mortgage held by....., upon lot No....., in Cincinnati, Ohio,..... .....dollars; for taxes on same lot,.....dollars; paying mechanics' lien thereon,.....dollars (and so of any other general expenditure).

That there is no personal estate of said ward dependent upon the settlement of any decedent's estate or the execution of any trust, nor in expectancy (or if the fact be otherwise, instead of the above say, That there will be the amount of.....dollars, or an amount not yet ascertained, supposed to be about.....dollars, coming to said ward from the estate of....., not yet finally settled; or such an amount will be due to said ward from the trust estate in the hands of....., who was made trustee by.....).

That said ward is the owner of the fee simple (or life estate or leasehold, as the case may be) of the following described real estate, situate in..... .....county, Ohio, and described as follows, to-wit: (Here describe it by metes and bounds), which real estate is worth, annually,..... .....dollars (or if wild land, say, which is wild land, and yields no income).

That the petitioner has received.....dollars, in rents, from all the real estate of his ward, and has expended the same as follows: In repairs,.....dollars; taxes on real estate,.....dollars (etc., etc., as the facts are, and if any money is remaining on hand, so state, and the amount; or if all the lands yield no income at all, say, instead of the above, That the petitioner has received no rents whatever from any of said ward's real estate).

That the sale of said real estate is necessary for the maintenance and education of said ward [or if it is proposed to reinvest the money arising from the sale, say or add, That the petitioner believes it will be for the interest of said ward to sell said real estate and reinvest the money arising therefrom in (state stocks, loans upon mortgage, or otherwise)].

That said ward is indebted to(.....for necessaries in clothing, in the sum of.....dollars; to.....for boarding, ...dollars; to.....for tuition,.....dollars, etc.); (or if the fact be so, say, There is no indebtedness of the said ward).

That.....has a lien on said real estate, by way of mortgage, to secure the sum of.....dollars now due (or not yet due, as the case may be), and.....has a mechanics' lien for..... dollars, which accrued in the lifetime of....., father of said ward (or if no liens exist, say, There are no liens upon said real estate to the knowledge of the petitioner).

(If there be a widow's dower in the land, say:) That..... widow of....., has a dower estate in said lands.

That ..... residing at ..... and ..... residing at ....., are all the persons entitled to the next estate of inheritance in such real estate.

Your petitioner therefore prays that said.....(and if there be a widow, or persons holding liens, add their names) may be made defendant (or defendants, as the case may be) to this petition. (If there be a widow and lienholders, add, That dower may be set off to said widow and the rights and liens of said lienholders may be adjusted), and that your petitioner may be ordered to sell said real estate (and if it is proposed to reinvest the money, add, and to reinvest the money arising therefrom as hereinbefore proposed, and for all other proper relief, etc.).

....., Guardian etc.[26*]

[Verification]

§ 1413. Notice of filing petition, etc. "Upon such petition being filed, verified by the oath of the guardian, the court shall order the petitioner to give notice to his ward, to the husband or wife of such ward, and to all persons entitled to the next estate of inheritance in such real estate, who also shall be defendants to the petition, of the filing and demand thereof, and the time when it will be heard, in such manner as to the court seems proper. In such proceeding, the right and expectancy of dower of the husband or wife of such ward in the premises, may be released in the manner and otherwise treated and dealt with as is provided by law in section ten thousand nine hundred and ninety-six." [R. S. § 6282; 101 v. 40.][27]

§ 1414. Ordering notice, etc.

The statute gives the Court full discretion as to the time when the petition shall be heard and the manner in which the notice should be given. It should not be within such a brief time, that the parties defendant may not have an opportunity to appear and properly present their case. Some Courts follow the rule in civil actions and make the answer day the fifth Saturday after the issue of summons.[28]

When the petition is filed, the Court should make a journal entry, fixing the date of hearing and the manner of service of such notice. The entry may be in the following form:

(*Title.*)

This day came said ....., as guardian of ....., and filed his petition, duly verified, asking for the sale of the real estate of his said ward. Whereupon it is by said Court ordered, that said cause shall be

[26*] Whitt. Probate Code.
See § 1466, Mort. of lands.

[27] § 10947 G. C.

[28] § 11346 G. C.

set for hearing on the....day of....., and that notice thereof shall be given to (here mention the name of the ward, the ward's wife or husband or next of kin, as may be required, under the previous section).

It is further ordered that the above notice shall be in writing and delivered to each of said parties personally. Or if that cannot be done, then by leaving a copy at their usual place of residence. Such notice to be served .....days before the day that said application is set for hearing. (If any of said parties are not within the county or State, it would be proper for the Court to order them to be served by publication, and this notice by publication, should be made in such a manner as the Court directs.)[29]

§ 1415. Service of notice.

It is an elementary proposition of law, that no one can be deprived of his property without his day in Court, and where the statute provides that certain parties must receive notice, before the Court hears a question, such notice is jurisdictional, and if not made, the Court's acts are void. It therefore becomes very important that the notice be served in exact compliance with the statute and the order of the Court,[30] but where notice has been given, its sufficiency cannot be attacked in a collateral proceeding.[31]

As this notice shall be given in such a manner as the Court directs, the person making the service should be very careful to comply with such order. If made by publication, proof of such service should be filed. If made by the plaintiff or any other person, an affidavit should be filed stating how the service was made. A general provision of the statute provides that when defendant is a minor the service of summons must be upon him and also upon his guardian, or father; or, if neither can be found, upon his mother, or person having the care of such infant, or with whom he lives. The manner of service shall be the same as in case of adults, and shall be made on such persons, in the order named.[32] It is questionable whether this statute, to-wit, 11291, G. C., applies, but it would

[29] See § 1437, Lease of real estate.

[30] Knickerbocker vs. Knickerbocker, 58 Ill. 399; Haws vs. Clark, 37 Iowa, 355; Lyon vs. Vanatta, 35 Iowa, 521.

[31] Cooper vs. Sunderland, 3 Iowa, 114; Sheldon vs. Wright, 5 N. Y. 497; Borden vs. State, 11 Ark. 519; Dexter vs. Cranston, 41 Mich. 448; Bunce vs. Bunce, 59 Iowa, 533; Howbert vs. Heyle, 47 Kans. 58; Stampley vs. King, 51 Miss. 728; Hamiel vs. Donnelly, 75 Iowa, 93.

[32] § 11291 G. C. (§ 839).

Care should be taken where wards are inmates of public institutions, that the notice be served as the statute directs. In some institutions service can only be made by the officers in charge. Lima Hospital. See § 2001 G. C.

be well that the Court making the order of notice follow its provisions.[33]

§ 1416. Form of notice. Publication, etc.

The following form may be used where the notice is made personally or where it is made by publication. As before stated, care should be exercised that the parties are served and notified in accordance with the order of the Court, as this is the guide as to the manner in which the service is to be made:

To....., and.....:
You are hereby notified that on the.....day of....., 190.., ...as guardian of....., filed in the Probate Court of.....county, Ohio, a petition, the object and prayer of which is, to procure said Court to order the sale of the real estate of the said ....., situate in the county of....., Ohio, and described as follows, to-wit: [Here describe it as in the petition; and if the prayer is, to reinvest the money, add, and to authorize the said guardian to reinvest the funds in (here state the manner named in the petition.)]
The application therefor, will be for a hearing by said Court, on the..... day of....., 190.., at.....o'clock A. M., at which time, unless you show cause to the contrary, an order will be asked as prayed for in said petition.
(Signed) ....., Guardian of.....
Dated this.....day of....., 190...[34]

§ 1417. Guardian ad litem.

It is provided by a general provision of the General Code,[35] "that the defense of an infant, must be by the guardian for the suit, etc." Whether or not this provision applies to proceedings brought by a guardian against his ward, is a mooted question. Before the law was amended in its present form, requiring notice to be given to the infant, and when it was purely a proceeding *in rem* and *ex parte,* there was no doubt that a guardian *ad litem* was not necessary.[36]

But since the Court has required that the ward be notified and the action has assumed more of the characteristics of an adversary proceedings, the question is one of considerable dif-

[33] See § 838, Service of summons. That is, make service on the ward and the persons in the order named, after their guardian, that is, the father, etc.
§ 839, Actual service.
§ 841, Constructive service.
See § 1467, Mortgage of land.
§ 1437, Lease of land.

[34] Whittaker's Pro. Code.

[35] § 11252 G. C.; see § 1384.

[36] Woerner on Gr. § 256, citing Smith vs. Race, 27 Ill. 387; Robb vs. Irwin, 15 O. 689; Shelton vs. Newton, 3 O. S. 494.

ficulty. While conceding that there is a certain degree of propriety in making such an appointment, the author is of the opinion that it is not necessary to have a guardian *ad litem* appointed. This conclusion is reached for the following reasons: *First,* the action is a special proceeding, not adversary in the general sense of the term,[36*] and no provision is made in the law relating thereto, for the appointment of a guardian *ad litem.* The object of notifying the infant is not so much for purpose of defense as for information of the Court.[37]

Second, the general statute requiring a defense to be made by a guardian *ad litem*[38] has reference to a suit, where the ward is notified by *summons.* This follows from the provisions of sec. 11253 G. C., which provides that the appointment may be made, etc., after return of *summons* or service by publication. If a guardian *ad litem* is required in this kind of a proceeding, I would ask when must the appointment be made? Must it be made before service of notice or after? Upon whose application is the appointment to be made? Where the interest of the guardian appears to be adverse to the ward, there would be no impropriety in the Court making such an appointment. But it is the general duty of the Probate Court to look after the interest of the ward and see that no unjust advantage is taken. The Court must fully inform itself upon the rights of the ward and not grant the order unless the welfare of the ward demands it. The Supreme Court has never passed upon this question, and if a person bringing the proceedings is in doubt, he may satisfy himself by having the appointment made.[39]

[36*] Barr vs. Closterman, 3 C. C. 444; 2 C. D. 636.

[37] It is held by a number of Courts that no guardian *ad litem* is ever necessary, unless the statute specially so provides. Woerner on Gr. 257.

[38] § 11252 G. C. (§ 1384).

[39] See Walter vs. Drapp. When failure to appoint is not subject of collateral attack. 7 N. P. 232; 8 Dec. 705.

A proceeding under § 3140*a* for the committal of a child to a home or benevolent institution being strictly statutory, a guardian *ad litem* is not necessary. Stine vs. Anderson, 1 Dayton Term Rep. 18.

See § 1383, Actions for the ward.

§ 1418. Hearing of petition. Appraisers. Survey into town lots. "At the time appointed for the hearing of such petition, if satisfied that the notice named in the next preceding section was given, and that such real estate ought to be sold, the court shall appoint three freeholders of the county in which it is situated, who are not of kin to the petitioner, to appraise it. If such petition seeks to have the land or any part of it laid out into town lots, and the court finds that it will be to the advantage of the ward to have this done, it also shall authorize the survey and platting of the land for that purpose." [R. S. § 6283.][40]

§ 1419. When order should be granted.

An order of sale should not be granted upon the hearing of the petition. The order that is made at this time, is one to appraise. The Court should find that it is necessary to sell the real estate. If the property is to be sold in parts or town lots, the Court should make an order accordingly. If there is any dower interest in the real estate, this matter should be provided for in the order to appraise. Before this order is made, the Court should be satisfied, *first,* that it is necessary to sell the real estate for some of the reasons set out in sec. 10945, G. C.[40*] *Second,* the Court should be satisfied that the petition contains all the facts required by sec. 10946, G. C.[41] *Third,* the Court should find that the guardian was appointed in the county in which the Court is located. The peculiar duty of looking after the ward's interest devolving upon the Probate Court, great care should be exercised in granting the order, and the Court should never do so, unless fully and completely satisfied that the interest of the ward demand that the same be done. While real estate may not yield as much of an income as personalty, yet it cannot suffer complete or great loss, if allowed to remain in the hands of the guardian.[41*]

[40] § 10948 G. C.
[40*] § 1405.
[41] § 1410.
[41*] Woerner on Gr. 235. An action lies to set aside a sale of real estate made by a guardian without appraisement and such action is available on the guardian's bond. McBride vs. Bell, 35 O. C. C. 403; affirmed, 91 O. S. —.

§ 1420. Order to appraise.

The general practice of the Probate Court is, to use the forms made for sale of real estate by administrators. The Court having satisfied itself that it is necessary to sell the real estate for one of the causes set out in sec. 10945, G. C.,[42] and being satisfied that the petition sets forth the facts required by sec. 10946, G. C.,[43] and being further satisfied that Court has jurisdiction, and that all the parties required by law and former orders of the Court have been notified in the manner specified by law and such former orders of the Court, should make on its journal an entry ordering the property to be appraised. This entry may be in the following form:

(*Title.*)

This day this matter came on to be heard upon the petition of A. B., guardian of C. D., for an order of this Court, authorizing said guardian to sell the premises in his petition described; and the same was submitted to the Court upon the evidence and the pleadings in the case.

Whereupon, after due consideration, the Court finds that all the parties defendant, have been served with notice as required by law, and the former order of the Court; that said guardian received his appointment in the Probate Court of this county; that it is necessary to sell the premises in the petition described as alleged in said petition; that the allegations of said petition are true. (Here insert according to facts whether there is a dower estate to be assigned and what has been done in reference thereto and whether it is desired to subdivide the property.)

It is therefore ordered that E. F., G. H. and I. J., three judicious freeholders of the county in which said real estate is situate who are not of kin to the guardian, appraise said real estate at its fair cash value, and return the same to the Court for confirmation.[44]

§ 1421. Oath of appraisers. "The appraisers shall take an oath truly and impartially to appraise such real estate at the fair cash value, which oath shall be indorsed on the certificate of their appointment, or order of sale issued by the court." [R. S. § 6284.][45]

What was said in a previous chapter in reference to appraisement of real estate in the sale of lands by administrators is applicable to a large extent in the appraisement of property under a petition filed by a guardian. Reference is, therefore, had to such previous chapter.[46] There is no statute however authorizing the guardian to administer the oath to appraisers. This must be done by someone authorized to administer oaths.

42 § 1405.
43 § 1410.
44 § 858, Appraisement by Admin. See § 1439, Lease, etc.
45 § 10949 G. C.
46 § 855 *et seq.* The statute nowhere fixes the fees of the appraisers. I assume the same would be paid the same as where an administrator sells, etc.

The appraisers having fully discharged their duties as prescribed by the order of the Court, will make a return of the same. The Court should then place an entry on its journal, ordering the bond to be given as provided in the following section. The entry may be in the following form:

(*Title.*)

This day came A. B., guardian of C. D., and filed herein a report of the appraisement of the property in the petition described, and the same was submitted to the Court. Whereupon the Court finds that the said appraisement is regular and correct and made in accordance with law and the former orders of this Court, and the same is herein confirmed.

It is further ordered by the Court that said A. B. give an additional bond in the sum of.....dollars, conditioned and sureties thereon as provided by law.

§ 1422. Guardian to execute additional bond before sale. "Upon filing the appraisement of such real estate, signed by the appraisers, the court shall require such guardian to execute a bond, with sufficient freehold sureties, at least two in number, payable to the state in double the appraised value of such real estate, conditioned for the faithful discharge of his duties and the payment of and accounting for, *all moneys arising from such sale according to law, which bond shall be additional to that given by the guardian at the time of his appointment. No court shall waive the giving of such additional bond, nor have jurisdiction to order the sale of such real estate until it is given.*" [R. S. § 6285.][47]

§ 1423. Form of guardian's bond

IN PROCEEDINGS TO SELL REAL ESTATE.

Know all Men by these Presents:

That we....., of the county of....., and the State of Ohio, are held and firmly bound unto said State of Ohio, in the just sum of.....dollars, for the payment whereof, well and truly to be made, we bind ourselves and each of us, our heirs, executors and administrators, and each of them, firmly by these presents.

Signed by us, and dated at....., this.....day of....., 190..

The condition of the above obligation is such, that whereas, on the.....day of....., 190.., ...as guardian of....., filed a petition in the Probate Court of said county against said ward.....for the sale of the real estate of said ward .....described in said petition.

And whereas, by a decree of said Court made in said cause on the.....day of....., 190.., it was considered by said Court that said

[47] § 10950 G. C.

See previous section.

real estate ought to be sold as prayed for in said petition, and the same appointed....., ..., and....., three freeholders of said county, and not of kin to the petitioner, to appraise said real estate according to law.

And whereas, afterward, to-wit: on the.....day of....., 190.., said appraisers filed in said Court their appraisement of said real estate in writing, signed by them, from which it appears that they appraised the same at the sum of.....dollars.

And whereas, said Court upon said appraisement being filed as aforesaid, made an order requiring said....., as guardian as aforesaid, to execute a bond in the sum of.....dollars, with sufficient freehold securities payable to the State of Ohio, and conditioned according to law. Now if the said.....as guardian as aforesaid, shall well and faithfully discharge.....duties as such guardian, and well and faithfully pay over to the proper person or persons, and account for all money arising from the sale of said real estate according to law, then these presents to be void, otherwise to be and remain in full force and virtue in law.

Signed and delivered in presence of

.....
.....
.....

§ 1424. Requirement of bond. Sureties, etc.

That part of sec. 10950, G. C., which is in italics, is an addition to the statute as it formerly existed. Under this former statute, it was held, that an order of the Probate Court for the sale by a guardian of the real estate of his ward where the bond is not given, although it may be erroneous, is not void.[47*] That is, that it cannot be attacked in a collateral proceeding. This decision was founded on a previous one,[48] but whatever the law may have been under the former statute there can be no doubt but what, under the present statute, the fact of giving such additional bond is jurisdictional, and without such bond being given the Court has no right or power to grant an order of sale. The matter as to the liabilities of the sureties on the various bonds has given rise to considerable discussion, and various decisions by our Supreme Court. This matter was discussed in previous chapters when considering the subject in relation to executors and administrators as well as guardians.[49]

§ 1425. Order of sale of real estate. Private sale when. Laying out in town lots. "When such bond is filed, and ap-

[47*] Arrowsmith vs. Harmoning, 42 O. S. 254; Arrowsmith vs. Gleason, 129 U. S. 86.

[48] Mauarr vs. Parrish, 26 O. S. 636.

[49] See §§ 250, 251, 1353.

proved by the court, it shall order the sale of such real estate, at auction, for not less than two-thirds of the appraised value thereof, providing in the order for reasonable notice and the place of such sale in the county in which the property lies, and the credit to be given for payment of the purchase money. The deferred payments must be secured by a mortgage executed by the purchaser on the real estate sold, and bear interest at the legal rate per annum from the day of sale, payable annually. But, if it is made to appear to such court that it will be more for the interest of the ward to sell such real estate at private sale, it may authorize the guardian so to sell it, either in whole or in parcels, and on such terms of payment as the court prescribes. In no case shall such real estate be sold at private sale for less than its appraised value. If the petition includes an application for laying out the land to be sold, or part thereof, into town lots, and the court approves the survey and plat made for that purpose, it also shall authorize the guardian, on behalf of his ward, to sign, seal, and acknowledge the plat in that behalf for record according to law. [R. S. § 6286.][50]

§ 1426. Entry ordering sale.

It will be observed that the above section gives to the Probate Court, the power of ordering either a public or a private sale. Providing only by statute that the public sale must be given on reasonable notice, and the deferred payments must be secured by mortgage, and if made at private sale, it cannot be made for less than the appraised value. There is no limitation to the price for which it may be sold at public auction, "except that it must bring two-thirds of appraised value." It would be well in this respect to follow the law as applied to executors and administrators.[51]

The entry may be somewhat in the following form:

(*Title.*)

This day came A. B., guardian of C. D., and filed his additional bond herein in the sum of ..... dollars, with E. F. and G. H. as sureties thereon; and it appearing to the Court that said bond is sufficient in law and in conformity to the former orders of this Court, the same is approved and confirmed.

[50] § 10951 G. C.

[51] § 877 *et seq.*

It is therefore ordered by the Court that the petitioner proceed to sell the lands in the petition described at public sale at not less than two-thirds of the appraised value. That said petitioner shall give notice..... weeks or days, of the time and place of sale prior thereto, by advertisement in some newspaper of general circulation in.....county; (being the county in which the land is situate), and that he give notice thereof by bills posted up in public places that said sale shall be at public auction, at the door of the Court House of.....county (or on the premises, etc.). That said sale shall be for one-third cash in hand, and one-third in one, and one-third in two years from the day of sale (or such other terms as the Court may think proper). The deferred payments to be secured by mortgage and executed by the purchaser to the said A. B., guardian, on the premises sold and to bear interest at the rate of six per cent. per annum from the day of sale.

If an auctioneer be employed, it would be well to make a note in the journal entry, and such other matters as the guardian may desire. It will be observed that the statute allows the guardian to acknowledge a plat of lots in a sub-division in a town, etc. If it is desired to make an order at private sale after having recited so much as is included in the above entry for a public sale, the following journal entry might be made in the former entry:

It is therefore ordered that the petitioner sell the lands in the petition described and, it being made to appear to the court that it will be more to the interest of the ward to sell such property at private sale it is ordered that same be sold at private sale for not less than the appraised value thereof. (Then make the entry to suit the order as to terms, etc.)

§ 1427. Public sale.

The statute does not contain any direct instruction as to the manner in which a public sale of the lands should be conducted and as to what person may become a bidder. No better rule to guide the guardian in such sale could be adopted than that which is applied to sales made by executors and administrators; and as this matter has been fully heretofore discussed in this volume, reference is made to such former discussion.[52]

§ 1428. Private sale.

The only limitation placed upon a private sale is that it be not less than the appraised value. It should be borne in mind that no private sale can be made unless there is an affidavit accompanying the return that the sale has been made for the highest price and after diligent endeavor, etc.[53]

[52] § 877 *et seq.*

[53] § 11213 G. C. (§ 882).

Matters relating to private sales have likewise been discussed in a previous chapter.[54]

§ 1429. **Report of sale, confirmation and deed.** "Upon the return of such order of sale, such guardian shall make report of the sale made by him; whereupon, on being satisfied that it was fairly and legally made, the court shall confirm it and order the petitioner to execute a deed of conveyance for the real estate so sold, upon the purchaser securing the deferred payments of the purchase money in the manner prescribed in the next preceding section." [R. S. § 6287.][55]

§ 1430. Form of guardian's deed.

Know all Men by these Presents:

That, whereas, on the.....day of.....190.., ... was duly appointed as guardian of.....by the Probate Court of .....county, Ohio, and afterwards, to-wit: on the.....day of .....190.., said guardian filed..h....certain petition and then and thereby commenced an action in the Probate Court of..... ..... county, Ohio, against.....and numbered on the docket of said Court as Case No....., praying, among other things, for an order of sale of certain real estate therein mentioned and hereinafter described.

And, whereas, such proceedings were had in said action, that on the..... day of.....190.., said Court finding the allegations of the petition true, and that said real estate ought to be sold as prayed for in said petition, ordered that the same be appraised and on the.....day of..... .....190.., said Court further ordered that said..... proceed according to law to sell the said real estate at public sale for not less than two-thirds the appraised value thereof.

And on the same day, in pursuance of said order and judgment, an order of sale with said real estate therein described, was issued out of said Court, under the seal thereof, to the said.....as..... as aforesaid, directed, commanding..h....to execute the said order, and of

[54] § 877 *et seq.*

[55] § 10952 G. C.

In the previous chapter relating to sale by executors and administrators, the matter of return of sale and confirmation has been gone into, to a considerable extent, and reference is made to that chapter for discussion for these various matters. As to entry confirming sale, etc., see § 895.

Where a guardian withheld a deed from record until a third party who made a loan to the purchaser put his mortgage on record, the guardian's mortgage was held to be subsequent in priority to third persons loaning the money. McFarland vs. Harper, 33 Bull. 87.

Where, in a guardian's proceeding to sell, a mistake occurs in his return of sale by leaving out the name of the subdivision, the description being correct in all prior parts of the proceedings, it is sufficient to divest the wards of their title and vest in the buyer, and the mistake can be reformed by an independent suit. Cook vs. Prosser, 7 C. D. 619; 14 C. C. 137.

The court in which the action is pending may determine all the equities and priorities of lienholders, etc. See § 814.

the same, together with..h....proceedings thereon, to make due return;

And, whereas, said.....having caused said premises to be appraised, and the report of such appraisement to be filed in said Probate Court, and having on the.....day of.....190.., returned said order of sale to said Court as commanded, with..h....proceedings thereon, stating in substance that in obedience to said order..he....duly advertised the real estate therein described for sale for.....consecutive weeks before the day of sale, in the.....a newspaper printed and of general circulation in said.....county, Ohio, stating in said notice the time, place, and terms of said sale, and on the.....day of .....190,.., ..he....attended....the.....and at the hour of.....o'clock....M.,..he....offered said real estate (hereinafter described) for sale, when.....bid to pay for the same the sum of.....dollars, which being the highest and best bid that was offered, and being.....two-thirds the appraised value of said premises..he....then and there sold the same to said..... for that sum.

And whereas, on the.....day of.....190.., the said Court having examined the proceeding of the said.....aforesaid, under said order of sale, and it appearing to the Court that said sale was in all respects legally made, ordered that the same be approved and confirmed. and that said.....should execute and deliver a proper deed to the purchaser, of the real estate so sold.

All of which will more fully appear by the records of said Court, to which reference is here made.

Now, therefore I, the said....., guardian of..... aforesaid, by virtue of said judgment, order of sale, sale and confirmation and of the statute in such cases made and provided, and of the powers vested in.....and for and in consideration of the premises, and the sum of.....dollars ($.....) paid, or secured to be paid to .....by said.....the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said....., ..h... heirs and assigns forever, the following real estate, situate in the county of .....in the State of.....and in the..... and bounded and described as follows:

.....

To have and to hold said premises with all the privileges and appurtenances thereto belonging, to the said....., ..h....heirs and assigns forever, as fully and completely as I, the said....., as such guardian by virtue of said judgment. order of sale, sale and confirmation, and of the statute made and provided for such cases, might or should sell and convey the same.

In witness whereof, the said.....as such.....ha... hereunto set..h....hand.., this.....day of.....A. D. 190...

Signed and acknowledged in presence of

.....

.....

.....

of.....

.....

The State of Ohio,.....County, ss.

Be it remembered, that on this.....day of.....190.., before me, the subscriber, a.....in and for said county, personally came the above named.....as.....of..... the grantor..in the foregoing deed, and acknowledged the signing of the same to be..h....voluntary act and deed as such..... for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

.....

.....

§ 1431. Appeal and error.

It is a well settled principle of law that no right of appeal exists unless given by statute. There is no express statutory provision giving this right to actions by guardians to sell the real estate of their wards. The general section providing for appeals[56] seems to limit the right of appeal in proceedings for the sale of real estate for the *payment of debts*. This evidently applies to actions brought by administrators or executors. While a guardian may sell for the purpose of paying debts, yet a sale may be had for a number of other reasons. It is possible that this section gives the right to appeal, but it is very questionable. It is also a general proposition of law that a reviewing Court will not entertain proceedings in error where the matter sought to be reviewed was one which rested in the discretion of the Court, making the order. It is very doubtful if proceedings in error will lie from an order of the Court in reference to the sale of an infant's real estate on application of his guardian. Yet in Ewing v. Hollister[57] it was held, before the law was passed making the action a civil action, that a proceedings by an administrator or executor to sell land might be reviewed in error. It would seem at least so far as the defendants are concerned that the order of the Court is upon a substantial right and a proceedings in error ought to lie.

[56] § 11206 G. C. (§ 39.)

[57] 7 O. pt. 2, 138.

CHAPTER LXXVII.

LEASE OF WARD'S REAL ESTATE.

§ 1432 Power to lease.
§ 1433 Power to lease for fifteen years.
§ 1434 Petition for lease.
§ 1435 Application for lease, etc.
§ 1436 Form of petition to lease and improve real estate.
§ 1437 Notice. Entry, etc.
§ 1438 Who may unite in application and proceedings thereon.
§ 1439 Appointment of appraisers. Entry, etc.
§ 1440 Order to view, etc.
§ 1441 Hearing and orders thereon.
§ 1442 Order authorizing lease, etc.
§ 1443 How improvements may be made.
§ 1444 Report of guardian, etc.
§ 1445 When lease extending beyond minority determines.
§ 1445a Lien of tenant for improvements.

§ 1432. Power to lease. *

It is the duty of the guardian to keep the ward's real estate in such a condition that it will yield a reasonable income, and in order that this object may be accomplished, he is empowered to lease the same. In making such a lease, he is responsible for a proper exercise of prudence and diligence, the same as in the discharge of any other duty pertaining to the guardianship. He has no right to make a lease which will permanently injure or in any way injuriously affect the real estate. That is, unless specially permitted by statute, and by order of the Court, he has no right to allow growing timber to be cut, where the same is not necessary in a proper use of the real estate, nor has he a right to allow minerals, etc., to be taken away. Neither has he a right to lease the real estate for an illegal purpose.[1]

The guardian should exercise care in leasing the real estate and have the property used for a good purpose and with the

[1] Woerner on Gr. 202; Sch. Dom. Rel. 350.

*Cited, *In re* Connell, 56 Bull. 143.

least wear and tear that a proper use will require. By a statutory provision the guardian is not permitted in any case unless under some specific statute, to lease real estate for more than three years, as will be seen from the following:

"A guardian of the person and estate, or of the estate only, of a minor may lease the real estate of his ward for a term not exceeding three years and not extending beyond the minority." [R. S. § 6295.][2]

§ 1433. Power to lease for fifteen years, etc.

If the real estate is in such a condition that it needs to be improved in order to increase its rents and that such increase of rents is needed for the education or support of the ward or to pay any of his debts, or any liens or claims against the estate, then a lease may be made, providing for such improvements and for a period not beyond fifteen years, or beyond the minority of the ward. The statute relating thereto is as follows:

"Such guardian also may lease the real estate of his ward for a term not exceeding fifteen years, although it extends beyond the minority, if, on his application, the court appointing him, finds that such lease will be to the advantage of the ward, and is necessary to secure the improvement of the real estate, and to increase its rents, and that such increase is needed for the support and education of his ward or to pay his liabilities or any liens on, or claims against his estate, and that by such lease a sale of real estate for these purposes may be prevented." [R. S. § 6296.][3]

§ 1434. Petition for lease. "Such application shall be by petition, which shall contain a description of the real estate and a particular statement of its value and the value of all other property or effects of the ward, and his income and expenses, a detailed statement of the improvements proposed and the liabilities or expense of support and education to be pro-

[2] § 10961 G. C.

See § 1463, Mortgage, etc.

§ 1534, Gdn. of drunkards.

If a guardian lease real estate for saloon purposes, etc., he will be liable for fine, etc. §§ 6209, 6210, 6211 G. C.

[3] § 10962 G. C.

Covenant at end of lease for option of three years' renewal, is void. Globe Soap Co. vs. Railway, 6 C. C. (N.S.) 496; 27 O. C. C. 759; affirmed 76 O. S. 577.

vided for, the rent of the real estate as it is, and the probable increase of rent if the improvements are made, the means intended to be used in making the improvements and the proposed terms and time of the lease; and such other facts as will be pertinent to the question whether the authority for making the lease should be granted." [R. S. § 6297.][4]

§ 1435. Application for lease, etc.

By the previous section it will be seen that several matters must be stated in the application. *First,* a description of the real estate. *Second,* its value. *Third,* the value of all other property of the ward. *Fourth*, his income and expenses. *Fifth,* a detailed statement of the proposed improvements. *Sixth,* the debts of the ward, or expenses of support and edution which is to be provided for. *Seventh*, the rent of the real estate as it is. *Eighth,* the probable increase of rent if the improvements are made. *Ninth*, the means intended to be used in making the improvements. *Tenth*, the proposed terms and time of the lease; and lastly, all other facts as are pertinent to the question whether the authority for making the lease should be granted. It should further state, that the person making the application is the acting guardian of the ward, and that he was appointed guardian by the Probate Court of the county in which the application is made. The age of the ward ought also to be stated. The application to lease is in its nature and character, very much like the application to sell, and what was said in the previous chapter in relation thereto will be applicable generally to this chapter. It will be observed that a lease for fifteen years is not to be made unless necessary under the provisions of sec. 10962 G. C.[5]

§ 1436. Form of petition to lease and improve real estate.

(*Title.*)

A. B., plaintiff, represents that he is the duly appointed, qualified and acting guardian of ..... of the age of .....: that on the ..... day of ..... he was appointed as such guardian by the Probate Court of ..... county. That his said ward .....

4 § 10963 G. C.

5 § 1433.

The Probate Court can not assign dower, in a proceeding to lease—or determine matters affecting the title, etc.

See Globe Soap Co. vs. Louisville R. R. Co., 6 O. C. C. (N.S.) 496; 27 O. C. C. 759; 76 O. S. 359.

is the owner in fee simple of the following described real estate (here describe); that said real estate is of the reasonable value of..... dollars; that the value of all other property and effects of his said ward, amount to.....dollars; that the present income of his said ward is.....dollars, and his ordinary and usual expenses amount to .....dollars; (if there be any liens on the real estate, here state) that the following is a detail statement of the proposed improvements to be made on said real estate. (Here set out in detail what improvements to be made on said real estate.) That the said ward is now indebted in the sum of.....dollars; that.....dollars will be necessary for the support and education of said ward; that said real estate would now rent for.....dollars; that the increase of rent if improvements are made, will be.....dollars; that the following means are intended to be used in making the proposed improvements (here insert how the money is to be raised with which the improvements are to be made and matter relating thereto); that it is proposed to lease said premises for.....years upon the following terms (here insert terms of proposed lease).

Said plaintiff, guardian further represents that it is necessary to make such lease to secure the improvements of the real estate and to increase its rents and profits which are needed for the support and education of his ward. Wherefore he asks that the said ward and.....may be made parties defendant to this application and be notified of the pendency and the prayer hereof according to law and that upon final hearing, he may be authorized to make such lease upon such terms and such manner as the Court may think proper.

.....

Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

§ 1437. Notice. Entry, etc.

From the provisions of the next section, it will be seen that the law applicable to the sale of the lands of a minor are made applicable here, in this, that the application may be made by two or more guardians or one guardian on behalf of two or more wards; and that the notice shall be given the same as in the sale of real estate.[6]

When the petition is filed, the Court should make an entry, fixing the method of service and the time of hearing. The same persons must be made defendants as in the sale of real estate. The following will serve as a general form of entry:

(*Title.*)

This day came A. B., guardian of C. D., and filed in this Court his petition, duly verified, praying for authority to lease and improve the real estate therein described belonging to said ward.

It is therefore ordered that the time of hearing of said petition be on the .....day of....., at.....o'clock. It is further ordered that said guardian cause notice thereof and of the time of hearing of said

[6] § 10947 G. C. (§§ 1413, 1414, 1415).

petition to be given to.....and....., defendants, in writing, to be served upon them personally at least.....days before the time set for hearing of said application; and if the same cannot be served personally, then by leaving a copy at their usual place of residence.[7]

§ 1438. Who may unite in application and proceedings thereon. "In such application the guardian may act for two or more wards, and two or more guardians of different wards may unite, when all the wards are jointly or in common interested in the real estate. The same rules shall apply as to parties and notice as in applications for the sale of real estate. On the hearing, the court shall appoint three disinterested freeholders of the county in which the real estate is situated, who are not of kin to the petitioner, to view the premises and report under oath their opinion of the probable cost of the improvements proposed, whether the improvements and the proposed lease would be for the best interest of the ward or wards, and if so, upon what terms the lease should be made. The report must be returned on or before a day named in the order for the final hearing of the case." [R. S. § 6298.][8]

§ 1439. Appointment of appraisers. Entry, etc.

At the time set for hearing, the Court, being satisfied that the petition makes a *prima facie* cause for action, and that all parties have been notified as required by law, and the former orders of the Court, should make an order for appraisers.[9] The entry may be in the following form:

(*Title.*)

This day this cause came on to be heard upon the papers, evidence and testimony, and was submitted to the Court. Whereupon after due consideration, the Court finds that all parties defendant herein have been duly and legally notified of the pendency of this action, and the time of hearing thereof as required by law and the former orders of this Court; and that the statements and allegations of said petition are true and that it is necessary to lease and improve the real estate of the plaintiff as in said petition set forth.

It is therefore ordered that E. F., G. H. and I. J., three disinterested freeholders of the county in which the real estate is situate and who are not of kin to the petitioner, be, and they are hereby appointed to view the premises under oath, and report their opinion of the probable cost of the improvements proposed, whether the same and the proposed lease will be for the best interest of the ward, and if so, upon what terms the lease should be made; and it is ordered that they make due return of their proceedings in writing to this Court on the.....day of.....at..... o'clock, which time is set for the final hearing of this cause.[10]

[7] As to form of notice, see § 1416, which can be easily changed to suit this kind of a proceeding.

[8] § 10964 G. C.

[9] §§ 1420, 1421.

[10] See § 1468.

§ 1440. Order to view, etc.

After the Court has made the entry on its journal it is a general practice to issue a formal order to the guardian to have the appraisement made. This may be in the following form:

(*Title.*)

Probate Court,.....County, Ohio.

To....., Guardian of.....

You are hereby notified that in the case in which you, as guardian, are plaintiff, and your said ward....., and others were defendants, an order was this day made that E. F., G. H. and I. J., three disinterested freeholders of the county in which the real estate is situate and who are not of kin to the petitioner, were appointed to view the premises in the petition described, and report under oath their opinion of the probable cost of the proposed improvements, and whether the same would be for the best interest of said ward, and if so upon what terms the lease should be made.

You will therefore notify said freeholders of the duty devolving upon them and present them with a copy of your petition filed in this case; and as soon as they have discharged their duties forthwith, make a report to this Court.

Witness the seal and signature of this Probate Court, this.....day of .....190..

....., Probate Judge.

The appraisers must have an oath administered to them, which may be as follows:

State of Ohio,.....County.

We, the undersigned disinterested freeholders, being not of kin to said guardian, do make solemn oath that we will truly and impartially perform the duties devolving upon us in pursuance of the order of the Probate Court of.....county, Ohio.

.....

.....

.....

Sworn to and subscribed before me and in my presence this.....day of ....., 190...

These appraisers or freeholders should carefully attend to the duties devolving upon them and should examine the petition and see that their report covers the premises described. They should also fully inform themselves as to whether or not the best interest of said ward will be subserved by making the proposed improvements. In this respect they act in an advisory manner to the Court. The report may be in the following form:

(*Title.*)

In obedience to the order of the Probate Court of.....county, we,....., after first being duly sworn, viewed the premises described in the petition, and we respectfully report that in our opinion the probable costs of the proposed improvements will be.....dollars. That the same and the proposed lease will.....be for the best interest of the ward and that said lease should be made upon the following terms. (Here insert the terms of the proposed lease.)

.....

.....

.....

§ 1441. Hearing and orders thereon. "If the report of the freeholders be in favor of the lease, and on the final hearing the court is of opinion that it will be to the advantage of the ward or wards to improve and lease the real estate, that such lease is necessary to secure the improvements and increase the rents, that such increase is needed for the support and education of the ward or wards, or to pay his or their liabilities or liens or other claims against his or their estate and that by such lease a sale of real estate for any of these purposes may be prevented, the court shall make an order authorizing the lease to be made on such terms and in such manner as it thinks proper." [R. S. § 6299.][11]

§ 1442. Order authorizing lease, etc.

(*Title.*)

This day this cause came on for final hearing in pursuance to the former orders of this Court; and the freeholders heretofore appointed herein having reported in favor of the lease, and the Court being of the opinion that it will be to the advantage of the ward to improve and lease the real estate in said petition described, and that such lease is necessary to secure the improvements and increase the rents, and that the same is indebted for the support and education of the said ward (or to pay his liabilities or lien or other claims against the estate).

It is therefore ordered that said guardian be and is hereby authorized to make said lease on the following terms: (Here insert terms of lease).

§ 1443. How improvements may be made. "In the lease made in pursuance of such order, it may be provided that the improvements shall be made by the tenant as part of the rent, or by the guardian, either out of the rent or other means of the ward or wards, as the court directs." [R. S. § 6300.][12]

§ 1444. Report of guardian, etc.

The guardian having made the lease, should report his proceeding to Court and have the same confirmed. The following may serve as a report:

(*Title.*)

In conformity to the former order of this Court, I beg leave to report that I have complied with its order and have made lease of the real estate to ....., on the terms following, to-wit: (Here insert terms of lease.) I have also improved said property at a cost of ..... dollars in the following manner: (Here insert the manner in which the

[11] § 10965 G. C.

While the statute does not so require, it would be good practice to have the guardian report when the lease is made and have the same confirmed by the Court and the entry may so provide.

[12] § 10966 G. C.

improvements have been made, and if such improvements are to be made by the tenant as a part of the rent, so state.)

Sign.....

It would be proper after the report was filed and the same was examined by the Court for the Court to make an entry which may be in the following form:

(*Title.*)

This day this cause came on to be heard upon the report of the guardian, plaintiff in the above proceeding of the lease of the real estate in his application described; and the terms of the same, and also the manner in which the real estate was improved, and costs of the same.

Whereupon, after due consideration and examination of the same the Court approves and confirms said lease. (And might be added that the costs of this proceeding be paid by the guardian.)

§ 1445. When lease extending beyond minority determines. "A lease made by a guardian to extend beyond the minority shall determine when the ward, if there be but one, arrives at full age, or if more than one, when all of them arrive at full age, unless such ward or wards then confirm it. In case of the death of the ward, if there is but one, or of all of them, if more than one, the lease shall also determine, unless the legal representatives of such ward or wards confirm it. If there is more than one ward, and some but not all die, the lease will continue until the survivor or survivors reach full age." [R. S. § 6301.][13]

§ 1445a. Lien of tenant for improvements. "When such lease is determined by reason of the death or majority of the ward or wards, the tenant shall have a lien on the premises for any sum expended by him in pursuance of the lease in making improvements and for which compensation has not been made, either by the rent or otherwise." [R. S. § 6301.][13*]

[13] § 10967 G. C.

[13*] § 10968 G. C.

CHAPTER LXXVIII.

POWER TO LEASE REAL ESTATE FOR PETROLEUM, GAS AND MINING PURPOSES.

§ 1446 Lease for petroleum or natural gas purposes.
§ 1447 Power to lease real estate for petroleum oil or natural gas purposes.
§ 1448 Petition therefor.
§ 1449 Notice of hearing.
§ 1450 Court to prescribe terms, etc.
§ 1451 Lease for mining purposes.
§ 1452 Power to lease real estate for ten years for mining purposes.
§ 1453 Petition; time for hearing.
§ 1454 Land to be viewed by disinterested freeholders.
§ 1455 Probate Court to order lease.
§ 1456 Royalty; report of by guardian; bond to recover.
§ 1457 Change in terms of leasing.
§ 1458 Lands owned in common by minors.

§ 1446. Lease for petroleum or natural gas purposes.

This chapter will include the sections of the General Code, passed at different times and providing for two different circumstances under which land may be leased. The first four sections relating to when the guardian of a *minor or lunatic,* etc., may lease real estate for the purpose of procuring petroleum oil or natural gas; and the remaining sections providing when the lands of a *minor* only, may be leased for mining purposes. In reference to the sections relating to leasing for petroleum or gas purposes, it will be observed that no provision is made, like in the statutes generally, for the appointment of appraisers or persons to view the premises and report upon the advisability of making the lease. While it is not required that this be done, good practice in this respect would follow the method of proceedings set forth in the previous chapter. The petition should set forth the matters required by 10977, G. C., (§ 1453). Then notice should be given and after notice is given, viewers appointed, and then a final hearing, and the forms in the preceding chapter may very easily

be changed to suit a proceedings for the purpose of leasing lands of an imbecile, minor, etc., for petroleum or gas.[1]

§ 1447. Power to lease real estate for petroleum oil or natural gas purposes. "A guardian of the person and estate, or of the estate only, of a minor, or of a lunatic, idiot, or imbecile, or an incompetent by reason of advanced age or mental or physical disability or infirmity, may lease the real estate of his ward, or of such lunatic, idiot or imbecile, or an incompetent by reason of advanced age or mental or physical disability or infirmity, for petroleum oil or natural gas purposes, or either, or for the removal of gravel, stone or other mineral substances for such period of time not exceeding ten years, as may be authorized by the probate court appointing such guardian." [87 v. 162, § 1; 101 v. 95; 109 v. 72.][2]

§ 1448. Petition therefor. "Before executing such lease, the guardian shall file his petition for authority to make it, in the probate court appointing him, which petition must contain a description of the real estate sought to be so leased, a detailed statement of the terms, time and conditions of the proposed lease, and, as near as may be, its net annual value to the ward." [87 v. 162, § 2.][3]

What to contain. "In cases when it is sought to lease the real estate of a lunatic, idiot or imbecile, or incompetent by reason of advanced age or mental or physical disability or infirmity, for such purposes, the guardian also shall set forth in his petition the number, names, ages and residences of those who have the next estate of inheritance from the ward, all of whom, as well as the ward, shall be made defendants." [87 v. 162, § 3; 109 v. 72.][3]

§ 1449. Notice of hearing. "On filing the petition, notice thereof, and its object and purport, and of the time of hearing of it in such court, shall be given the ward and all other defendants, as in proceedings therein to sell the real estate of a minor." [87 v. 162, § 4.][4]

§ 1450. Court to prescribe terms, etc. "Upon the final hearing, if satisfied from the evidence that it will be for the best interests of the ward, that the prayer of the petition be granted, the court may prescribe the terms, covenants, conditions and stipulations of the lease, either in accordance with those set forth in the petition or otherwise. Such lease, when so made by the guardian, shall be by him reported to the court and not

[1] See § 1392; see §§ 1530, 1534.
[2] § 10983 G. C.
[3] §§ 10984, 10985 G. C.
[4] § 10986 G. C.

take effect until it is approved and confirmed by the court." [87 v. 162, § 5.][5]

§ 1451. Lease for mining purposes.

The remaining sections of this chapter provide for the lease of the lands of a *minor,* and not those of a *lunatic, imbecile* or *drunkard,* for the purpose of mining. It seems to be that in the case of managing coal lands, or mining lands, of an imbecile or lunatic that the statute contemplates that such lands shall not be leased, but may be sold.[6] A peculiarity of the following section is that unlike the other special acts relating to leasing of the lands of a ward, it does not specify what the petition shall contain. In this respect it would be safe to set out in the petition the facts required when filing an application for the purpose of improving and leasing the lands of a minor.[7] Otherwise the act substantially follows the law relating to the leasing of lands of a minor for improvement, etc.[8] The forms and practice therein suggested may easily be adopted for an application under the following sections. In all cases the statute itself should be strictly followed.

§ 1452. Power to lease real estate for ten years for mining purposes. "The guardian of the person and estate, or estate only, of a minor, may be authorized by the probate court of the county in which the lands are situated, to lease upon such terms and for a time not exceeding ten years, any lands in such county belonging to his ward, supposed to contain coal or gypsum for the purpose of mining for and removing these minerals. If the period of ten years extends beyond the minority of the ward, it shall then terminate as to him, unless he confirms it." [R. S. § 6301–1.][9]

§ 1453. Petition; time for hearing. "Upon the filing of a petition, under either of the next two preceding sections, the court shall fix a time, not less than five nor more than fifteen days from its filing, for hearing it, and order the petitioner to give notice in writing to his ward, who shall be defendant

[5] § 10987 G. C.
[6] § 10994 G. C. (§ 1522).
[7] § 10997 G. C. (§ 1434).
[8] See previous chapter.
[9] § 10975 G. C.

thereto, of its filing and prayer, and the time it will be heard, which notice must be served not less than five days before the hearing. He shall return to the court a copy of such notice, stating the time and manner of its service." [87 v. 223, § 2.][10]

§ 1454. **Land to be viewed by disinterested freeholders.** "At the time appointed for hearing the petition, if the court finds that it will be to the advantage of the ward to lease the lands, as prayed for therein, it shall appoint three disinterested freeholders of the vicinity who are not of kin to the petitioner, to view such lands, and report in writing to the court their opinion as to the probability of the lands containing coal or gypsum, in what quantity, and the terms upon which it would be advantageous to the ward to lease the lands for mining such minerals. Before entering upon the discharge of their duties, such freeholders must take an oath faithfully and impartially to discharge them." [R. S. § 6301–3.][11]

§ 1455. **Probate Court to order lease.** "When the report of such freeholders is filed with such court, if satisfied that it will be to the advantage of the ward to lease the lands for such mining purposes, the court shall order the guardian to lease them, upon such terms as it directs, which shall not be less favorable to the ward than those reported by the freeholders." [87 v. 223, § 4.][12]

§ 1456. **Royalty; report of by guardian; bond to recover.** Within six months after the receipt of the first royalty under such lease, the guardian shall report to the court the amount thereof, and the court shall then fix a bond which will cover the royalty therefrom. At any time the court deems the bond insufficient to secure the royalty, it may increase it, or require a new one." [87 v. 223, § 5.][13]

§ 1457. **Change in terms of leasing.** If the guardian is unable to lease the lands upon the terms ordered, he may report the fact to the court, and it may change the terms of leasing, but not below the customary royalty in the vicinity of such lands." [87 v. 223, § 6.][14]

[10] § 10977 G. C.
[11] § 10978 G. C.
[12] § 10979 G. C.
[13] §§ 10980 G. C.
[14] § 10981 G. C.

§ 1458. Lands owned in common by minors. "When the same person is guardian of two or more minors owning lands in common, such minors may be joined as defendants in the same petition, or if the minors have different guardians, such guardians may unite in one petition." [87 v. 223, § 7.][15]

[15] § 10982 G. C.

CHAPTER LXXIX.

MORTGAGE OF WARD'S LANDS.

§ 1459 Statute must be followed, etc.
§ 1460 Where action to be brought.
§ 1461 Guardian may mortgage real estate of ward in certain cases.
§ 1462 For whom action may be brought.
§ 1463 When application may be filed.
§ 1464 Petition therefor; what to contain.
§ 1464a Investigation and report.
§ 1465 Essentials of petition.
§ 1466 Form of petition.
§ 1467 Proceedings upon filing of petition.
§ 1468 Viewers, when to be appointed.
§ 1469 Amount to be borrowed, etc.
§ 1470 Entry ordering guardian to report. What rate loan to be made.
§ 1471 Order and report of guardian.
§ 1472 Acceptance and confirmation of report and terms.
§ 1473 Entry confirming report and making distribution.
§ 1474 Report of execution of mortgage, etc.
§ 1474a Form of guardian's mortgage.

§ 1459. Statute must be followed, etc.

The object and purpose of the statute in providing for mortgaging the ward's lands is that money may be secured for the benefit of the ward or his estate and make the real estate a security for its payment. It therefore follows that it may as effectually deprive the ward of the title of its real estate as if sold by the guardian under a proceeding brought for that purpose; and the Courts have held that in order to make a valid mortgage, so that it cannot be attacked or defeated by the ward, the statute must be strictly complied with.

In one case it was held that where the statute provided that the order of the Court shall specify the amount to be secured by such mortgage, the rate of interest to be paid, and the length

In an action on a lease the guardian must show by what authority he acted. Guardian cannot give an option to extend lease after the expiration. Globe Soap Co. vs. Louisville, 6 C. C. (N.S.) 496; 27 O. C. C. 759; affirmed 76 O. S. 577.

of time for which such mortgage shall be given, and the Court failed to pass upon these questions, the mortgage was absolutely void, and under foreclosure the purchaser obtained no title.[1] And in another case, where the statute required a report to be made to the Court of the sale, leasing, or other disposition of the property, and the guardian failed to report as to his agreement in reference to the mortgage and the terms of the mortgage, that it was void.[2]

In a proceeding brought for the purpose of sale, the Court has no jurisdiction to make an order to mortgage or *vice versa*.[3] Likewise the order of the Court is invalid if the mortgage is authorized for a reason not permitted or granted by statute. In the foreclosure of a mortgage, it has been held that the ward had a right to question its validity, although its execution had been approved by the Probate Court.[3*] It will therefore be seen that it is important to the holder of the mortgage, as well as to the guardian, to see that the statute is strictly complied with in all respects.[4]

§ 1460. Where action to be brought.

The statutes relating to mortgaging and leasing the real estate of a ward do not contain a specific direction as to the Court having jurisdiction to grant such an order. It therefore follows that it is under the general statute which gives the Court making the appointment of the guardian the right to control his conduct, and therefore neither the Court of Common Pleas of the county in which the appointment was made, nor of any other county, nor the Probate Court of any other county, would have the right to entertain jurisdiction in this kind of a proceeding.

§ 1461. **Guardian may mortgage real estate of ward in certain cases.** "In any case when at the time a person is adjudged an idiot, imbecile, lunatic, drunkard, insane or an incompetent by reason of advanced age or mental or physical disability or infirmity there exists one or more mortgages or judgments that are a lien on his real estate, or when valid debts are due, which may be a claim against the estate of such person,

1 Edwards vs. Taliafero, 34 Mich. 13, 15.
2 Battell vs. Torrey, 65 N. Y. 294.
3 Woerner on Gr. 282.
3* Woerner on Gr. 284.
4 See § 1404 *et seq.*, as to sale made by guardian. See § 1534.

and would require the sale of his real estate to pay it, or when repairs or improvements may be for the benefit of such estate, or when real estate descends or is devised to a minor or minors, or to a person adjudged an idiot, imbecile, lunatic, drunkard, insane or an incompetent by reason of advanced age or mental or physical disability or infirmity, which is liable for the payment of debts, or legacies or on which one or more mortgages or judgment liens exist, or when it is necessary to borrow money for maintenance of such ward, the guardian of such person may borrow money and mortgage the real estate of his ward or a part thereof to pay such mortgage, debts, legacies and judgments, and such additional sum as by the court is deemed necessary, to make needed repairs and improvements thereon, or for the maintenance of ward." [R. S. § 6301a; 109 v. 72.][5]

§ 1462. For whom action may be brought.

Sec. 10969, G. C., seems to provide for two different conditions of an estate for which an application to mortgage may be filed. The *first* seems to limit the application to a guardian of an idiot, imbecile or insane person, and the second allows it to be filed for a minor, idiot, imbecile, lunatic or drunkard. Unquestionably, it cannot be filed by a guardian of a minor under the first part of sec. 10969, G. C. There may be some question whether it can be filed by the guardian of a drunkard. A general provision relating to drunkards[6] provides that all laws relating to guardians for lunatics, idiots, imbeciles, etc., shall be application to guardians for drunkards. This makes the question whether a guardian of a drunkard may file the application for any of the causes set forth in the first part of sec. 10969, G. C.,[7] a very uncertain question. From the fact that sec. 10969, G. C., was enacted into law after sec. 11011, G. C., and specifically fails to include a drunkard, the author is inclined to the opinion that the application cannot be made for either a drunkard or a minor for causes set forth in the first part of sec. 10969, G. C.

In the section as now amended the incongruities above referred to are taken out and in addition a mortgage may be executed for maintenance.

[5] § 10969 G. C.
[6] § 11011 G. C. (§ 1535)
[7] § 1460.

§ 1463. When application may be filed.

The application may be filed by a guardian of an idiot, etc., where there exists, *first,* a mortgage or judgment — that is, a lien on the real estate of such ward; *second,* when there are valid debts due from such ward which are a claim against the estate of such person; and *third,* when the condition of the personal estate of the ward is such that the real estate must be sold to pay the debt; *fourth,* when repairs or improvements are needed or necessary for the benefit of the estate. In this latter respect it seems to confer upon the guardian of a lunatic, imbecile or idiot the right to borrow money for making repairs which is given to the guardian of a minor by other sections.[8] The second part of sec. 10969, G. C., provides that the application may be made only, *first,* when an estate is inherited or received by devise, which estate is liable for the payment of any debts or legacies which may be due from the ancestor in the settlement of the estate, or when there are valid mortgages or judgment liens that may exist against said real estate. It does not permit a guardian of a minor or drunkard to borrow money for the payment of debts that have been incurred by the guardian. It seems that when the Court makes the order authorizing the mortgage, that it may also include an order for a certain amount of money to be borrowed to make needed repairs and improvements. Sec. 10969, G. C., is a piece of not very clear legislation. Recent amendments have clarified the statute considerably.

§ 1464. Petition therefor; what to contain. "The guardian proposing so to borrow money must file in the probate court which appointed him, a petition describing the real estate so encumbered, and also all the real estate of such ward, and stating the nature and amount of the encumbrances thereon, when they became or will become due, and the rate of interest thereon; the amount and character of all valid debts due from such ward, to whom due, when they will become or became due and the rate of interest thereon; the necessity for and character of any repairs and improvements, and the amount required therefor, together with a statement of the ward's per-

[8] See § 1432.

sonal property and the income therefrom and from his real estate; the amount probably necessary to maintain the ward and his family, and the names, ages and residence of the ward and next of kin residing in the state, including the wife or husband of such ward, and all persons holding liens on such real estate, all of whom must be made defendants, and be notified of the pendency and prayer of the petition in such manner as the court directs; also a statement of the nature of the imbecility or insanity of such ward, whether temporary or confirmed, its duration, and such other facts as may be pertinent to the question whether such money should be borrowed, and a prayer that he be authorized to mortgage so much of the ward's lands as may be necessary to secure such loans." [R. S. § 6301b.][9]

§ 1464a. Investigation and report. "Before the court makes an order authorizing the guardian to mortgage real estate for the purpose of borrowing money to make repairs or improvements as provided in section ten thousand nine hundred and sixty-nine,* it shall appoint three disinterested freeholders, whose duty it shall be fully to investigate the question as to the necessity for, and the advisability of making such repairs or improvements, and their probable cost, and report this to the court under oath." [R. S. § 6301b.][9*]

§ 1465. Essentials of petition.

The following may be classed as the essentials to be set forth in the application: *First*, it should state the fact that the person filing the application is the acting guardian, and that he was appointed in the county in which the application is made: *second*, it should describe the real estate upon which it is sought to execute a mortgage; *third*, it should describe all other real estate of the ward; *fourth*, it should state the nature and amount of the incumbrance on all the real estate; *fifth*, it should state when said incumbrance will be due, and the rate of interest thereon; *sixth*, it should state the amount and character of all valid debts due from such ward, to whom due, and when the same will become due, what rate of interest thereon; *seventh*, if it is sought to make repairs or improvements, the

[9] § 10970 G. C.

[9*] § 10971 G. C.

* § 1461.

See *In re* Connell, 12 N. P. 311.

kind of repairs and amount required to make such repairs should be stated; *eighth,* a full statement of all the ward's personal property; *ninth,* the income from such personal property and from the ward's real estate; *tenth,* the probable amount necessary to maintain the ward; *eleventh,* names, ages and residence of such ward, including the next of kin residing in this State, and the wife or husband of such ward and all persons holding liens on said real estate; *twelfth,* if the application is made for one of the reasons authorized by the latter part of sec. 10969, G. C., (§ 1461), it should state that the real estate in the petition described has been acquired by the ward by descent or devise; *thirteenth,* the character of the imbecility or insanity of such ward, whether temporary or confirmed, and its duration; lastly, such other matter as the petitioner may believe is pertinent to the question whether the order should be granted or not, closing with the prayer that the guardian may be authorized to mortgage so much of said ward's lands as may be necessary to secure the loan.

§ 1466. Form of petition.

The form of petition given under the section relating to the sale of real estate by a guardian may be easily adopted for a petition to mortgage, being careful that the petition sets forth the facts stated in the previous section.[10] It should be observed that the ward and next of kin of such ward residing in the State, including the wife or husband and all persons holding liens, must be made defendants.

§ 1467. Proceedings upon filing of petition. "Upon the filing of such petition, like proceedings shall be had as to pleadings and proof as on petition by a guardian to sell the real estate of a minor." [R. S. § 6301c.][11]

As the above section specifically states, that the same proceedings shall be had, etc., as in the sale of real estate, it will be proper to refer to that chapter as to the entry which should

[10] § 1412, for form for the sale of real estate.

[11] § 10972 G. C.

be made upon the filing of the petition; and the forms of notice and manner of service there stated will be applicable.[12]

§ 1468. Viewers, when to be appointed.

Unless the guardian seeks in his petition for authority to mortgage the property for the purpose of making repairs and improvements on the property, it seems that no viewers need be appointed, and that on the day of hearing, the Court may make an order either granting the application or refusing. If, however, it is sought to borrow money for the purpose of repairing and improving, then it would be necessary to make an order at the time set for hearing, appointing viewers, whose duty it shall be to investigate the question as to the necessity for and the advisability of making said repairs or improvements, and the probable cost thereon, and report the same to the Court. When this is acquired, the entry in a previous chapter in reference to a lease of ward's real estate may be used.[13]

§ 1469. Amount to be borrowed, etc. "If on the final hearing it appears to be for the best interests of the estate of the ward that the prayer of the petition be granted, the court shall fix the amount necessary to be borrowed, direct what lands shall be encumbered by mortgage to secure it, and issue an order to such guardian directing him to ascertain and report to the court the rate of interest and time for which he can borrow such amount." [R. S. § 6301d.][14]

§ 1470. Entry ordering guardian to report. What rate loan to be made.

If no viewers need be appointed, then the Court may make the following entry on the day when the case is set for hearing:

(*Title.*)

This day this matter came on to be heard upon the application of A. B., guardian of C. D., for authority to mortgage certain real estate therein described; and the same was submitted to the Court upon the pleadings and testimony.

Whereupon after due consideration, the Court finds, that all the parties

[12] §§ 1415, 1421.

[13] § 1439.

[14] § 10973 G. C.

defendant, have been duly notified, as required by law and the former orders of this Court of the pendency of said application, its prayer and the time of hearing.

That the allegations of said petition are true; that it is necessary to mortgage the real estate as therein alleged for the sum of..... dollars. (If it is desired to use the money for repairs or improvements, the following should be included in the entry.) (The Court further finds that said matter was further submitted to the Court upon the report of the viewers heretofore appointed, to investigate the question as to the necessity for and the advisibility of making repairs or improvements on said premises as set forth in said petition and the probable cost thereof. The Court approves and confirms said report.)

Wherefore it is ordered that said guardian shall ascertain and report to this Court the rate of interest and the time for which he can borrow said amount so found necessary.

§ 1471. Order and report of guardian.

The following may be used as the order of the guardian:

State of Ohio,
.....County, ss.
Probate Court.
To....., Guardian of.....

You are hereby notified that an order has this day been made in this Court in a certain case wherein, you as guardian have made application to mortgage certain real estate belonging to....., your ward; and that you were therein directed to ascertain the rate of interest and the time for which you can borrow the sum of.....dollars by mortgaging the real estate therein described, to secure the same.

Witnesseth my signature and the seal of the Probate Court, this..... day of.....190...

....., Probate Judge.

The following may be used as a report:

(*Title.*)

In obedience to the order of the Probate Court in the above case, I have made a full and diligent inquiry, and beg leave to report that the best terms obtained in making the loan in behalf of my said ward is as follows: (Here state terms.)

.....

Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

§ 1472. Acceptance and confirmation of report and terms. "If such report and the terms proposed be satisfactory to the court, they may be accepted and confirmed, and the guardian ordered, as such, to execute a note or notes for such amount, and a mortgage on the lands so designated, which shall be a valid lien thereon. The guardian in no way shall be personally liable for the payment of the sum so borrowed, or any part of it, but such lands solely shall be held and bound therefor. Such court shall direct the distribution of the fund, and the guardian shall report to the court, for its approval, the execu-

tion of such notes and mortgage and his distribution of the fund." [R. S. § 6301e.][15]

§ 1473. Entry confirming report and making distribution.

(*Title.*)

This day this matter came on to be further heard upon the report of plaintiff therein, as to the rate of interest and time for which he could borrow said amount of.....dollars; and the same was submitted to the Court; and the same is found satisfactory to the Court and is accepted and confirmed; and the said guardian is authorized and ordered as such guardian to execute a note (or notes) for that amount and execute a mortgage on lands so designated (or such part as the Court may find necessary), and the matter coming on to be heard further as to the distribution of the money procured by said mortgage. It is ordered (here set out how the money is to be applied and designate what portion thereof is to be used in repairs and improvements).

§ 1474. Report of execution of mortgage, etc.

After the guardian has executed a mortgage, procured the money and made distribution, it is his duty to report that fact to the Probate Court for its approval. The forms for this purpose are very simple and space will not be taken up for the same in this work. The Court, after the report is made, should make an entry confirming the same.

§ 1474a. Form of guardian's mortgage.

Know all Men by these Presents:

That, whereas, on the.....day of.....190.., C. C. was duly appointed and qualified as guardian of the persons and estate of R. C. and O. C., the minor children of H. C., deceased, late of.....county, Ohio, by the Probate Court of said county; and afterwards, to-wit: on the .....day of....., 190.., sad C. C., as guardian, filed his certain application and then and thereby commenced an action in the Probate Court of.....county, Ohio, against said R. C. and O. C. and numbered on the docket of said Court as Case No....., praying for an order authorizing him to borrow sufficient money to pay off the existing lien upon the real estate of his said wards, and execute notes and mortgages securing the same, for the purpose of obtaining said money.

And whereas, such proceedings were had in said action, that on the..... day of....., 190.., sail Court, finding the allegations of said petition true and that it was necessary to mortgage the real estate described in said application for the sum of.....dollars, ordered said guardian to ascertain and report to the Court the rate of interest, and the time for which he could borrow said sum of money.

Thereupon said guardian, after diligent inquiry, made report to said Court that he could obtain said money at.....interest, payable annually for a period of.....years; and said Court having examined said report

[15] § 10974 G. C.

and being satisfied that the same is true, and that the terms therein reported were the best that said applicant had been able to obtain, thereupon authorized and ordered said guardian to execute a note and mortgage to one.....for the sum of money above referred to and upon the terms so reported to said Court.

Now, therefore, the said C. C., guardian of said R. C. and O. C., in consideration of said finding and order of said Court, and of the premises, and of the powers vested in him as such guardian by law, and in consideration of the sum of.....dollars, to him paid by the said..... ....., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said....., his heirs and assigns forever, the following described real estate..... To have and to hold said premises with all the privileges and appurtenances thereunto belonging to the said....., his heirs and assigns forever, as fully and completely as the said C. C., guardian as aforesaid, by virtue of said order and of the statute made and provided for such cases, might or should execute said conveyances.

Provided, nevertheless, that..... then these premises shall be void.

In witness whereof the said C. C., as guardian of R. C. and O. C., does hereunto set his hand this.....day of....., 190..

Signed and acknowledged in the presence of us:	.....
.....	.....
.....	.....

State of Ohio, County of....., ss.

Be it remembered that on the.....day of....., 190.., before me, the subscriber, a.....in and for said county and State, personally came the above named C. C. as guardian of R. C. and O. C., the grantors of the foregoing mortgage, and acknowledged the execution of the same to be his voluntary act and deed as such guardian and also in person for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and affixed my .....seal, this day and year last aforesaid.

.....

CHAPTER LXXX.

FOREIGN GUARDIANS.

§ 1475 Rights, duties, etc.
§ 1476 Effect of removal of ward from State and appointment of foreign guardian.
§ 1477 When and under what circumstances the guardian here may be removed.
§ 1477a Foreign State must have similar laws.
§ 1478 Comments.
§ 1479 What to be done if guardian here removed.
§ 1480 When foreign guardian of foreign ward may demand or receive property of his ward in this State.
§ 1481 Foreign guardian of minors may sue and be sued in this State and sell real estate.
§ 1481a Sale of their lands.
§ 1482 Comments.
§ 1483 Foreign guardian of foreign idiot, imbecile or lunatic may dispose of property belonging to his ward.

§ 1475. Rights, duties, etc.

It is an elementary principle of law that no guardian has any authority beyond the State in which he receives his appointment, unless by virtue of the laws of the State in which he wishes to act. Our statute makes ample provision for a foreign guardian to secure the funds of his ward situate in this State. But before he can do so, he must comply with our law, and then it rests in the discretion of the Court whether or not the fund shall be turned over to such foreign guardian.[1] In a previous chapter we have seen [2] that full provision is given for the appointment of what is termed a trustee to take possession of any property which may be situated in this State and belonging to a person who is under a disability of minority, idiocy, lunacy or imbecility, residing in such foreign State. The one condition which our laws require before such guardian may act in this State is that the laws of the State of the residence of the guardian make similar provision for guardians

[1] Banning vs. Gotshall, 62 O. S. 210.

[2] § 1273 *et seq.*

The court may under certain conditions compel a nonresident guardian to file an account. Schwab vs. Rappold, 12 Bull. 197.

residing in this State. These rights being statutory, and in derogation of the common law, should be strictly construed and literally complied with.[3]

§ 1476. Effect of removal of ward from state, and appointment of foreign guardian. "When a minor, for whom a guardian has been appointed in this state, removes to another state or territory, and a guardian of such infant is there appointed, the guardian in this state may be removed, and required to settle his account as hereinafter provided." [R. S. § 6276.][4]

§ 1477. When and under what circumstances the guardian here may be removed. "Such removal shall not be made unless the guardian appointed in another state or territory applies to the probate court in this state which made the former appointment, and files therein an exemplification from the record of the court making the foreign appointment, containing all the entries and proceedings relating to his appointment, his giving bond, with a copy thereof, and of the letters of guardianship, all authenticated as required by the act of congress in that behalf. Before such application is heard, or action taken therein by the court, at least thirty days' written notice must be served on the guardian appointed in this state, specifying the object of the application and the time it is to be heard." [R. S. § 6277.][5]

§ 1477a. Foreign state must have similar laws. "No such removal shall be made in favor of a foreign guardian, unless at the time of the hearing the state or territory in which he was appointed has a similar provision as to wards removing therefrom. In any case, the court may deny the application unless satisfied that the removal of the guardian appointed in this state would be to the interest of the ward." [R. S. § 6277.][5*]

§ 1478. Comments.

Of course, the application for such removal can only be filed in the court making the appointment. The above section is

[3] See § 1318, Ancillary Gdn.

A suit for partition may be maintained in the proper court by an assignor for benefit of creditors. Horstman vs. Ritter, 6 N. P. 470; 9 Dec. 413.

See § 763, Parties, etc.

See § 1273, Trustee for nonresident.

See § 1318, Ancillary Gdns.

[4] § 10940 G. C.

[5] § 10941 G. C.

[5*] § 10942 G. C.

See § 1482, Sell real estate.

Where a foreign guardian is without authority to dispose of property belonging to his ward, a sale of securities is void even in the hands of an innocent purchaser. Bank vs. Schirk, 5 C. C. (N.S.) 569; 17 Cir. D. 125; 27 O. C. C. 125.

Action for personal injury may be maintained by guardian appointed in Pennsylvania. Pennsylvania Co. vs. Raub, 11 O. C. C. (N.S.) 157; 30 O. C. C. 542; affirmed no op., 79 O. S. 454; not following Smith vs. Madden (U. S. C. C.), 37 Bull. —.

very similar to sec. 11020 G. C.,[6] and the forms adopted for that section, and the suggestions there made, will answer for an application under the above section. The Court should fully inform itself that the foreign guardian is a proper and suitable person — one who, if he lived in this State, would be a proper and competent person.[7]

Likewise the Court should be assured that the bond given in the foreign jurisdiction is ample and sufficient to cover all funds.

§ 1479. What to do done if guardian here removed. "If on such hearing, the court removes the guardian, it may make all suitable orders for discharging the resident guardian, and authorizing the paying over and delivery to the foreign guardian of all moneys and other property in the hands of the resident guardian after his settlement." [R. S. § 6278.][8]

§ 1480. When foreign guardian of foreign ward may demand or receive property of his ward in this State. "In any case in which a guardian not appointed in this state and his ward are both non-residents of the state, and the ward is entitled to money or other property in the lawful custody of an executor, administrator, or other person in this state, by order of the probate court of the proper county, upon filing therein the proofs named in sections ten thousand nine hundred and forty-one and ten thousand nine hundred and forty-two and giving notice to such custodian as therein prescribed, such guardian may be permitted to demand, receive, or recover, by suit, such money or other property, and remove it, unless the terms of limitation attending the right by which the ward owns it conflict with such removal." [R. S. § 6279.][9]

§ 1481. Foreign guardian of minors may sue and be sued in this State, and sell real estate. "Minors living out of this state and owning lands within it, are entitled to the benefit of

[6] § 1282.

[7] Habighurst vs. Stephenson, 19 Bull. 106.

[8] § 10943 G. C.

[9] § 10944 G. C.

See § 1273 *et seq.*, as to trustees for nonresidents.

A foreign guardian is not entitled to receive or receipt for money due the ward from an executor until he complies with § 10944 G. C., by filing an exemplification of the record, etc., and the Probate Court may refuse to order the payment of the money if detrimental to the ward. Payment without such order is unauthorized and will not protect the person making it. Banning vs. Gotshall, 62 O. S. 210.

See § 10941 G. C. (§ 1477); § 10942 G. C. (§ 1779).

this chapter. Guardians of minors residing out of this state, appointed according to the laws of the state or territory where they reside, may bring and maintain actions and enforce the collection of judgments, rendered in such cases in their favor, in the manner and to the extent that they could do if appointed under the laws of this state, upon giving security for the costs which may accrue therein in the manner other non-residents are obliged to do." [R. S. § 6290.][10]

§ 1481a. Sale of their lands. "Applications for the sale of real estate by guardians of minors who live out of this state shall be made in the county in which the land is situated, or, if situated in two or more counties, then in one of the counties in which a part of it is situated. Additional security shall be required from such guardian or guardians, when deemed necessary, and such as may be approved by the probate court of the county in which the application is made." [R. S. § 6290.][10*]

§ 1482. Comments. Same.

The above section confers an absolute right on foreign guardians to sue the same as local guardians, except that they must give security for costs the same as other non-residents. But before a local Court would order a fund to be turned over to a foreign guardian, it would require proof, as set forth in sec. 10941, G. C., that such person was acting in the capacity he represented himself to be, and that the bond he had given was ample and sufficient to secure whatever might be received.[11]

A foreign guardian may bring an action for the sale of real estate. The petition for such sale, in addition to that required by a local guardian,[12] must set forth the fact of such foreign appointment, and should file as an exhibit with the petition the matters required by sec. 10941, G. C.[13]

§ 1483. Foreign guardian of foreign idiot, imbecile or lunatic may dispose of property belonging to his ward. "The foreign guardian, conservator, trustee, or other person having power similar to those of guardians in this state, of a foreign idiot, imbecile, or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, ap-

10 § 10955 G. C.
10* § 10956 G. C.
11 Previous section, § 1477.
12 §§ 1410, 1412.
13 Previous section § 1477.

pointed in any other state of the United States, or any territory thereof, may possess, manage, or dispose of the real and personal estate of his ward, situate in this state, in like manner and with like authority as guardians of idiots, imbeciles or lunatics, or an incompetent by reason of advanced age or mental or physical disability or infirmity appointed by the courts of this state, after complying with the following requirements:

"1. An authenticated copy of the foreign commission of idiocy or lunacy or incompetency proved, allowed, and recorded in the probate court of the county or one of the counties in which such estate is situated, in like manner as is provided by law for the admission to record of an authenticated copy of a will made in any other of the United States;

"2. Evidence satisfactory to the court here, before which such foreign commission is approved, that such idiocy or lunacy or incompetency still continues;

"3. The foreign guardian, conservator, trustee, or other person, having powers similar to those of guardians in this state, shall file his bond, with sureties, residing in this state or elsewhere, to the acceptance of the court, conditioned for the faithful administration of his guardianship." [R. S. § 6315; 109 v. 75.][14]

[14] § 11009 G. C.
See § 1501, as to Guardians for idiots, etc.; § 1535, as to Guardians for drunkards, etc.

CHAPTER LXXXI.

GUARDIAN'S ACCOUNTING.

§ 1484 Duty to account.
§ 1485 When and where to be filed.
§ 1486 When barred by lapse of time.
§ 1487 What it should contain.
§ 1488 With what guardian should be charged.
§ 1489 Entitled to what credits.
§ 1490 Guardian's compensation.
§ 1491 Preparation of the account, etc.
§ 1492 Notice, hearing, exception, etc.
§ 1493 Effect of his settlement with Court — review of such settlement.
§ 1494 When account may be opened up.
§ 1495 Appeal and error.
§ 1496 Settlement with succeeding guardian.
§ 1497 Settlement with ward.
§ 1498 How finding of Probate Court enforced.
§ 1499 Settlement by executors, administrators, etc., of guardians. How enforced.
§ 1500 Comments.

§ 1484. Duty to account.

Our lawmaking power has fully recognized the importance of requiring the guardian to file a proper account; for in one section [1] it is provided that a guardian must render, on oath, a proper account of the receipts and expenditures of such guardian, verified by vouchers of proof, etc.; and in another section it is made the special duty of the Court to enforce the return at the prescribed times of all accounts required to be filed.[2]

This matter of filing accounts cannot be too carefully attended to by the guardian or enforced by the Court. The guardian who does not properly file his account at the time required by statute should not only suffer the penalty which the law prescribes, but should be promptly removed by the Court if, after notice, he neglects to act. Probate Judges are sometimes unmindful of this statutory duty placed upon them, and by negli-

[1] § 10933 G. C., § 1367.

[2] § 10939 G. C., § 1362.

gence or flimsy excuse permit guardians to serve year after year without accounting as the law prescribes. If a defalcation occurs, which is likely if accounts are not required to be filed, the Court may not be financially responsible, but certainly is morally so. What was said in previous chapters as to the accounting by administrators and executors,[3] and accounting by trustees [4] is applicable to guardians.[5]

The object of the statute in requiring reports is to provide, in permanent and reliable form, from time to time, statements of the condition of the trusts placed in their management for the information of the Court and the protection of the ward.[6]

§ 1485. When and where to be filed.

Of course, the account must be filed in the Court that made the appointment.[7] During the existence of the guardianship it must be filed at least once in every two years, or as often as the Court may order or the guardian desires. Where the fund does not exceed two hundred dollars, the account need only be filed when the guardianship terminates. In all cases, when the guardianship is at an end, whether it comes by reason of a removal by the Court,[8] or death of the ward, resignation of the guardian, or the ward's arrival at the age of majority, the account must be filed at the time such event occurs, or within a reasonable short period thereafter. Although the guardianship may have terminated, the Court does not lose jurisdiction over the guardian until he files his account, and the same is passed upon by the Court, and he is in this manner discharged of his duties; and it has been held that if a guardian removes

[3] § 702 *et seq.*

[4] § 1361 *et seq.*

[5] The duty of a guardian to make biennial reports is imperative and not discretionary. Baldridge vs. State, 69 Ind. 166; Colburn vs. State, 47 Ind. 310; Eiceman vs. State, 75 Ind. 46; Bernhamer vs. Steeg, (Ind. App.) 37 N. E. Rep. 420.

[6] Eiceman vs. State, 75 Ind. 46; Baldridge vs. State, 69 Ind. 166.

See § 1355; see §§ 1488, 1534.

The Probate Court may examine into all the various acts of the guardian to the end that a complete account shall be made. *In re* Strickland, 7 N. P. 233; 1 Dec. 702.

[7] § 11029 G. C., § 1293.

[8] § 1355.

to a foreign State, although such fact of removal from the State terminates his guardianship, yet the Court has jurisdiction to compel such guardian to account, and may procure service on him under the provisions of sec. 11205, G. C., (§ 37).[9]

§ 1486. When barred by lapse of time.

As a general rule, it may be said that lapse of time will not bar the right to compel a guardian to file an account.[10] But long lapse of time, without showing some reason, will be considered to be such *laches* on the part of the ward that Courts have frequently refused to compel an accounting. Thus, where a period of twenty years had lapsed, it was held to be such a want of diligence on the part of the ward that the Circuit Court held that an accounting required by the Probate Court without actual notice to the former guardian was erroneous.[11] And it has been elsewhere held that twenty years was such a bar,[12] and so nineteen years where the parties resided in the same neighborhood,[13] and so eight years.[14]

§ 1487. What it should contain.

The account should contain a statement, made in an orderly manner, of all the receipts and expenditures of the guardian. In addition, it is now required that a full itemized statement of the investments made by the guardian of the ward's fund must be filed with the account. The statement of an investment

[9] Netting vs. Strickland, 18 C. C. 136; 9 C. D. 841.

The Probate Court has exclusive jurisdiction. In an action on the bond the Common Pleas can compel an accounting. Wegner vs. Wiltsee, 23 C. C., 302.

[10] Woerner on Gr. 337, 367; Wall's Appeal, 104 Pa. St. 14; Marr's Appeal, 78 Pa. St. 66; Wade vs. Lobdell, 4 Cush. 510; Hiestand vs. Kuns, 8 Blackf. 345; Stark vs. Gamble, 43 N. H. 465; Gilbert vs. Guptill, 34 Ill. 112; Woodbury vs. Hammond, 54 Me. 332.

[11] Gilbert vs. Gilbert, 13 C. C. 29; 7 C. D. 58.

[12] Heath vs. Elliot, 83 Ia. 357; S. C., 49 N. W. Rep. 984.

[13] Maulfair's Appeal, 110 Pa. St. 402; S. C., 2 Atl. Rep. 530.

[14] *In re* Bauer's Estate, 12 Pa. Rep. 77; Hart vs. Stibling (Fla.) 6 So. Rep. 455.

See § 742, When may compel filing, etc.

See § 1352, Action on bond, etc.

must show its amount, its kind, its date, its security, and its rate of interest.[15]

The account should include only such matters as constitute transactions between guardian and the estate of the ward, and close with the termination of the guardianhsip. A transaction occurring after the termination of the guardian, as a general rule, is one of which the Probate Court has no jurisdiction. In some instances, however, the Court has sanctioned acts of the guardian which were done after his trust had ceased, if made for the benefit of the ward or by the ward's consent. Thus it was held that a credit should not be refused for moneys paid the ward's mother for boarding after the ward's majority, to which the ward did not object.[16] So our Supreme Court has held that where a guardian commences a suit on a note which he holds as such trustee, that such suit does not abate by reason of the ward arriving at majority, but it may be prosecuted to final termination by the guardian.[17] In addition, there should be filed with the account, vouchers for each item of expenditure. The statute allows items to be proved without vouchers,[18] but it is to the guardian's interest in all cases to have a proper voucher. The statute relating to insane persons, etc., does not allow credence to be given to a voucher signed by such insane ward.[19] But there is no prohibitory law against the guardian accepting the voucher of a minor, but from the fact that the minor has no contractual ability, the voucher is not entitled to the same weight that is given the voucher of an adult.[20]

§ 1488. With what guardian should be charged.

The guardian should be charged with all the property that comes into his hands and with interest on investments, as the law provides.[22] If there are any investments or claims that have become worthless, such fact should be stated in the account, and the Court should pass upon the fact whether the

[15] § 10991 G. C., § 1367.
[16] Woerner on Gr. 339, 340.
[17] Gard vs. Neff, 39 O. S. 607.
[18] § 10933 G. C., § 1367.
[19] §§ 10991, 10992 G. C., § 1516.
[20] Millen vs. Young, 18 C. C. 576; 8 C. D. 395.
§ 702, Accounting of admir.
§ 721, Voucher, etc.
[22] §§ 1385, 1388.

guardian is responsible for the fact of their being in a worthless condition. Money which a guardian had no right to receive, if received, must be accounted for as assets.[23]

The guardian should charge himself not only with the fund he has in his hands, but that which should have come into his possession with the exercise of a proper degree of diligence. With all such property as ought to be in his possession by virtue of a proper management of the estate, he is chargeable.[24] He should charge himself with all the estate set forth in his inventory in some manner.[25]

If the guardian is indebted to the estate of his ward, it is probable that the rule adopted by our Supreme Court in the case of administrators and executors would require him to be charged with such indebtedness, although he was insolvent.[26]

§ 1489. Entitled to what credits.

Whatever expenditure the guardian has made which was necessary and proper in the discharge of his duty is one for which he is entitled to credit. As a general rule, it may be said that only such expenditures as are incurred during the existence of the guardianship are such as the guardian may claim credit for. But it has been held that debts incurred before his appointment, and even when due to himself, might be included, as well as such as were properly incurred after the termination of the guardianship. But not such as occurred after the final account was filed.[27]

If the guardian advances money to meet any payment for any proper expenditure, he is entitled to charge interest on the same so advanced at the legal rate. We have previously discussed

[23] *In re* Cloud, 20 Bull. 455; Goebel, 177.

A mother having placed $5,000 in the hands of her children's guardian, "said guardian and trustee" to pay her the interest until the youngest child became of age, and then divide the fund among the children, the guardian holds the interest as trustee for the mother, but holds the children's share as guardian and must account as such. Kaufman's Estate, Goebel, 98; Foster vs. Wise, 46 O. S. 20, 27.

[24] § 1378 *et seq.*, as to powers and duties in relation to estate; Woerner on Gr. 345.

[25] See § 1484 *et seq.*, as to succeeding Gdn.

[26] § 390.

[27] Woerner on Gr. 352, 353.

what are the proper duties of a guardian and the same need not be repeated.[28]

§ 1490. Guardian's compensation. "By the court settling his account, every guardian shall be allowed the amount of all his reasonable expenses incurred in the execution of his trust; and also such compensation for his services as the court deems reasonable." [R. S. § 6288.][29]

It will be observed that the matter of compensation to a guardian for his services is by the above section left entirely to the discretion of the Probate Court. In the absence of a statutory regulation on this subject, judges have found in actual experience, considerable difficulty in determining what is just, reasonable and proper compensation. Sometimes a guardian is found who errs for the benefit of his ward in this matter; but there are some who take the very last cent that they can induce the Court to allow. It was formerly the rule in England that guardians were not entitled to compensation.[30] But the ideas of our people are not in accord with that doctrine. We believe that the laborer is worthy of his hire.[31] The statute provides that such compensation will be forfeited if the guardian fails to file his account at the times required by law, unless the Court shall otherwise so state on its journal,[32] providing the guardian has been notified. This seems to be the only forfeiture provided by statute. We have heretofore seen that [33] an administrator is entitled to his commission, although he may have been guilty of a maladministration of the estate, and the Courts would probably follow this rule in reference to a guardian's compensation, at least so far as was proper to compensate him for matters beneficial to the estate, especially where the wrong doing is the result of ignorance.[34]

[28] § 1361 *et seq.*; § 1378 *et seq.* Cited Scattergood vs. Ingram, 86 O. S. 77.

The doctrine that no relative can recover, does not apply to a guardian of an imbecile for services rendered, the court may allow such sum as is proper, etc. The allowance is not a personal claim against the ward. *Id.*

See § 1517.

[29] § 10953 G. C.

[30] Woerner on Gr. 363; Sch. Dom. Rel. 375.

[31] A guardian's duties are personal and honorary and the position is not to be assumed with a view to making a profit out of it, but still the courts should allow such reasonable compensation as the circumstances of the particular trust warrant. Gott vs. Culp, 45 Mich. 265.

[32] § 10991 G. C., § 1367.

[33] § 655.

[34] Woerner on Gr. 357.

The simple act of receiving money and giving a receipt therefor, does not entitle the guardian to compensation. And where there are two funds one can not be taxed for services rendered to the other. *In re* Klein, 5 O. L. R. 471; 52 Bull. 554.

In determining the amount which should be allowed, the Court ought to take into consideration, *first,* the size of the estate; *second,* the services required; and *third,* the conduct of the guardian as to the management of the estate. More might be allowed where the estate has been made prosperous by the diligence and business thrift of the guardian than where it was suffered to diminish or barely maintain its own; and then the manner in which the guardian looks after the personal welfare of the ward should be considered. That sum of money which will reasonably compensate the guardian for his time and trouble and business capacity should be allowed him. In New York, under a statute which authorizes the Court to make a reasonable allowance to guardians, the following rule was established: Five per cent. on all sums received and paid out, that is, two and one-half per cent. for that received and two and one-half per cent. for that paid out, on sums not exceeding one thousand dollars; two and one-half per cent. on any excess, between one thousand and five thousand, and one per cent. for all above five thousand dollars.[35]

It was held that this rule of compensation does not cover the entire field of services and duties of the guardian, nor deny him remuneration for his personal services.[36]

In Alabama this same rate is fixed by statute. In Maryland guardians of minors are allowed a commission of not to exceed ten per cent. of the annual income.[37]

Another matter that should be considered in fixing the compensation for the guardian is the length of time that he has served. Where the rate is fixed by statute full compensation is allowed only where the guardian has served the entire time of the guardianship. Of course, the guardian cannot receive compensation in two trust capacities.[38]

The statute relating to compensation for executors and administrators might serve as a guide to a certain extent. Thus,

[35] Woerner on Gr. 356; Matter of Roberts, 3 John, Ch. 42.

[36] Morgan vs. Morgan, 39 Barb. 20.

[37] Woerner on Gr. 355, where the rule of various states is given.

[38] 15 A. & E. Ency. of Law 110; Blake vs. Pegram, 101 Mass. 592; Redf. Sur. Prac. 838.

if the guardianship was of short duration, and the guardian is required to convert the assets into money, there would be no reason why he would not be entitled to as much as an executor or administrator, but it would be wrong to allow a full compensation as fixed by the statute relating to executors and administrators where there was more than one account filed, at each time of settlement. In such cases perhaps the statutory commission should be charged but once upon the entire amount of assets collected. Perhaps, following the rule adopted by New York, allowing one-half of the per cent. on assets collected and one-half on assets disbursed would be a better rule. But whatever rule is followed, the guardian is entitled, as the statute provides, to a reasonable compensation. He is also entitled for extraordinary services which he may render to the estate either as an attorney or otherwise.[39]

§ 1491. Preparation of the account, etc.

Much that was said in the chapter relating to the filing of an account by the administrator or executor is applicable to the preparation of the account.[40] The draftsman should be very careful to see that all matters contained in the inventory or charges in a previous account are in some manner accounted for. The form of an account is very much similar to that of an administrator; it must be sworn to.[41]

§ 1492. Notice, hearing, exception, etc.

The same law is applicable to guardians' accounts as is applicable to administrators' and executors' accounts in reference to notice, time of hearing, exception, compelling filing, etc., and need not again be discussed.[42]

In reference to the hearing of such accounts, Woerner says:

[39] Where the estate in the hands of the guardian is small the Court can allow the guardian the interest upon the fund by way of compensation. Mattox vs. Patterson, 60 Iowa 434.

[40] § 725.

[41] § 10991 G. C., § 1367.

For further matters relating to preparation of accounts, etc., see § 702 *et seq.*, Accounting by administrator.

[42] §§ 725, 740.

The Probate Court may refer the amount to a referee, but only by consent of parties. *In re* Gorman, 2 N. P. (N.S.) 667; 15 Dec. 204.

The decision was made without reference to § 10833 G. C., and seems to the author to be somewhat doubtful. See § 738.

"While Courts cannot be too strict and vigilant in the investigation of accounts in cases where presumption of bad faith or dishonesty rebut the *prima facie* evidence, by reason of extravagant charges, purchase of articles not needed, concealment of funds or anything of the kind, yet guardians should not, in the settlement of their accounts, be held to the strictest rules of evidence. It cannot be expected that they can always have witnesses to their various transactions; and were they obliged to prove the signature to every receipt for debts paid, supplies purchased, etc., the expense of summoning witnesses, taking depositions, etc., would involve heavy and oftentimes unnecessary expenses." [43]

Of course, the guardian must show, as the statute requires, a voucher, or by proper proof, that every expenditure set forth in his account has been made. It will also devolve upon the guardian to show that he has made proper investments of funds in his hands, and has in a proper manner discharged the duties devolving upon him. While the burden of proof as to the correctness of credits claimed by the guardian in the settlement of his account is on the guardian, in the absence of the showing of bad faith, the presumption will be in favor of the guardian that he has discharged his duties in a proper manner. The statute differs from that relating to administrators in reference to vouchers. The items of an administrator, where the amount exceeds ten dollars, must be evidenced by a voucher, or there must be a specific affidavit as to such items.[44]

All items in a guardian's account may be established by proof.

§ 1493. Effect of his settlement with Court. Review of such settlement. "The settlement in the probate court of the accounts of a guardian is final between him and his ward unless an appeal be taken therefrom to the common pleas court in the manner provided by law. But a subsequent guardian during the minority of his ward, or a ward, within two years after he arrives at full age, may open and review such settlement for

[43] Woerner on Gr. 343. [44] § 723.

fraud or manifest mistake by civil action in the common pleas court of the county in which it was made, or the county where the former guardian resides when the petition is filed, as the plaintiff elects." [R. S. § 6289][45]

§ 1494. When account may be opened up.*

The effect of the above section is to make each account, whether intermediate or final, a final account between the guardian and his ward as to every fact contained in the account, unless an appeal be taken as provided by law. There is only one reservation to this rule, that is, that the ward, within two years after arriving at the age of majority, shall have the right of opening the account for *fraud* or *manifest mistake*, by civil action in the Court of Common Pleas. As to all matters contained in the account, the settlement by the Court becomes an adjudication,[46] and as such cannot be attacked in a collateral proceeding. In an action upon a guardian's bond for the recovery of the amount found due the ward upon the final settlement of the guardian's accounts in the Probate Court, the sureties are concluded by the settlement, and will not be heard in the absence of fraud and collusion to question its correctness or to demand a rehearing of the accounts.[47] And where it is claimed that the payment made by the guardian with which he credited himself in his account, as approved by the Probate Court, was in fact wrongfully made, the ward or a subsequently appointed guardian cannot bring an action against the party who received payment for such a claim.[48] A settlement by the Court, however, does not include matters which are not therein contained, or which may not by proper inference be presumed to have come within the matter set forth in the account.[49]

[45] § 10954 G. C.

This statute applies to guardians for idiots, imbeciles and drunkards. see § 10981 G. C.

[46] Woodmansie vs Woodmansie, 32 O. S. 18.

[47] Wegner vs. Wiltsie, 23 C. C. 302; Braiden vs. Mercer, 44 O. S. 339.

[48] Lynch vs. Cogswell, 18 C. C. 641; 7 C. D. 12; Walsh vs. Miller, 51 O. S. 462.

[49] State vs. Parish, 1 Ind. App. 441; Davis vs. State, 68 Ind. 104; Parsons vs. Milford, 67 Ind. 489; Briscoe vs. Johnson, 73 Ind. 573; Naugle vs. State, 101 Ind. 284; Wainwright vs. Smith, 106 Ind. 239.

* Cited, *In re* Connell, 56 Bull. 145; 12 N. P. (N.S.) 311.

Where the guardian keeps such loose and tangled accounts that it is necessary to have them examined and straightened out, the costs attaching such examination shall not be taxed against the ward. *In re* Gorman, 2 N. P. (N.S.) 667; 15 Dec. 204.

Action to open up an account must be brought within the two years' limit provided by statute, and not within four years after the discovery of the fraud, under § 11224 G. C.; Everett vs. Howard, 78 O. S. 109.

Where the finding is made by the Probate Court, upon a fraudulent statement of fact, and the law courts give no relief, a Court of Equity will. Gantz vs. Grease, 82 O. S. 41.

A guardian's final account is unimpeachable after two years. Lambkin vs. Robinson, 10 N. P. (N.S.) 1; 21 Dec. 40; Woodward vs. Curtis, 19 C. C. 15; 10 C. D. 400.

It is a general practice, and one which no doubt the Courts will uphold, that where, in an intermediate account there is a palpable error in calculation or in omission to make a proper charge either for or against the guardian, to permit such error to be corrected in a subsequent or final account. Having given proper notice, the Court may pass upon the account regardless of the fact whether the ward has had actual notice or not.[50]

§ 1495. Appeal and error.

The general statute relating to appeal specifically provides that there may be an appeal from the decision of the Probate Court upon an account of the guardian.[51] From the peculiar wording of sec. 10959, G. C.,[51*] which makes the account final unless appeal is taken therefrom as provided by law, the question whether a proceeding in error could be prosecuted from the decision of the Probate Court upon an accounting is an exceedingly serious one. The probability is that such jurisdiction would not be entertained and the party would be required to follow the remedy of appeal particularly provided by statute.

§ 1496. Settlement with succeeding guardian.

When a guardian files his account before his ward arrives at the age of majority, it is his duty to pay to his successor in the trust the amount which the Court may find that is owing by him to his ward's estate; and on failure so to do, his successor may sue him individually therefor or may enter suit on his bond and recover the same. If there was found anything due the guardian, it would be the duty of his successor to pay such amount whenever he had funds in his hands applicable for that purpose. As to the succeeding guardian's liability for investments and assets delivered into his hands by the former guardian, some difficulties have been encountered. Thus it is said that a distinction exists between loans made by the guardian of funds in

[50] Scobey vs. Gano, 35 O. S. 550. See § 743, How account of admin. may be opened up.

[51] § 11206 G. C., § 39.

[51*] § 1493.

Where a case is appealed from the decision of the Probate Court refusing to allow fees of a referee, the Common Pleas may proceed and tax the costs in the manner it deems just and reasonable. *In re* Gorman, 2 N. P. (N.S.) 667; 15 Dec. 104.

A subsequently appointed guardian or the ward himself may have an accounting within two years after account is filed, and if the guardian moves from the jurisdiction of the court, suit may be brought on the bond. Engelcke vs. Engelcke, 3 N. P. (N.S.) 88; 15 Dec. 529.

his hands, and simply retaining investments previously made by a former custodian, or by the owner of them; the rule of liability being much more stringent in the former than in the latter case.[52]

The succeeding guardian is not bound to take the securities tendered him if they are improper investments, but may insist on having them converted into cash, or, at any rate, he need only take the securities at their actual value, and then should collect the balance from the outgoing trustee. If he takes the securities at their inventory value, he will be responsible for them at that price.[53] Especially would he be responsible, if he retained such security for a considerable time uncontroverted. He could not then charge his predecessor with any loss.[54]

[52] Woerner on Gr. 209.

Thus where a guardian received from a former guardian three judgment bonds, constituting liens upon the property of the obligor (upon which there were prior liens), in lieu of the money secured by said bonds and belonging to his ward, he was held not liable for loss, although the obligor became insolvent before the maturity of the third bond, and the security turned out to be inadequate by reason of the prior liens; the Court considering that the investment had been made by the guardian's predecessor, with special reference to the interest of the ward, being made payable when she became of age, and was such as careful and prudent men would have deemed safe at the time the bonds were assigned to him. Jack's Appeal, 94 Pa. St. 367.

[53] Loring Trustee's handbook 83, citing *In re* Salmon, 42 Ch. Div. 351; Thayer vs. Kinsey, 162 Mass. 232.

[54] Thayer vs. Kinsey, 162 Mass. 232.

A guardian who knows that his predecessor used the ward's money for his own purpose, but suffered his accounts to be passed without charging this sum to him, Burke vs. Turner, 85 N. Car. 500; or who accepts from the administrator (Bescher vs. State, 63 Ind. 302); or from his predecessor (State vs. Greensdale, 106 Ind. 364; 55 Am. Rep. 753) a note, instead of money is liable.

But the guardian is not liable for a note taken by the executor which came into the guardian's hands as part of the estate, except upon a finding of negligence. Sanders vs. State, 49 Ind. 228.

Where the guardian negligently failed to collect a note, but delivered it to his successor, it is no defense that the successor obtained a judgment and collected a part. Ames vs. Williams, 74 Miss. 404.

Compare Mattax vs. Patterson, 60 Iowa 434; State vs. Bolte, 4 Mo. App. 599; 72 Mo. 272.

Where the guardian received from his predecessor a note, which might have been collected by immediate action, but was soon lost by the debtor's insolvency, he was held not liable, the Court saying: "He is not bound instantly to sue in all di-

As a general rule, it may be said that it is the duty of the succeeding guardian to examine the account of his predecessor, and to accept no securities from him at their face value without being satisfied that they are good and that he is willing to assume the responsibility of their collection; and whatever he agrees to accept in discharge of the former guardian's liability, he will be held accountable. Thus, where by agreement between a succeeding and a former guardian, the succeeding guardian agreed to accept a stock of goods in discharge of the former guardian's indebtedness to the ward, it was held that he made himself chargeable with the amount of such indebtedness.[55]

Where a succeeding guardian settled with his predecessor as if the amount he received was in cash, although he had accepted several mortgages in lieu of money, if such mortgages were not properly secured or invested in such trust funds as required by law, the responsibility of the guardian was held to be the same as if he invested the fund of his ward himself.[56]

§ 1497. Settlement with ward.

We have heretofore seen that all contracts made by and between a guardian and his ward during the guardianship, and its termination within a short time thereafter, are always subject to the strictest scrutiny of Courts.[57] In order to make a settlement binding between a guardian and the ward, the guardian must show that the ward had full knowledge of all his affairs, and that no undue advantage was taken in such settlement. For the protection of the ward, a presumption of law has arisen in reference to all transactions between a guardian and his ward, that if such transaction results prejudicially to the ward's interest it is construed to be fraudulent.[58]

rections." Stem's Appeal, 5 Whart. (Pa.) 472; 34 Am. Dec. 569; 15 A. & E. Ency. of Law, 2 ed. 92.

[55] Martin vs. Davis, 80 Wis. 376.

[56] Matter of Hathoway, 80 Hun, 186, 188.

See § 708, Successive administrations.

See State vs. Beatty, 33 Bull. 109, for action against former guardian for failure to collect money.

[57] § 1399.

[58] Woerner on Gr. 360, 361.

The relation of guardian and ward after settlement is that of debtor and creditor Lamkin vs. Robinson, 10 N. P. (N.S.) 1; 21 Dec. 40.

Six years bars a claim for a balance shown on a guardian's final account. *Id.*

The ordinary conclusive presumption that all men know the law does not apply in such cases, and the ignorance of the legal effect of the transaction is a complete answer to the objection of undue delay in the assertion of his rights by the ward; and if a guardian makes a final settlement with his ward, and is discharged without having in fact paid over the balance due his ward, neither the guardian himself nor the sureties upon the bond are released from liability.[59]

If a settlement is honest, it discharges both the guardian and his sureties; but if it is tainted with fraud, or is afterwards set aside, it is wholly void.[60]

Where such a settlement is fairly made, it can be enforced, and if the guardian induces his ward to sign a receipt for the money, and then does not pay it to her, she may sue him for the amount without in any way opening or reviewing the account which was settled in the Probate Court.[61]

While a guardian may make a settlement out of Court, and before his final account has been approved by the Court, yet he always does so with some liability to himself. The better way is for the guardian to file his account, let it be passed upon by the Court, and then pay whatever is found due to the ward, and take the ward's receipt in full, having the ward's signature made in the presence of witnesses or in open Court, and have such receipt recorded with the final account.[62]

[59] Naugle vs. State, 101 Ind. 284.

[60] Bohart vs. Atkinson, 14 O. 228; Douglass vs. Ferris, 138 N. Y. 192; 34 A. S. Rep. 435.

[61] Lindsay vs. Lindsay, 28 O. S. 157.

See Berkmeyer vs. Kellerman, 32 O. S. 239, where a conveyance by a minor on the day he became of age to his guardian was set aside.

[62] The following came within the author's personal experience. The ward having died and there being an administrator appointed, the guardian at the time he filed his final account in the Probate Court made a settlement with the administrator and took his receipt in full before the account was passed upon by the Court. The widow of the ward claimed that she was a party in interest and appeared in Court and filed exceptions, the Court sustaining her right to do so. While the exceptions were not sustained and the account was finally approved by the Court, yet the guardian was required to defend his account when all funds in his possession had been paid out.

See further as to contracts between guardian and ward, § 1399.

§ 1498. How finding of Probate Court enforced.

The Probate Court has no power to compel obedience to its judgment or decree, or to enforce the payment of the balance found by execution;[63] there is no statute specially applicable thereto. If such amount is not paid, the succeeding guardian or ward must commence an action in the Court of Common Pleas to recover whatever may be due.[64]

§ 1499. Settlement by executors, administrators, etc., of guardians. How enforced. "When a guardian dies or by reason of insanity or other incompetency, is placed under guardianship before the settlement in court of his or her guardianship account, the executor, administrator or guardian of such deceased or incompetent guardian, must settle such account in the manner the guardian should have done. Any person having an interest in the settlement of the account, or the court by which such guardian was appointed, of its own motion, by citation to be issued, returned and proceeded upon according to the provisions of law then in force for the settlement of decedent's estates, may compel such settlement to be made by such administrator, executor or guardian. The executor, administrator or guardian making the settlement shall be allowed such compensation therefor as the court with which it is made deems reasonable." [R. S. § 6291.][65]

[63] A failure to pay is not a contempt of Court. *Ex parte* French, 4 Gaz. 209; *In re* Rowekamp, 27 B. 289.

[64] The language of § 10848 G. C. (§ 761), seems to permit an action to be brought in the Probate Court, on the settlement of a guardian, the same as an administrator's, etc — but in other sections, to-wit. §§ 10850 G. C. (§ 770); §10856 G. C. (§ 783), the codifiers do not include guardians, although they are in the original act. 58 V. 202, etc.

The accounts of a guardian mean his dealings on account of his ward while the relation of guardian and ward exists, and over these the Probate Court has sole jurisdiction. Subsequent dealings after the ward has become of age have nothing to do with the guardian's account. At that time the relation of guardian and ward has ceased, and that of debtor and creditor has begun; Crowell's Appeal, 2 Watts, 295; and both parties have passed beyond the control of the Probate Court, except as to matters which occurred while their former relations subsisted. Meier vs. Herancourt, 8 Bull. 29; Woerner on Gr. 110.

[65] § 10957 G. C.

See § 707.

§ 1500. Comments.

Under the statute relating to administrators, it is made the duty of the administrator of a deceased administrator to file the account within six months.[66]

The above section gives no such length of time, and it is the duty of the administrator of a deceased guardian to forthwith file such account.[67]

The settlement by the administrator of a deceased guardian is the same in effect as if made by the guardian himself.[68]

The administrator has no power to manage the property of the estate, but only to transmit it to the succeeding guardian. He cannot maintain an action on the bond of a third person to recover a sum alleged to be due.[69] He has no authority to invest the funds, nor to discharge the guardian's general indebtedness by setting aside a portion of the guardian's estate for that purpose.[70]

The executor of a deceased guardian has no right, it has been held, to draw from the bank, nor the bank to pay out to him, money deposited by the deceased as guardian.[71]

66 § 10822 G. C., § 707.

67 See § 1355; *In re* Est. Bruckman, 1 N. P. (N.S.) 7.

68 Braiden vs. Mercer, 44 O. S. 339, 345; Scobey vs. Cano, 35 O. S. 550.

69 Davis vs. Fox, 69 N. C. 435.

70 Moorehead vs. Orr, 1 S. C. 304; Clark vs. Tompkins, 1 S. C. 119.

71 Gary vs. Bank, 26 S. C. 538.

CHAPTER LXXXII.

GUARDIANS OF LUNATIC, IMBECILE AND IDIOT.

§ 1501 Guardian of idiot, imbecile and lunatic. Who is an imbecile.
§ 1501a Guardian for persons confined in State institutions.
§ 1502 Court having jurisdiction.
§ 1503 For whom appointment made.
§ 1503a Guardians for incompetents and persons confined in institutions.
§ 1504 Application for appointment.
§ 1505 Form of application.
§ 1506 Notice, entry, etc.
§ 1507 Form of notice and service.
§ 1508 Hearing, etc.
§ 1509 When order should be made.
§ 1510 Entry. Finding person incapacitated.
§ 1510a Costs.
§ 1511 Effect of finding of disability.
§ 1512 Who may or should be appointed.
§ 1513 When guardianship to terminate.
§ 1514 Procedure for removal, etc.
§ 1515 Appeal and error.
§ 1516 Laws applicable to guardians of lunatics, idiots, imbeciles and their children.
§ 1516a Settlement of such guardian.
§ 1517 Exception as to voucher and opening account.
§ 1518 Duties of guardian as to welfare of ward.
§ 1519 Duty of guardian as to existing contracts.
§ 1520 Insolvency of lunatics.
§ 1521 Suit by guardian of idiot, imbecile or lunatic, and revivor of same.
§ 1522 Sale of real estate by guardian of idiot, imbecile or lunatic. Petition. Private sale. Parties defendant.
§ 1522a Petition; what to contain.
§ 1522b Husband or wife to be made defendant.
§ 1523 Dower of insane, idiotic or imbecile person; how assigned or sold.
§ 1524 Procedure in assignment of dower.
§ 1524a Application to sell and release dower, etc.
§ 1524b Entry authorizing and ordering release of dower right, etc.
§ 1524c Guardian's deed.
§ 1525 Guardian empowered to lease and improve estate. Termination of lease. Lien of tenant.
§ 1526 Long lease by guardian may be authorized by court. Lease for three years without order of court.
§ 1527 Application for authority to make long lease.
§ 1528 Proceedings on such application.
§ 1529 Final hearing and orders.
§ 1530 Guardian may improve real estate of imbecile, etc.
§ 1531 Proceedings.
§ 1532 May unite with owners of adjacent property.
§ 1533 Guardian's report, etc.

§ 1501 Guardian for idiot, imbecile and lunatic. Who is an imbecile. "The word 'imbecile,' as used in this chapter means a person who, not born idiotic, has become so." [R. S. § 6302.][1]

Upon satisfactory proof that a person resident of the county, or having legal settlement in any township thereof, is an idiot

[1] § 10988 G. C.

or imbecile, or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, the probate court shall appoint a guardian for such person, who by virtue of such appointment shall be the guardian of the minor children of his ward, unless the court appoints some other person as their guardian. No such guardian shall be appointed until at least three days after the personal service of a written notice setting forth the time and place of the hearing shall have been served upon the person for whom such appointment is sought; and also until at least three days after written notice has been served upon the persons next of kin of such person for whom appointment is sought, resident in the county in which application is made, to attend such hearing at the same time and place; which notice shall be served by delivering a copy of it to each person named therein or by leaving such copy at his or her usual place of residence. [R. S. § 6302; 108 v. 387.][1*]

§ 1501a. Guardian for person confined in state institution. Upon satisfactory proof that a person resident of the county, or having a legal residence therein, is confined in any state, benevolent or penal institution under the order of any court, the probate court may on its own motion, or upon application, appoint a guardian for such person. No guardian shall be so appointed until at least three days' written notice to the person so confined and the persons next of kin resident in the county of such person is given to attend at the same time and place, which shall be served by delivering a copy of it to each person named therein, or by leaving a copy at his usual place of residence. [103 v. 471.][1†]

Laws applicable. Laws relating to guardians for minors, idiots, imbeciles and lunatics or an incompetent by reason of advanced age or mental or physical disability or infirmity, and pointing out the duties, rights and liabilities of such guardians and their sureties, shall be applicable to guardians appointed under the provisions of section 10989-1 of the General Code. [103 v. 471; 109 v. 73.][1‡]

§ 1502. Court having jurisdiction.

The appointment must be made by the Probate Court of the county in which the alleged idiot, imbecile or lunatic resides, or in which he has a legal settlement in some township of such

1* § 10989 G. C.
The clause providing for notice was not in the statute prior to Mch. 1, 1889.

See § 1317, Kinds of Gdns.

1† § 10989-1 G. C.

1‡ § 10989-2 G. C.

county. This jurisdiction is exclusive, and no other court, either Probate or Common Pleas, has a right to make such appointment. What will constitute a resident of the county has been discussed in several previous chapters of this work.[2]

Where a guardian is appointed for a lunatic or an imbecile, the residence of such person would be that in which he lived at the time the imbecility or lunacy fastened itself upon him. An idiot himself can not change his place of residence, and in this respect is very much similar to a minor—that is, when he changes his residence, it must be by virtue of the direction of some one having legal control over him. The Probate Court can not appoint a guardian unless the person has resided continuously, for a period of at least twelve consecutive months, or has come into such county with his father, or some one having legal control over him, with the intention of making it his permanent place of abode.[3]

The second requirement of the statute is that the alleged imbecile, idiot or lunatic must have a legal settlement in the township of the county if he is not a resident of the county. "Legal settlement" has been defined to mean the continuous residence within the county for twelve months.[4]

Woerner says:[5] "The subject of the settlement of paupers has given rise to considerable litigation, and two principles of law are said to be well established which throw light on the question of jurisdiction over persons of unsound mind: first, that an idiot (or person of unsound mind) can acquire no residence or settlement in any place by virtue of his own acts; and next, that a person having acquired a legal settlement in one place, that settlement continues until he acquires a legal settlement in another place in the State."

§ 1534, Gdns. of drunkards.

2 §§ 116, 1322.

3 *In re* Canady, 4 N. P. 403; 7 Dec. 285.

In Payne vs. Town, 29 Ill. 125, it is said: "The term residence mentioned in this chapter, shall be taken and considered the actual residence of the party or the place where he or she was employed, or in case he or she was in no employment, then it shall be considered and held to be where he or she made it his or her home. In most instances there can be no difficulty in applying these provisions of the law, in the light of which the statute must be read, in order to give it its legitimate office. One of these is, that an idiot can acquire no residence or settlement in any place, by virtue of his or her own acts, for an idiot is incapable of exercising a will or doing any act binding on himself or

§ 1503. For whom appointment made.

The person for whom a guardian can be appointed under the provisions of sec. 10989, G. C.,[6] must be either an idiot, imbecile or a lunatic.[6a] These various designations are intended to include persons who by want of understanding are unable to properly take care of themselves or their estate. An idiot is defined to be one who has had no understanding from his nativity.[7]

When a man can not count or number twenty, nor tell his father's nor mother's name, or his age, having been frequently told, it is fair presumption that he is devoid of understanding.[8]

others. His residence or settlement must be derived from his father, or those having the paramount right to control him.

[4] The object of the law in requiring the appointment to be made in the county in which the person for whom the appointment is sought, resides, or has a legal settlement, is that it be made where it is most likely that persons having an interest in such appointment or the welfare of such unfortunate person will have notice of such proceedings, and may take such steps as will prevent an injustice being done. It is to prevent the spiriting away of such weak-minded person from his relatives or friends, to strangers, and there make an application, which by reason of no one to defend, might result in a great wrong. This court is, or at least should be, the special protector of such persons. *In re* Canady, 4 N. P. 404; 7 Dec. 285.

[5] Woerner on Gr. 398.

[6] § 1501 R. S.

[6a] See next section.

[7] Bouv. Dic.

In Owing's Case, 1 Bland (Md.) 370, it was said: "Idiocy is that condition in which the human creature has never had, from birth, any the least glimmering of reason, and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished. It is not the condition of a deranged mind, but that of a total absence of all mind. Hence this state of faculty can rarely or ever be mistaken by any—the most superficial, observer. The medical profession seems to regard it as a natural defect, not as a disease in itself, or as the result of any disorder. In law it is also considered as a defect, and as a permanent and hopeless incapacity."

The difference between an idiot and a madman is, that "madmen put wrong ideas together, and so make wrong proposition, but argue and reason right from them; but idiots make very few or no propositions, and reason scarcely at all." Com. vs. Haskell, 2 Brews. (Pa.) 491; 15 A. & E. Ency. of Law 924.

[8] Bouv. Law Dic., Title, idiot.

A person who has attended school for a number of years and is not able to tell how much ten times twelve is, or six times fifteen or six per cent. of $100, or ten per cent. of $100, or how he would invest $400 other than he would put it in the bank, although in some small dealings he is close and careful, and is generally regarded as stingy, is not capable of taking care of his own property. Frantz vs. Frantz, 6 Dec. 555; 4 N. P. 278.

Our statute defines an imbecile to mean a person who is not born idiotic, but has become so. It therefore follows that idiocy and imbecility, within the statute applying to guardianship for such persons, mean the same thing,[9] only the one has been such from birth and the other was acquired afterwards. An imbecile is defined as one destitute of strength, either of body or mind; one who is weak, feeble, impotent or decrepit.[10]

A lunatic is one who is insane, and insanity is defined to be the prolonged departure without any adequate cause from the states of feeling, modes of thinking, usual to the individual in health.[11] Another definition is that a lunatic is one who hath had understanding, but by disease, grief or other accident has lost the use of his reasoning.[12]

It will be observed that under this definition of a lunatic might also be included an imbecile—the difference being that lunacy results from an acute derangement of the understanding, while imbecility generally follows from a decay of understanding, resulting from old age, disease, etc. But the main question before the court in this kind of proceeding is not whether the person is an idiot or an imbecile or a lunatic in the general sense of the term, but whether he is possessed of such understanding as will enable him to make that use of himself or his property as he would do were he possessed of his right faculties. It was held in one case by our Supreme Court that where a person was appointed and qualified as guardian of an infant, who was also of unsound mind, but the record was silent as to the ground of the appointment, and the guardian continued to act as such for seven years after the infant was of age, it would be presumed that the appointment

[9] It evidently did not mean that a person cannot be adjudged an imbecile unless he is a complete idiot—that is, a person without mind and capacity. It simply means that a person must have become infirm to the extent that he can not manage his business and affairs with sufficient capacity to preserve his property. *In re* Emswiler, Ohio Leg. New. Vol. 8; 8 N. P. 132.

[10] In Messenger vs. Bliss, 35 O. S. 587, it was said that "infirmity of mind, termed imbecility, as distinguished from idiocy or lunacy, is usually incident to extreme age, and is generally the result of a gradual decay of the mental faculties."

[11] Bouv. Law Dic.

See *In re* Shelleg, 11 Dec. 81.

[12] 1 Black. Com. 304.

The word "insanity" will include imbecility. Ross vs. Todd, 4 C. C. 1; 2 C. D. 385.

covered both grounds.[13] This question will again be referred to in a subsequent section.[14]

§ 1503a. Guardians for incompetents and persons confined in state institutions.

Since the former edition of this work the legislature has added three classes of persons for whom a guardian may be appointed, to-wit:

1. An incompetent by reason of advanced age or mental or physical disability or infirmity. § 10989 G. C. (§ 1501).

2. A person confined in any state benevolent or penal institution under the order of any court. § 10989 G. C. (§ 1501a).

3. A person who is incapable of taking proper care of himself or herself, or his or her property, or neglects or fails to provide for his family, or for other persons whom he is chargeable by law to provide for by reason of improvidence. § 11011 G. C. (§ 1537).

In the first two the procedure is the same as in the appointment for a lunatic; in the latter the same as for a drunkard.

The recent amendment affecting the appointment of a guardian for a lunatic, etc., now provides that no appointment can be made until at least three days after the personal service of a written notice setting forth the time and place of hearing shall have been served upon the person for whom the appointment is sought. It was the practice of many courts before this provision became the law, to require this to be done; but it was not mandatory, and further this must be a personal service; it can not be made by leaving a copy at his usual place of abode. The facts that the order can not be made until after three days from date of service, and that the service must be a personal one, are jurisdictional facts, and an order made where the statute has not been complied with, would be null and void. In addition to this the notice must be given to the next of kin as formerly provided. The only difference in procedure for appointment of a guardian for a lunatic, etc., and a drunkard, etc., is in the length of time of notice to be given, and in the fact, where the application is for a drunkard, etc., only the person for whom the guardianship is sought, needs to be notified.

[13] King vs. Bell, 36 O. S. 460.

[14] See § 1509.

* This is not essential, but may be desirable.

What will constitute an incompetent, remains yet to be judicially determined, but it is now do doubt intended to apply to persons who may be neither idiots, lunatics, nor imbeciles, but yet not strong enough mentally or physically, or both combined, to properly take care of themselves, or their property. The same rule should be given as to want of capacity in all cases. The difference between guardianship under the statute relating to lunatics and that relating to drunkards, is, that under the latter the cause for the existing facts which justify a guardian, lies largely within the will of the party himself; under the former this is not the case.

The question will sometimes arise, upon what ground the application shall be based, as these various causes which will justify a guardian, run into each other. The person about to make the application should carefully consider which of the following the evidence will show: 1, idiocy; 2, lunacy; 3, imbecility; 4, incompetency by reason of advanced age or physical disability or infirmity; 5, confinement in any state benevolent or penal institution; 6, incapable of *I,* taking proper care of himself or herself; *II,* of his or her property; *III,* or neglecting or failing to provide for his own family; or *IV,* other persons whom he is charged by law to provide for, by reason of *a,* intemperance; *b,* improvidence; *c,* or habitual drunkenness.

Several of these causes I apprehend, might be joined in one application if the person was in doubt, only if the application be on the first five grounds, notice must be served on the next of kin and may be heard in three days. If on the sixth ground, five days' notice must be given. In all cases there must be a personal service on the person for whom the guardianship is sought.

§ 1504. Application for appointment.

Whenever it is sought to have the court make an appointment for a person under a disability, some interested party should appear in the Probate Court and file an application. This application should set forth, *first,* facts showing that the person making the application has some interest in the alleged idiot, imbecile or lunatic *; *second,* that the alleged imbecile, idiot or lunatic is a resident of the county in which the application is made, or has a legal settlement in some township thereof; *third,* it should state the age of such idiot, etc.; *fourth,* it should contain an allegation that the said person is either an idiot, lunatic

or imbecile; *fifth*, that such person is incapable of taking care of or preserving his property; *sixth*, it should state the amount, character and nature of the alleged idiot's, etc., property; *seventh*, it should state the name, and, if a minor, the age, and the place of residence of all of his next of kin; *eighth*, it should contain a prayer for such appointment and be verified. The court should require an application of this kind to be filed even though it had previously passed upon the party's insanity and committed such person to the asylum. In proceedings to commit a person to a hospital for the insane, the statute does not require notice to be given to the next of kin or any person. But in proceedings to have a guardian appointed, such next of kin is entitled to notice, and it would now be held, although the Supreme Court held otherwise,[15] under the statute as it then existed, that an appointment made without such notice would be void.[16]

§ 1505. Form of application.

(*Title.*)

Now comes A. B., a resident of....., and represents to the Court that one C. D., age.....years, is a resident of this county and has a legal settlement in the township of.....in said county. That the said C. D. is an idot (lunatic or imbecile) (if a lunatic has been committed to an asylum, state such fact) and by reason of such idiocy (imbecility or lunacy) he is incapable of taking care of (himself) or preserving his property.

Said A. B. further represents that the following is the whole estate of said C. D., to-wit: personal property consisting of (here mention) of the value of.....dollars; and real estate (here describe) of the probable value of.....dollars. That the following named persons are the only next of kin of the said C. D. resident of this county.....

.....

Wherefore he asks and prays that a guardian of the person and estate of said C. D. be appointed and that the Court may fix a time for the hearing of this application and that notice thereof may be given to the said C. D. and his next of kin, resident in this county.

.....

State of Ohio,.....County, ss.

A. B., being first duly sworn, says that the statements contained in the above are true as he verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of ....., 190..[17]

§ 1506. Notice, entry, etc.

Prior to 1889, the statute did not require notice to be given to any one, but now requires not only notice but personal notice in writing. Whether or not the alleged imbecile must

[15] Heckman vs. Adams, 50 O. S. 305.

[16] See § 1536, Gdns. of drunkards.

[17] See § 1536.

be notified, when the statute does not so direct, is somewhat of a mooted question. In an early case, in the Court of Common Pleas, decided by a judge who was afterwards a member of the Supreme Court, it was held " that not to give notice is probably not in accordance with approved practice anywhere, and no such power could be safely lodged with any Court." [18]

It was said afterwards, by a learned and distinguished jurist, that although the statute made no provision for it, notice ought to be given.[19] This same Court, however, held where the statute did not require notice to be given, that such notice was not jurisdictional, and a failure to give notice is an irregularity which can be complained of only in a direct proceeding to set aside the order of appointment.[20]

" It may, however," says Woerner, " be laid down as a fundamental principle of justice, essential to the rights of every man, that even in the absence of express statutory requirement, he shall have notice of any judicial proceeding, for the purpose of divesting him of his property, or of its control, that he may appear and defend his right; and that an inquisition which, if the Court has jurisdiction, is conclusive, is void and of no effect, if notice had not been given." [21]

Unquestionably a judgment would be void in a direct or collateral proceeding, were not the statute followed in giving notice to the next of kin in the county. When the application is filed an entry should be made, which may be in the following form:

(*Title.*)

This day came A. B. and filed his application for the appointment of a guardian of C. D., alleging that said C. D. is an idiot (lunatic or imbecile) and by reason thereof is incapable of taking care of and preserving his property.

It is therefore ordered that said cause be set for hearing on the..... day of ....., at ..... o'clock, at the Probate Court room of ..... county, Ohio; and it is further ordered that at least three days' written notice personally served on said ..... of the time and place of hearing be given to the said C. D. and all his next of kin, residents of this county, of the time and hearing of said application and that said notice be served by delivering to each person therein named a copy thereof, or by leaving a copy at their usual place of residence.[22]

[18] Cox vs. Cox, 1 W. L. M. 96.

[19] Judge Taft in Jordan vs. Dickson, 20 Bull. 360.

[20] Id.

[21] Woerner on Gr. 393, citing a number of authorities.

[22] If the notice is to be served by any one other than the sheriff, the

§ 1507. Form of notice and service.

State of Ohio,.....County, ss.
To..... of said County, Greeting.

You are hereby commanded to notify (here insert the names of the next of kin and the alleged imbecile) giving at least three days' notice, that on the.....day of....., 190.., filed in the Probate Court of .....and State of Ohio, an application for a guardian of C. D., an alleged imbecile (idiot or lunatic) and that he is thereby incapable of taking care of and preserving his property. That said application has been set for hearing on the.....day of....., at..... o'clock. At which time and place they are required to answer, touching said application.

The statute directs the manner of service, and it should be strictly complied with.* Return of service should be made by affidavit, if the notice has been served by a private individual, or otherwise by an official endorsement.[23]

§ 1508. Hearing, etc.

Whatever the law may be elsewhere, it is settled in Ohio that the defendant is not entitled to a trial by jury.[24] The Court in one case says: "Under existing legislation, the Probate Courts of this State have power to appoint guardians for deaf and dumb persons of full age, whom they find to be incapable of managing their affairs, without submitting the question of incapacity to a jury of any kind." [25]

It was further held that proceedings for the appointment of guardians are not *inter partes* or adversary in their character. They are properly proceedings *in rem*.[26]

The question, then, whether or not a guardian should be appointed is submitted to the Court upon evidence, the burden being upon the persons making the application to establish by satisfactory proof that a guardian should be appointed. The

entry should designate who should make the service.

See § 1536.

See Heckman vs. Adams, 50 O. S. 305, where it is held that where the Probate Court acquires jurisdiction in an inquest for lunacy to send to an asylum, jurisdiction is maintained until such person is discharged — and no additional finding is required for appointment of a guardian.

[23] See Woerner on Gr. 394, 395. In the case of Jordan vs. Dickson, 20 Bull. 361, it was held that if the alleged imbecile was present in court, that such action would dispense with notice given to him.

See § 1536.

[24] Hagany vs. Cohnen, 29 O. S. 82.

[25] Shroyer vs. Richmond, 16 O. S. 455.

[26] Id. 456.

* 1501.

Sometimes the laws governing particular state institutions require some of the officers of that institution to serve all papers on inmates, etc. See § 2001 G. C., Lima state hospital.

jurisdictional facts of residence and notice must be fully established. The evidence introduced in such proceeding is not different from that in proceedings generally of this character. Opinions of witnesses derived from observation are admissible in evidence from the nature of the subject when no better evidence can be obtained.[27] But such witnesses must state the facts upon which they base their opinion. The acts and conduct of a party, from his boyhood up, are admissible to illustrate his state of mind, even at the time of the trial. One thing that the Court should always look at, and that is the motive of the person or persons who are seeking the appointment of the guardian. It is said the "Court will guard with peculiar care the alleged lunatic from interference springing from a hostile motive, and will weigh with more precision the evidence, if the person by whom it is tendered appears to be actuated by a sinister intent." [28]

As a general rule, it would be well to have the party himself present in Court, for there is something about the actions and ways of a person not possessing his ordinary faculties that are best determined from observation, and the experience of the Probate Judge derived from inquests of lunacy will give him peculiar ability to determine the question at issue from the observation of the person himself.[29]

§ 1509. When order should be made.

One of the most delicate of the many duties pertaining to the office of Probate Judge is that of making a finding upon an application of guardianship for an alleged idiot, imbecile or lunatic. When the person's incapacity is clearly shown, no difficulty is encountered, but there are many cases, especially of imbecility, where the line of demarkation between sufficient and insufficient understanding or capability is exceedingly fine. Persons who have once had charge of their own affairs are loath to ever believe that they have lost their ability to properly man-

[27] Hardy vs. Merrill, 56 N. H. 227.

[28] Woerner on Gr. 409, citing Francke vs. His Wife, 29 La. An. 302, 303.

[29] Cline vs. Lindset, 110 Ind. 337. See § 1536.

age their estate or themselves. Facts which will justify an appointment of imbecility have recently been passed upon by several of our inferior Courts. In a case in Hamilton county,[30] where it was held that the facts were not sufficient, the following was quoted with approval: "The infirmity must be such as to render her incompetent to have charge of any affairs, or do any business. If it does not extend that far, then she should not be found by you incompetent. If Mrs. Storick is possessed of ordinary sagacity, and insight into affairs, so that she knows how to care for her house and table and clothing; to deliver and transact ordinary affairs, and is not so insane, nor so foolish or imbecile, as to have no mind or intelligence regarding ordinary matters and affairs which she is accustomed to know of, then you are not to find her incompetent."

In a recent case in Scioto county an application was again refused.[31] In this case it was held a guardian will not be appointed of a woman on the ground that she is an imbecile and incapable of managing her affairs when it appears that she is seventy-seven years of age, her hearing is very much impaired, her memory is defective, and that she possesses certain peculiarities, when it also appears that she had managed her household affairs, paid her taxes, water rent and insurance regularly, attended to market and visited her friends and conversed intelligently with them. The Court says the action of Mrs. Shelleig, in conveying property away, to most minds, and to the Court, seems unwise in the extreme; but the question is not what may seem wise or unwise to others, but did Mrs. Shelleig know what she was doing when she did it?[32]

[30] *In re* Tempest, 21 Bull. 301.

[31] *In re* Shelleig, 8 N. P. 399.

[32] A person may be an imbecile, though able to govern himself so as not to need a guardian for his person. Therefore, where a person has become so infirm mentally that he cannot manage his affairs with sufficient capacity to preserve his property, a guardian may be appointed.

One who for some years has been wasting his property, making disadvantageous contracts, spending large sums of money on property in which he had only a life estate, and which was not worth, when the money was invested, one-half the sum expended on it, is an imbecile within the meaning of the statute. *In re* Emswiler, 8 N. P. 132; 8 Ohio Legal News.

See § 1539.

A mere weakness of mind is not sufficient to justify an order of appointment when such decree is not necessary for the protection of the party's property, or person or of society.[33]

The Court should always be fully satisfied that the interests of the alleged imbecile or idiot, regardless of the desires of any one else, require the appointment to be made before a finding to that effect is entered. If it really be to the interest of the person, no hesitancy should occur in promptly making the order.[33*]

§ 1510. Entry, finding person incapacitated.

(*Title.*)

This day this matter came on to be heard upon the papers in the case, and testimony of witnesses and was submitted to the Court. Whereupon the Court finds that the said C. D. is a resident of this county and has a legal settlement in the township of.....county of..... That the said C. D., E. F., G. H. and I. J., all of his next of kin residing in this county, have had due and legal notice of the pendency of this application and its prayer, as provided by law, and the former order of the Court. That the said C. D. is a lunatic (idiot or imbecile) and that he is thereby incapacitated from taking care of or preserving his property.

Wherefore it is ordered that some suitable person upon making the proper application in this Court and filing a statement and a bond, as required by law, be appointed guardian of the person and estate of the said C. D.[34]

The entry should contain a finding on all jurisdictional facts, and where the facts actually were shown to exist, it might be entered by a *nunc pro tunc* entry.[35]

§ 1510a. Costs, etc.

Sometimes considerable costs are incurred in the trial of the question of the person's incapacity. Of course if the court finds that he is incapacited, etc., then the guardian appointed is generally taxed with such costs and it comes from the ward's property. And generally if the application is dismissed, the costs are taxed against the party making the application. This may, however, not always be just, and if the court believes that the application was made in good faith and upon reasonable grounds,

[33] Woerner on Gr. 414.

[33*] See § 1503.

[34] It has been made a question in this state whether the court could make an appointment of a guardian of the estate of a lunatic without appointing a guardian of the person. But the Supreme Court has answered this question in the affirmative, and a guardian may now be appointed either for the person or for the estate of a person under disability. Heckman vs. Adams, 50 O. S. 305; King vs. Bell, 36 O. S. 460.

[35] See § 1536.

In re Dickson, 18 Bull. 37.

After this entry is made then the person desiring to be appointed should file an application, etc., in the same manner as if the guardianship was for a minor.

This entry of finding that the party is incapacitated is not a final order from which appeal can be prosecuted. A guardian must be refused or appointed, and such order will be the final order. *In re* Breitenstein, 4 N. P. (N.S.) 358; 17 Dec. 71. The statute as it now exists, allows an appeal from the finding

the court in the discretion vested in it, might tax the costs against the person for whom a guardian was applied for, or the costs might be divided.[35a]

§ 1511. Effect of finding of disability.

It was formerly provided by statute that the finding that a person was under such disability, that the guardian ought to be appointed, was only *prima facie* evidence of his imbecility; and our Supreme Court then held that the fact of such imbecility might be inquired into by an alleged imbecile in an action brought by him to enjoin the guardian from interfering with the control and management of his property.[36]

The statute does not now contain such provision, and in a very able opinion Judge Taft decided[37] that the due appointment by the Probate Court of a guardian for a person as an idiot, imbecile or lunatic, is conclusive evidence of such person's incapacity to make or to ratify contracts, or to do any act in derogation of his guardian's authority pending the guardianship. As to the ward's capacity to marry, to make a will, or to commit a crime, the appointment is only *prima facie* evidence of incompetency.[38]

While the person under guardianship is generally incapacitated to make a contract, yet he may incur a valid obligation for necessaries.[39]

§ 1512. Who may or should be appointed.

It is specially provided by statute that the wife may be appointed guardian.[40] This statute was enacted when the wife was under a common law disability. Since this disability as to her property rights has been removed, this statute is surplusage. Under early English rules, the appointment of an heir at law, or the one next entitled to the alleged idiots, etc., property, was not favored. I presume, upon the reason that such person would not properly look after the personal welfare of the person for whom he was appointed guardian. But this rule is not fol-

that a guardian should be appointed. See § 11206 G. C., § 39.

35a § 11628 G. C.

36 Messenger vs. Bliss, 35 O. S. 587.

37 Jordan vs. Dickson, 19 Bull. 64.

38 Jordan vs. Dickson, 20 Bull. 362; Woerner on Gr. 424; McCleary vs. Barcalow, 6 C. C. 481; 3 C. D. 547.

It is held that it was only *prima facie* and not conclusive evidence of incompetency to enter into a legal marriage. Millen vs. Young, 18 C. C. 575; 8 C. C. 394.

As to will, also see § 1024.

Where an imbecile marries, it will be annulled upon suit by the guardian. Waymire vs. Jetmore, 22 O. S. 271.

39 Blockway vs. Jewell, 52 O. S. 187; Hoster vs. Beard, 54 O. S. 398.

Where a guardian never assumed control of a will, the same remaining in the possession of the ward, a contract of the ward for repairs will be enforced.

Kimball vs. Bumgardner, 16 C. C. 587; 9 C. D. 409.

See §§ 1536, 1538.

40 § 10990 G. C.

lowed in our country. If no peculiar objection exists, a person who is bound by ties of kindred is better qualified and more likely to look after the welfare of the person under disability than an entire stranger. What was said about the Court appointing guardians for minors could be followed in making selections of guardians for persons of adult age, but under disability.[41]

§ 1513. When guardianship to terminate. "When the probate judge is satisfied that an idiot, imbecile, or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, or a person as to whom guardianship has been granted as such, is restored to reason, or that letters of guardianship have been improperly issued, he shall make an entry upon the journal that such guardianship terminate. Thereupon it shall cease, and the accounts of the guardian be settled by the court." [R. S. § 6316; 109 v. 76.][42]

§ 1514. Procedure for removal, etc.

Of course, the guardianship would terminate by death of the ward or the guardian in the same manner as if the ward were a minor. The guardianship might also terminate by reason of the guardian's removal from the State or other causes, the same as if the ward was a minor. The procedure for removal would likewise be the same as that for the removal of a guardian of a minor, and the forms and entries and suggestions made in the chapter for the removal of executors and administrators could easily be adopted for the proceeding for the removal of the guardian of an imbecile.[43]

The matter of removal of the guardian rests largely in the discretion of the Court. But an appeal will lie from an order of refusal.[44]

[41] § 1330.
Woerner on Gr. 437.
A guardian should be appointed for a person under disability, even though he has been admitted to an infirmary. Kissell vs. Gram, 4 N. P. 333; 7 Dec. 233.
See § 1517.

[42] § 11010 G. C.
See § 1541.

[43] See § 214, for removal of executor.
See § 1359, for removal of guardians for minors.

[44] Hiett vs. Nebergall, 45 O. S. 702.
See § 41, Who may prosecute appeal.
Only the Probate Court can entertain a motion of removal. This is true even where the Common Pleas Court made the appointment on appeal. *In re* Gdn. Oliver, Vol. IX N. P. (N.S.) 178; 77 O. S. 474.

§ 1515. Appeal and error.

The general section relating to appeal[45] provides that "appeal may be taken in proceedings to appoint guardians or trustees for lunatics, imbeciles or drunkards, by any person against whom such order, decision or decree shall be made, or who may be affected thereby." And in a case before the Superior Court of Cincinnati, Judge Taft said that "I presume that a refusal by the Probate Court to set aside the appointment for irregularity in making it may be carried up on error, because such refusal is a final order within the statutory definition, *i. e.*, 'An order in a special proceeding affecting a substantial right of a person interested.'"[46]

As the Probate Court is a court of record, and its order can not be attacked in a collateral proceeding, if the action of the Probate Court is questioned, it must be done in a direct proceeding in the Probate Court and followed to higher courts by proceeding by way of appeal or in error.

§ 1516. Laws applicable to guardians of lunatics, idiots, imbeciles and their children; settlement of such guardians. "Laws relating to guardians for minors and their wards and pointing out the duties, rights and liabilities of such guardians and their sureties, shall be applicable to guardians, for idiots, imbeciles, lunatics and incompetents by reason of advanced age or mental or physical disability or infirmity, and their children, except as otherwise specially provided. Be it further provided, that all sales, leases, encumbrances, or liens made or created on any real estate located in Ohio, by guardians for incompetents by reason of advanced age or mental or physical disability or infirmity since the seventeenth day of August, 1919, by order of any court of this state shall not be, nor be declared to be, invalid for the reason that such guardians for incompetents were not vested with all the statutory powers given to guardians of idiots, imbeciles and lunatics; and to the extent that said acts of guardians for incompetents are hereby prohibited from being held invalid they are declared to be legal and effective." [R. S. § 6304; 109 v. 73.][47]

[45] § 11206 G. C., § 39.

[46] Jordan vs. Dickson, 20 Bull. 362.

Where an appeal is taken to the Common Pleas from the Probate Court, the entire case is taken up, and if the Common Pleas decides there should be a guardian that court may appoint a guardian. And the clerk of the Court of Common Pleas should certify the case back to the Probate Court. *In re* Gdn. of Oliver, Vol. IX, N. P. (N.S.) 178; 77 O. S. 475.

If there is already an appointment made and the appeal is from the order making the appointment, the Common Pleas Court will not interfere, if it finds there should be a guardian. And it is held that the finding of the Probate Court of the necessity of the guardianship, is not a final order that may be appealed from. The final order is the appointment. *In re* Freitenstein, 4 N. P. (N.S.) 358; 17 Dec. 71.

The statute now permits an appeal. See § 11206, § 39.

The guardian may appeal from an order terminating the guardianship, and he need not give bond if he appeals in his fiduciary capacity. *In re* Kramer, 8 N. P. (N.S.) 217; 19 Dec. 444.

[47] § 10991 G. C.

§ 1516a. Settlement of such guardian. "In the settlement of the accounts of such guardians, no voucher shall be received from or allowed as a credit to the guardian of an idiot, imbecile or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, which is signed or purports to be signed by such idiot, imbecile or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity." [R. S. § 6304; 109 v. 73.][47*]

§ 1517. Exception as to voucher and opening account.

It will be observed that two matters are excepted in making the laws relating to minors applicable to imbeciles, etc. The first is that no voucher signed by the ward shall be received from or allowed as a credit to the guardian. This simply means that the voucher itself shall not be *prima facie* evidence that the expenditure has been made, but that if such a voucher is taken, the guardian must establish by proof the same as if no voucher was given that the expenditure was made. It probably has about the same effect as if a voucher were given by a minor.[48]

The second exception is in reference to the time in which an account may be opened up or reviewed. The language of sec. 10991, G. C.,[48*] is somewhat different from that in sec. 10954, G. C.,[49] which provides how and when the settlement of the guardian of a minor may be opened up and reviewed; and if it stood alone, might lead to the opinion that an account might be opened up any time within two years after the guardianship was terminated, even though there was no allegation of fraud or manifest mistake. But this matter was very thoroughly considered by the Circuit Court,[50] and here it was held: "After an account rendered by the guardian of an imbecile has been passed upon in due form by the Probate Court having jurisdiction exclusively over the matter, the Court has no power, at a subsequent day, or in a subsequent year, upon the mere motion, suggestion, or request of the heirs of an imbecile, or of a ward, to open up the account, place the matter in *statu quo,* and impose upon the guardian the duty of going back and establishing by evidence every item of debt which is contained in his account. This can only be done where it is shown by the excepting parties that a mistake or fraud has entered into such

47* § 10992 G. C.
48 § 1489.
48* § 1516.
49 §§ 1493, 1510.
50 Millen vs. Young, 18 C. C. 571; 8 C. D. 391.

settlements, and to that extent only can such settlements be reformed and corrected."

In case of a minor, the account can only be opened up by an action in the Court of Common Pleas. But in the case of an imbecile, etc., it can be opened up in the Probate Court within two years, where it is shown that there was a *mistake or fraud.* Otherwise each settlement made is a final one between a guardian and his ward.

§ 1518. Duties of guardian, as to welfare of ward.

As to the guardian's general duties, both in respect to the ward and his property, the law applicable to guardians of minors is applicable to guardians of imbeciles, etc. The statute makes the guardian of the imbecile also the guardian of the minor children of his ward, unless some other person be appointed; therefore, the additional duty devolves upon the guardian of looking after the welfare of the family of his ward. It is one of the principal duties of the guardian of a ward to so manage the estate as to preserve it to be turned over to the ward upon the termination of the guardianship. The chief duty of the guardian of a minor is to educate and maintain his ward and preserve his property. The chief duty of the guardian of an imbecile, or idiot, or lunatic, is to look after the welfare, comfort and security of the ward, and not alone to increase the estate.[51]

The maintenance of a lunatic is not limited as an infant's is. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments, and even harmless caprice, are to be indulged up to the limits of income, and for solid enjoyments and substantial comfort the Court will, if necessary, go beyond the limits of income.[52] And, in another place, it is said it is not part of the guardian's duty to diminish the reasonable comforts of his ward, or to prevent him from enjoying such luxuries, or indulging such tastes as would be allowable and proper

[51] May vs. May, 109 Mass. 252.

[52] Woerner on Gr. 454, citing *In re* Persse, 3 Molloy, 441, quoted with approval in Kendall vs. May, 10 Allen, 59, 67.

An action for a tort committed by a lunatic must be against the lunatic. It will not lie against the guardian alone. Stankus vs. Keiper, 35 O. C. C. 4.

in the case of a man similarly situated in other respects, but in the full possession of his faculties. It is not, therefore, the duty of the guardian to so manage the property that there may be something left for his heirs, but he should so use it that the ward could derive the greatest degree of comfort and happiness out of it that the circumstances would allow. Of course, the guardian should not permit an unreasonable expenditure, but he should, wherever he consistently can, favor the ward, especially in the many little things that such persons usually are very solicitous about. The guardian is not bound to apply the pension from the United States, payable to his ward, to the payment of pre-existing debts, nor is he bound to sell the furniture of his ward not subject to execution.[53]

Where the ward has, previous to his derangement, adjusted matters as to his living expenses, and matters of that character, if the estate is ample, the guardian should not interfere with the same, but should endeavor to give the ward the same degree of comfort that he had before the appointment was made.[54]

§ 1519. Duty of guardian as to existing contracts..

A guardian appointed for an idiot, imbecile or lunatic should be exceedingly careful in executing contracts made by his ward before his appointment, or paying debts incurred by such person. If the contract was made or the debt incurred before the ward became an imbecile, or a lunatic, it would be an obligation that the guardian must honor. But if the contract was made, or the debt incurred, after the ward became *non compos mentis,* then, as a general rule, the guardian is under no legal obligation to honor the same. There are two exceptions to this rule. The first is, where the debt was incurred for necessaries, or, second, where the contract was founded upon an adequate consideration of benefit furnished to the person making the same, and in good faith, without knowledge of his unsound mental condition. In either one of these two cases the contract

[53] Fuller vs. Wing, 17 Me. 222; Woerner on Gr. 455.

[54] Woerner on Gr. 456, citing Hambleton's Appeal, 102 Pa. St. 50; Matter of Heeney, 2 Barb. Ch. 326; Shaffer vs. List, 114 Pa. St. 486.

will be enforced to the extent of the value of the consideration furnished.[54a] The validity of contracts of a person *non compos mentis* has been recently discussed in a very thorough and learned opinion by Judge Williams in our Supreme Court,[55] and there the above rules were laid down; and it was further held in that case that a note signed by a person under disability, though negotiable in form, is not within that rule of commercial law which protects negotiable paper in the hands of a *bona fide* holder for the value against defenses to which it was subject in the hands of the payee. The purchaser takes it charged with notice of the maker's disability, and occupies no better position as against him than the payee, and is subject to the same burden of proof when the maker's incapacity is pleaded in defense to an action brought by the holder.

In reference to obligations which were incurred by an imbecile or lunatic, near to the time of the guardian's appointment, unless the same be within one of the above exceptions, the guardian ought not to pay the same. In such cases he should either disavow the obligation and compel the owner to enforce the same in an action at law, or he may make application to the Probate Court for authority to allow the same, if he thinks it ought to be allowed, or possibly he may bring an action in the Court of Common Pleas under the provisions of sec. 10857, G. C.[55*] If the guardian admits that the debt is just, the creditor might compel the payment of the same by an application in the Probate Court for that purpose under sec. 10939, G. C.[56]

As to carrying on the business of such ward, this has been discussed in a previous section, and reference will be made thereto.[57]

It very often happens that when an application is made for the appointment of a guardian of a person under disability that such person employs an attorney to represent him at the hearing; and the question arises whether the guardian should pay the bill of such attorney. As a general rule, it seems that such bill ought to be paid unless it is clearly manifested that the

[54a] A husband is liable for necessaries furnished to his wife although he may be insane or incompetent to transact ordinary business. Badger vs. Orr, 34 O. C. C. 328.

[55] Hosler vs. Beard, 54 O. S. 398.

[55*] § 33.

[56] § 1362.

[57] §§ 1379, 1380.

employment of such attorney was unnecessary, for the party charged with incompetency ought to be allowed the fullest privilege of defending his competency, and a reasonable attorney fee for defending him is proper and should be paid.[58]

§ 1520. Insolvency of lunatics. "If the estate of the idiot, imbecile or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity is insolvent, or will probably be insolvent, it shall be settled by the guardian in like manner, and like proceedings may be had as are required by law for the settlement of the insolvent estate of a deceased person." [R. S. § 6314; 109 v. 75.][59]

The above section provides the manner in which debts shall be paid, provided the ward is insolvent. Otherwise the same rule applies to payment of debts of imbeciles as to a minor.[60] It has been held that a judgment rendered during the existence of a guardianship, against an imbecile, idiot or lunatic, and his legal guardian, is not a lien upon the lands of such imbecile,[61] and that execution can not be had against the property of a person under guardianship for disability.[62]

§ 1521. Suit by guardian of idiot, imbecile or lunatic, and revivor of same. "Such guardian may sue in his own name, describing himself as guardian of the ward for whom he sues. When his guardianship ceases by his death, removal or otherwise, or by the death of his ward, actions or proceedings then pending shall not abate, if the right survives. His successor as guardian, or such idiot, imbecile, or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, if he be restored to his reason, or the executor or administrator of such idiot, imbecile, or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, as the case may require, shall be made party to the suit or other proceeding, as is provided by law for making an executor or administrator party to a suit or proceeding of a

[58] So where one is restrained of his liberty without legal process, as an insane person, and employs counsel to prosecute a writ of habeas corpus in his behalf, for the purpose of investigating the grounds and circumstances of the restraint, such counsel is entitled to recover a reasonable compensation for his services rendered in good faith, if the condition of the party be such as to render investigation proper. Woerner on Gr. 470.

[59] § 11008 G. C.

[60] § 1380.

See Woerner on Gr. 460.

[61] Neff vs. Cox, 5 N. P. 413; 5 Dec. 377.

[62] § 1380.

See § 959 *et seq.*, as to settlement of insolvent estates by administrators.

The remedy in such a case would be to apply to the Probate Court for an order requiring the guardian to pay the same.

See Woerner on Gr. 460.

like kind, where the plaintiff dies during its pendency." [R. S. § 6305; 109 v. 73][63]

§ 1522. Sale of real estate by guardian of idiot, imbecile or lunatic. Petition. Private sale. Parties defendant. "When a sale of the real estate, or coal from under, or fire-clay upon or under, the real estate of such ward is necessary for the support of himself or his family, or the payment of his debts, or such sale will be for the interest of such ward or his children, the guardian may sell it under like proceedings as are required by law to authorize the sale of real estate by the guardian of a minor. Or, if it be more for the interest of such idiot, imbecile or lunatic, or an incompetent by reason of advanced age or mental or physical disability or infirmity, or his children, upon petition of the guardian, the probate court may authorize him to sell such real estate, or coal, iron-ore, limestone, fire-clay or other minerals upon, or under the real estate, or the right to mine them, at private sale, either in whole or in parcels and upon such terms of payment as the court prescribes." [R. S. § 6306; 109 v. 74.][64]

§ 1522a. Petition, what to contain. "The petition shall contain a pertinent description of the real estate, coal or fire-clay proposed to be sold, a statement of its value as near as can be ascertained, and the facts upon which the application is founded. If, upon the hearing, the court is satisfied that it will be more for the interest of the ward that such real estate, coal or fire-clay be sold at private than at public sale, it may make an order authorizing the sale, and prescribing the terms thereof, first taking from the guardian a sufficient bond for the faithful performance of his duty in the premises, and to account for the proceeds of all sales made under such order. But the guardian shall not be authorized to sell such real estate, coal, or fire-clay at private sale for less than its appraised value." [R. S. § 6306.][64*]

§ 1522b. Husband or wife to be made defendant. "The ward's husband or wife shall be made a defendant to the petition, and if he or she file an answer consenting to the sale, free and discharged of all right and expectancy of dower therein, on the sale being confirmed, such answer shall be a full release of his or her expectancy of dower. Unless in such answer an allowance in lieu of dower be waived, the court shall allow, out of the proceeds of the sale, such sum in money as is the just and reasonable value of his or her expectancy of dower." [R. S. § 6306.][64†]

[63] § 10993 G. C.
See §§ 11401, 11407, 11408 G. C., § 627.
[64] § 10994 G. C.
[64*] § 10995 G. C.
[64†] § 10996 G. C.
Guardian of idiot may enter appearance in action against. Segal vs. Building Co., 11 C. C. (N.S.) 481; 31 O. C. C. 519.
Trustee should be appointed for insane defendant in divorce, and rights of defendant can be passed on. Kerlick vs. Kerlick, 10 C. C. (N.S.) 524; 30 O. C. C. 274.
All the next of kin should be made parties, etc.

The procedure for the sale of real estate under the above section is by it made similar to that of a guardian selling real estate of minors. Suffice here to say that the statute should be carefully read, and the forms and suggestions previously made in the chapter relating to sales of real estate by guardians of minors can be easily applied to an action brought under the above section.[65]

§ 1523. Dower of insane, idiotic or imbecile person; how assigned or sold. "If appointed in this state, the guardian of an idiot, imbecile or insane person, or an incompetent by reason of advanced age or mental or physical disability or infirmity, who has or is supposed to have a right of dower, or a contingent right to it, in lands or tenements, of which the husband or wife of such person was seized as an estate of inheritance or in land held by bond, articles or other evidence of claim, where the dower has not been assigned, may sell, compromise, or adjust it upon such terms as he deems for the interest of such person, and as the probate court of the county in which the guardian was appointed approves, or if appointed in a foreign state, as the probate court of the county wherein the land is situated, approves. After such approval, the guardian may execute and deliver all the needful deeds, releases and agreements for the sale, compromise, or assignment of such dower, or contingent right to it." [R. S. § 6307; 109 v. 74.][66]

Sec. 12021, G. C., provides that the Common Pleas Court may authorize and direct the guardian of an insane person to sell such dower right, and a guardian in any proceeding may elect for his insane ward.[67]

§ 1524. Procedure in assignment of dower.

In a previous chapter[68] we have seen that the guardian of an heir may, with the approval of the Probate Judge, assign to the widow a dower right. The above section confers the right upon the guardian to sell or adjust such dower right, upon the approval of the Probate Court. The guardian, wishing to

[65] See § 1404 *et seq.*, as to sale of real estate of minors.

[66] § 10997 G. C.

[67] § 12020 G. C.

[68] § 957.

make such assignment or sale of the dower right of his ward, should file an application in the Probate Court setting out all the facts, and have the court to make an order directing him to sell or release such dower right.[69]

§ 1524a. Application to sell and release dower right.

In the matter of the Guardianship of .....

PROBATE COURT, CLARK COUNTY, OHIO.

..... says that he is the duly appointed and acting guardian of ....., an insane person, appointed as such by the Probate Court on ....., 19... That the said ..... is the wife of ....., and is ..... years of age and as such has a contingent right of dower in the following described real estate: .....

That the said ..... [husband] has contracted a sale of said real estate to ..... and ..... for a consideration of ..... [$10,300]. That there is a mortgage indebtedness thereon, which said mortgage amounts to ..... [$4,000], and was executed by the said ..... [husband] and the said ..... [wife], and the money secured thereby was applied on the purchase price of said land when purchased by said .....

That the said ..... [husband] has agreed, out of the consideration so to be received for the sale of said real estate, that ..... [$1,000] thereof may be paid to this guardian in full of the contingent dower right of the said ..... in and to said real estate, which is the full and fair value of the same, and it would be to the interest of his said ward to accept the same. That said guardian, if it meets the approval of the court, has agreed to accept the same. Wherefore he asks that the court may approve his agreement to accept the same in full of the contingent dower right of the said ..... in said real estate, and that he may, as said guardian, and as and for said ..... by deed duly executed, release, quit claim and convey to said ..... and ..... the premises hereinbefore described, upon receipt of $.....

.....

STATE OF OHIO, CLARK COUNTY, SS.

....., being first duly sworn says that the allegations in the above application are true as he verily believes.

.....

Sworn to and subscribed before me in my presence this ..... day of ....., 19...

.....
Probate Judge.

By .....
Deputy Clerk.

[69] See chapt. next to index, as to calculation of dower right.

§ 1524b. Entry authorizing and ordering release of dower right, etc.

In the matter of the Guardianship of .....

PROBATE COURT, CLARK COUNTY, OHIO.

ENTRY.

This day came ....., guardian of ..... and filed herein his application for authority from this court, to accept the sum of $....., as the reasonable and just value of the contingent dower right of ....., as the wife of ....., in the premises in said application described, and the same was submitted to the court; whereupon the court finds that $..... is the full and fair value of the said dower right in said premises, and that it would be to the interest of the estate of the said ..... for said guardian to accept the same, and it is therefore ordered that the said guardian accept the same in full of said dower right and that upon receipt of the same the said guardian, as such, and for the said ....., is authorized and directed to make, execute and deliver to ..... and ....., a deed duly executed, releasing and quit claiming and conveying to them all the dower claims the said ..... might have in and to the premises in the application described.

§ 1524c. Guardian's deed.

KNOW ALL MEN BY THESE PRESENTS: That, whereas, on the 26th day of July, 1920, ..., was duly appointed and qualified as guardian of the person and estate of ....., an insane person, by the Probate Court of Clark County, Ohio, and

Whereas, afterwards, on the ..... day of ..... the said guardian did file his application in said court for authority to accept the sum of $..... as the full and fair value of the contingent right of dower of the said ....., as the wife of ..... in the premises hereinafter described, and

Whereas, the court did then find the same was the full and fair value of her said dower interest therein, and did order the guardian to accept the same, and did order this guardian, on the receipt of said sum of $....., to make, execute and deliver a deed conveying and quit-claiming to ....., his heirs and assigns forever, relinquishing to him all the dower rights and all claims in said premises as the wife of said .....

Now, therefore, I, ..., guardian of ....., aforesaid, by order of said Probate Court and the powers vested in me by the statute in such case made and provided, and in consideration of the sum of $..... paid me by ..... do hereby remise, release and forever quit claim to the said ....., his heirs and assigns, forever, releasing and relinquishing to the said ..... all rights and claims the said ..... has, or may have, as the wife of the said ....., in and to the undivided, etc., ... [here describe the real estate.]

To have and hold with all the privileges and appurtenances thereunto belonging to the said ....., his heirs and assigns, forever, as fully and

completely as I, the said ....., as guardian, by virtue of said order of the court, and of the statute made for such cases, might or should sell and convey the same.

In witness whereof I, the said ....., as such guardian, have hereunto set my hand this ..... day of .....

.....
Guardian of ....., lunatic.

Witnesses.

[Add acknowledgment clause same as ordinary deed.]

§ 1525. Guardian empowered to lease and improve estate. Termination of lease. Lien of tenant. "Such guardian also, in like manner, as the guardian of a minor, may be authorized to lease and improve the real estate of his ward. If the lease extends beyond the restoration of such ward to sound mind, or his death, it will determine on his restoration or death, unless confirmed by such ward or his legal representatives. If the lease determines by the restoration of the ward or his death, the tenant shall have a lien on the premises for any sum or sums expended by him in pursuance of the lease in making improvements and for which compensation was not made by the rent or otherwise." [R. S. § 6308.][70]

This section is no doubt intended by the Legislature to confer similar rights upon the guardian of an imbecile, etc., as sec. 10967, G. C., confers upon a guardian of a minor.[71]

§ 1526. Long lease by guardian may be authorized by Court. Lease for three years without order of Court. "Such guardian also may be authorized by the probate court to lease the real estate of his ward or any part of it for a limited term of years or by perpetual lease, with or without the privilege of purchase, when, on his application, the court finds that such lease is necessary for the support of his ward or of his family, or that it will be for the best interests of him or them. Such guardian may lease the real estate of his ward for not exceeding three years without application to the court." [R. S. § 6309.][72]

The above, and the three following sections, are very much similar to sec. 10962, G. C., and the immediate following sections, and suggestions there made can be adapted for procedure under the above.[73]

§ 1879 *et seq.*, Partition.
70 § 10998 G. C.
71 § 1445.
72 § 10999 G. C.
73 § 1433.

§ 1527. Application for authority to make long lease. "The application for authority to make such long lease or leases, shall be by petition, setting forth the character of the idiocy, imbecility, or lunacy of the ward, whether curable or not, temporary or confirmed, and its duration, the number, names, ages, and residence of the family of the ward including the wife or husband of the ward, and of those who have the next estate of inheritance from him, all of whom as well as the ward must be made defendants. The petition also must contain a description of the real estate, its value, and the amount for which it probably can be leased, the reasons for the proposed lease, and the terms, covenants, conditions and stipulations on which it is proposed to lease it." [R. S. § 6310.][74]

§ 1528. Proceedings on such application. "On filing the petition, like proceedings shall be had as on petition for sale of the real estate of a minor, except that the appraisers shall appraise not only the value of the real estate, but the value of its annual rent upon the terms, covenants, conditions, and stipulations of the lease as proposed in the petition . In their report, the appraisers shall state whether in their opinion, the proposed lease will be to the interests of the ward and his family. They may also suggest any change in the terms, covenants, and stipulations proposed in the petition. On the return of the appraisement, the guardian shall not be required to give an additional bond, but, in case of sale under the terms of the lease, he must give such bond before the confirmation of the sale." [R. S. § 6311.][75]

§ 1529. Final hearing and orders. "If, upon final hearing, the prayer of the petition be granted, the court may prescribe the terms, covenants, and stipulations of the lease, in accordance with those set forth in the petition or otherwise, and authorize the lease to be made by public or private letting, as it deems best. But in no case shall the leasing be allowed for a less rent than that named in the report of the appraisers, and the lease shall not take effect until it, with the security therein, is approved and confirmed." [R. S. § 6312.][76]

§ 1530. Guardian may improve real estate of imbecile, etc. "The guardian of an imbecile or insane person, or an incompetent by reason of advanced age or mental or physical disability or infirmity may use the moneys and personal estate of his ward in improving his ward's real estate, as follows: The

[74] § 11000 G. C.
[75] § 11001 G. C.
[76] § 11002 G. C.

guardian proposing to make such improvement, shall file in the probate court in which he was appointed, a petition describing the premises to be improved, the amount of rent the premises yield at the time the petition is filed, in what manner it is proposed to make such improvement; how much it is proposed to expend therefor, what rent the premises will probably yield when so improved, with a statement of the value of the ward's personal estate, and such other facts as are pertinent to the question whether the improvement should be made, and a prayer that he be authorized to use so much of his ward's moneys and personal estate as may be necessary to make it. If the property is so situated that, to the best interests of the ward's estate, it can be advantageously improved in connection with the improvement of property adjoining and adjacent to it, the petition must show this, and have a prayer in accordance therewith. It also shall state the character of the imbecility or insanity or incompetency of the ward, whether temporary or confirmed, and its duration; the names, ages and residence of his family, including the ward's wife or husband, and of those who have the next estate of inheritance from the ward, all of whom, as well as the ward, must be made defendants, and be notified of the pendency and prayer of the petition in such manner as the court directs." [86 v. 31, § 1; 109 v. 74.][77]

It will be observed that the next section provides that same proceedings shall be had as to pleadings and proof as are had on petition by a guardian to sell the real estate of a minor, and reference will be made to that chapter for suggestions and forms, etc.[78]

§ 1531. **Proceedings.** "Upon filing such petition, like proceedings shall be had as to pleadings and proof as on petition by a guardian to sell the real estate of a minor. The court shall appoint three disinterested freeholders of the county as commissioners, to examine the premises proposed to be improved, the surroundings, and report to the court their opinion whether the improvement proposed will be advantageous to the estate of the ward." [86 v. 31, § 2.][79]

§ 1532. **May unite with owners of adjacent property.** "On the final hearing, if the prayer of the petition is granted, the court shall fix the amount of money and personal estate that may be used in making such improvement. It also may authorize such guardian to unite with the owners of adjoining and adjacent property in improving the premises of his ward, and

[77] § 11004 G. C.

[78] § 1404 *et seq.* See also, § 1446 *et seq.*, as to power to lease, etc.

[79] § 11005 G. C.

for the proper management and repair of the property, when so improved, upon such equitable terms and conditions as the court approves." [86 v. 31, § 3.][80]

§ 1533. **Guardian's report, etc.** "The amount of money and personal estate expended in making such improvement, the guardian shall distinctly report under oath, to the court, within forty days after the improvement is completed. In case of the ward's death, without being restored to reason, if there are heirs who inherit real estate only from him, then such money, so expended, shall descend and pass the same as his other personal estate, and be a charge on the premises so improved in favor of the heirs who inherit the personal estate." [86 v. 31, § 4.][81]

[80] § 11006 G. C.

[81] § 11007 G. C.

CHAPTER LXXXIII.

GUARDIANS OF DRUNKARDS, IMPROVIDENTS, ETC.

§ 1534 Laws relating to guardians generally, applicable.
§ 1535 When guardian to be appointed for drunkards.
§ 1535a Improvidents, spendthrifts.
§ 1536 Procedure to appoint.
§ 1537 Notice to be served on party, etc. Sale thereafter is invalid.
§ 1538 Incapacity to contract.
§ 1539 When order of appointment should be made.
§ 1540 When guardianship shall terminate.
§ 1541 Procedure to terminate.

§ 1534. Laws relating to guardians generally, applicable.

Sec. 11011, G. C.,[1] provides that all laws relating to guardians for lunatics, idiots and imbeciles, etc., shall be applicable to guardians of drunkards; and another section [2] provides that all laws relating to guardians for minors and their wards, etc., shall be applicable to guardians for idiots, imbeciles and idiots. It therefore follows, from these two provisions of our statute, that all laws relating to guardianship generally are applicable to guardians of drunkards, unless where from the nature of the subject matter, they cannot be so applied. It is therefore needless to discuss the general duties and liabilities of guardians in reference to drunkards, as such matter has been fully discussed in previous parts of this work.[3]

§ 1535. When guardian to be appointed for drunkards, etc. "Upon satisfactory proof that any person, resident of the county wherein the application is made, is incapable of taking proper care of himself or herself or of his or her property, or neglects or fails to provide for his family, or for other persons whom he is charged by law to provide for, by reason of intemperance, improvidence or habitual drunkenness, the probate court forthwith shall appoint a guardian of the person and property of such person, or either, which guardian, by virtue of such appointment, shall be guardian also of the minor

[1] § 1535.

[2] § 10991 G. C. (§ 1516).

[3] See § 1305 *et seq.*, as to kind of guardians, etc.; § 1319, As to appointment and bond of guardians for minors; § 1343, As to bonds; § 1354, As to duration of guardianship of minors, etc.; § 1361, As to powers and duties of guardians of minors; § 1378, Management of estate, etc.; § 1404, Guardian's sale of real estate of minors; § 1432, Lease of minor's real estate; § 1446, Lease for petroleum, gas and mining purposes; § 1459, Mortgage of ward's land; § 1484, Guardian's accounting; § 1501, Powers and duties of guardians of lunatics, idiots, etc.

See § 1317.

child or children of his ward, in case no other be appointed. All laws relating to guardians for lunatics, idiots and imbeciles, and their wards, and all laws pointing out the qualifications, duties, rights and liabilities of such guardians, and their sureties, shall be applicable to the guardians contemplated by this subdivision of this chapter." [R. S. § 6317; 99 v. 483.][4]

§ 1535a. Improvidents. Spendthrifts.

The above section originally only applied to drunkards, etc. It has been very much enlarged and now applies to *intemperance, improvidence* and *habitual drunkenness.* The guardianship is allowed whenever, from the existence of either one of three causes, the person is (1) incapable of taking proper care of himself or herself, or (2) is incapable of taking proper care of his or her property, or (3) neglects or fails to provide for his family, or (4) neglects or fails to provide for other persons who he is charged by law to provide for. Nos. (1) and (2) seem to rest upon the incapacity of the person; Nos. (3) and (4) on his want of desire to act. Improvidence is defined as a want of care and foresight in the management of property.[4a]

The term improvident is probably used in our statute as synonymous with spendthrift, and the latter is defined to be a person who by excessive drinking, gambling, idleness or debauchery of any kind, shall spend, waste, or lessen his estate so as to expose himself or his family to want or suffering, or expose the town to charge or expense for the support of himself or his family.[4b]

§ 1536. Procedure to appoint.

The procedure to appoint a guardian of an alleged drunkard is very much similar to that for the appointment of a guardian of an imbecile or lunatic, the only difference being in reference to the notice which is to be served. In the case of lunatics, a three days' notice is required, and in the case of drunkards a five days' notice. In the case of lunatics, it must be served upon all the next of kin resident of the county; in the case of drunkards, it need be served only upon the alleged drunkard. But it would be well to make service upon some, at least, of the next of kin. The form of application for the appointment of

[4] § 11011 G. C.

[4a] 22 Cyc. 34.

The symptoms of an improvident temperament would, evidently, be carelessness, indifference, prodigality, wastefulness or negligence in reference to the care, management and preservation of the property in charge. Cite Webster's Dictionary.

[4b] 36 Cyc. 800. Woerner Gdn. § 114.

a guardian of a lunatic can easily be adopted for the appointment of a guardian of a drunkard.[5]

§ 1537. Notice to be served on party, etc. Sale thereafter invalid. "At least five, but not more than ten days, prior to the time when the application for the appointment of the guardian authorized by the next preceding section is made, a notice, in writing, setting forth the time and place of its hearing, shall be served upon the person for whom such appointment is sought. From the service of such notice until the hearing, or the day thereof, as to all persons having notice of such proceeding, no sale, gift, conveyance, or incumbrance, of the property of such intemperate person or habitual drunkard, shall be valid." [R. S. § 6318.][6]

§ 1538. Incapacity to contract.

The above section invalidates the contracts of an alleged drunkard, provided the court finds that he is a drunkard or improvident, from the time that a person may have notice of proceedings to appoint; and any sale, gift or conveyance or incumbrance of the property of such alleged drunkard or improvident, made to a person with such knowledge, is void. Such alleged drunkard or improvident, however, is not prohibited from buying necessaries after service of such notice.[7] If an alleged drunkard or improvident would make a contract with a person that had notice of such proceedings, and no unjust advantage taken, the contract could be enforced. It therefore follows that if it is desired that any particular person be prevented from contracting, a notice should be ordered served upon such person.[8]

§ 1539. When order of appointment should be made.

The order is to be made when satisfactory proof has been presented that any person resident of a county is incapable of taking care either of himself or of his property by reason of intemperance or habitual drunkenness. The questions then to be established are first, that the party is incapable of taking care of his property and second that such incapacity results from intemperance or habitual drunkenness. If a person was unable to take care of his property but not by reason of intemperance or habitual drunkenness, or improvident, the appointment could

[5] See § 1504, Application for appointment; § 1505, Form of application; § 1506, Notice; § 1507, Form of Notice; § 1508, Hearing, etc.; § 1510, Entry finding person incapacitated; § 1511, Effect of finding of disability.

[6] § 11012 G. C.

[7] Broadway vs. Jewell, 52 O. S. 187.

[8] Woerner on Gr. 469, 413.

See § 1511, Effect of finding of disability; § 1024, As to making will.

not be made under this section but probably under § 10989, G. C. (§ 1501); and if a person were intemperate or guilty of habitual drunkenness and still able to take care of his property, the appointment could not be made unless he should neglect his family or in danger of becoming a public charge. The same want of capacity to take care of his property should be shown as is required for any other adult person[8*]

§ 1540. When guardianship shall terminate. "Upon reasonable notice to such guardian, and to the person or persons on whose application the appointment was made, and satisfactory proof that the necessity for the guardian no longer exists, the court shall order that the relation of guardian and ward terminate, and that the ward be restored to the full control of his property, as before the appointment." [R. S. § 6319.][9]

§ 1541. Procedure to terminate.

The above section differs from the statutory provision,[10] which provides for terminating the guardianship of a lunatic, in this that before such guardianship is terminated, reasonable notice shall be given to the person on whose application the appointment was made. It, therefore, follows that there should be filed an application for removal and an order requiring notice to be given and the final entry should show that such persons as the statute requires were made parties.[11]

Whether an appeal will lie from an order of removal, has never been settled by the Supreme Court. But it has been held that an appeal might be prosecuted from an order refusing to terminate the guardianship.[12]

8* See § 1509. See § 220 as to what constitutes habitual drunkenness.

As to validity of contract made by intoxicated person, see note to Wright vs. Walker (Ala.), 54 L. R. A. 440. The statute has recently had inserted therein as one of the grounds for guardianship, "improvidence." This has as yet received no judicial constructions.

9 § 11013 G. C.

10 § 6316 R. S. (§ 1513).

11 See § 214 for removal of executors, § 1359 for removal of guardians of minors.

12 Hiett vs. Nebergall, 45 O. S. 702.

See § 39, Who may prosecute appeal.

While the statute limits the right to appeal to proceedings to appoint guardians for *idiots, lunatics, imbeciles* or *drunkards,* I am inclined to believe it would include improvidence, as this was put in in amending the statute relating to appointments for drunkards.

CHAPTER LXXXIV.

ASSIGNMENT. JURISDICTION. APPOINTMENT.

§ 1542 Definition, etc.
§ 1543 Effect of bankrupt act.
§ 1544 Jurisdiction of Probate Court.
§ 1545 Jurisdiction of Court of Common Pleas.
§ 1546 Assignee must give bond in Probate Court.
§ 1546a Assignment; when to take effect.
§ 1547 Who may make.
§ 1548 Who may be assignee.
§ 1549 What property may be assigned.
§ 1550 How made.
§ 1551 Filing in Probate Court, etc.
§ 1552 Filing deed in recorder's office.
§ 1553 Qualification of assignee.
§ 1554 Bond, etc.
§ 1555 Order of appointment.
§ 1556 Effect of order and issue of letters.
§ 1557 Notice of appointment.

§ 1542. Definition, etc.

An assignment for the benefit of creditors is defined to be a voluntary transfer by the debtor of all or a part of his property to an assignee or assignees in trust to apply the same or proceeds thereof to the payment of some or all of the assignor's debts, and return the surplus if any, to him.[1]

Under our statute as at present constituted, this definition might be varied a little in this, our statute contemplates that when a debtor makes an assignment, that all of his property be transferred to the assignee and that all of it is to be sold if needed, for the payment of debts, and the surplus returned to the assignor.[1a] In many respects the assignee occupies a position in reference to the property placed in his charge, similar to an administrator in the administration of the estate of a deceased person.[2]

An assignee comes within the general term of trustee and he is liable and held responsible for negligence or failure to per-

[1] 1 Am. & Eng. Ency. of Law, subject, "Assignment of creditors."

[1a] The assignee for the benefit of creditors takes the property assigned, charged with all the liens, liabilities and encumbrances against it while owned and possessed by the assignor. Klaustermeyer vs. Trust Co., 89 O. S. 742.

[2] Kilbourne vs. Fay, 29 O. S. 264; Straman vs. Rechtine, 58 O. S. 443.

form his duties in the same manner as an ordinary trustee. In some respects he occupies a position very much analogous to a receiver, appointed by the Court of Common Pleas to wind up a partnership or business and distribute the proceeds.[3]

§ 1543. Effect of bankrupt act.

The effect of this act is well stated in a recent case,[4] where it is said, " When the petition in bankruptcy was filed by the defendant, all proceedings in the State Court should stop. In other words, in the language of the Bankrupt Act as contained in sec. 11, " The proceedings shall be stayed." This is mandatory. The State Court has no right to proceed further in an action there pending until the petition in bankruptcy has been adjudicated. When that has been done, the same may be further stayed in the State Court at its discretion. But whether it is stayed or not, the plaintiff in the State Court cannot obtain judgment against the defendant for any costs made after the petition in bankruptcy is filed, nor can he obtain judgment in the State Court for any interest upon his claim accru-

[3] While our statutes relating to assignments for benefit of creditors are sometimes called insolvency laws, yet it should be remembered that they are not, strictly speaking, insolvency laws. All insolvency laws are similar to bankruptcy laws, and generally provide that if the creditor turns over all his property, that he may be discharged from all future liability as against all his past creditors. Our assignment laws make no such provision and future property of the assignor can be reached by creditors who have not presented their claims or have not received payment in full. This feature of our assignment laws, together with other features of the bankrupt act, has taken almost all of such business to the United States Courts, so much so, that in Cincinnati the Insolvency Court is almost entirely deprived of business and it is now contemplated to abolish the same.

Foreign assignment does not affect real estate in Ohio (Lesser vs. Redrick, 2 O. 234; Rogers vs. Allen, 3 O. 488), but a foreign assignment may be superior to a subsequent foreign attachment. Shortwell vs. Jenett, 9 O. 180; Mt. Morris Nat'l Bank vs. Werk, 17 Bull. 174.

It has more recently been held that a foreign assignment of both real estate may be valid, even when prohibited by a subsequent foreign statute. Hall vs. The Ohio & Western Co., 24 Bull. 311.

[4] Carpenter Bros. vs. O'Connor, 16 C. C. 526; O. C. D. 201; affirmed, 41 Bull. 268.

See *In re* Chase, 124 Fed. Rep., —; 49 Bull. 17, where services of the assignee were allowed when beneficial to the estate.

In a recent case in the Circuit Court of Franklin County, where the property of a corporation was placed in the hands of a receiver, and then a petition in bankruptcy was filed, and the directors of the corporation employed an attorney to resist the bankruptcy proceedings, the receiver also having an attorney employed, it was held that the receiver was the proper person to employ such attorney, and the attorney of the directors could not, the bankruptcy proceeding having been dismissed, assert his claim against the assets in the hands of the receiver.

ing thereafter. The running of the claim and all costs incident to the procuring of a judgment against the claimant are arrested at once upon the filing of the petition in bankruptcy, and if the defendant is declared a bankrupt, the plaintiff in the State Court is entitled to receive only his claim with interest and costs to that date. He may pay the costs in the State Court, which he rightfully made in the prosecution of his claim against the bankrupt in that Court, and present them to the trustee in bankruptcy to be allowed as a proper claim against the assets in the bankrupt Court. His rights are protected in the same degree in so far as the exemptions under the homestead and other laws are concerned. The State laws govern entirely in the bankrupt Court in that regard." It is also held that an assignee or receiver appointed by said Court should deliver the assets on demand to the trustee in bankruptcy.[5]

And it has also been held that if an assignment be made for the benefit of creditors and afterwards the assignor is declared a bankrupt that funds expended by the assignee in payment of Court costs or other costs attending the assignment for benefit of creditors, that such costs can not be recovered,[6] and that an assignee is not entitled to any fees or commission. But upon this proposition the Courts are not in accord, and it has also been held, where a voluntary assignment for the benefit of creditors was set aside only for the reason that proceedings in bankruptcy supersede it, the voluntary assignee is entitled to all reasonable expenses and compensation for his services.[7]

The United States Supreme Court has not to the writer's knowledge directly passed upon this question. It has, however, recently held, that an assignee for the benefit of creditors, has the right to have his claims for the amount paid to counsel or retained by him on account of commissions as assignee, before the bankruptcy of his assignor, adjudicated in the State Court in the customary mode of proceedings; and the bankruptcy

[5] Davis vs. Coe, 19 C. C. 639; 10 C. D. 264.

[6] Stearns vs. Flick, 4 Am. B. R., 723; 103 Fed. 919; Wilbur vs. Wilson, 47 Bull. 99; 7 A. B. R. 54; *In re* McCauley, 44 Bull. 283.

[7] *In re* Kurth, 17 N. B. R., 573; Fed. cases, 7948.

If made six months before bankruptcy it is valid. Farrell vs. Harvey, 8 O. L. R. 415; 16 O. F. D. 474.

Court has no jurisdiction to finally adjudicate the merits of his claims, unless by his consent, and then only by a plenary suit.[8]

It would seem, therefore, that the logical way to proceed in case bankruptcy proceedings were had in the United States Court would be for the assignee to cease administering upon the estate, file his account in the Probate Court and such Court pass upon the question of his compensation and expenses, etc., and turn the remainder of the property over to the trustee in bankruptcy.[8a] This logical conclusion might be drawn further from the fact that it has been held by our State Courts,[9] as well as the United States Court,[10] that the bankrupt act does not of itself deprive the Probate Court of jurisdiction, and therefore where an assignment is pending or is made, the Probate Court may rightfully exercise jurisdiction until the jurisdiction of the United States Court is invoked. For, if the acts of the Probate Court are valid, then it must follow that all the acts of the assignee in the lawful and proper performance of his trust, are valid acts. This would include his right to do everything that is proper in the administration of his trust, as well as compensation for his services thus rendered. Some of the United States Courts in holding that he is not entitled to commission, go on the assumption that the act of making the assignment is *per se* a fraudulent interference with the workings of the bankrupt law. This to the writer seems to be an erroneous view. It has been held that if creditors in any way consent to the assignment in the Probate Court, that such creditors would be precluded from filing a petition in the United States Court.[11]

[8] Louisville Trust Co. vs. Comingor, 7 Am. B. Rep. 421 (1902).

[8a] In Wolfe vs. Union Stove, 17 N. P. 213, this was laid down as the proper way when a receiver had been appointed.

[9] Berk vs. Hirsch, 8 N. P. 459.

[10] *In re* Carder, 113 Fed. 139; *In re* Romanow, 92 Fed. 51.

[11] Armour vs. Brown, Minn. 1899; 79 N. W. Rep. 522.

See Randolph vs. Scruggs, 190 U. S. 533, as to allowance of claim of attorney for services rendered assignee. The court held that so far as the same was beneficial to the estate the same might be allowed as a preferred claim through the assignee.

In Summers vs. Abbott, 122 Fed. R. 36, a fair compensation for the assignee and his attorney was allowed.

If an assignment is made in the Probate Court, the only way in which proceedings can be conducted without danger of being interfered with by proceedings in bankruptcy in the United States Court, is for one of two things to be done; either sufficient creditors must assent to such assignment, so that there will not be sufficient remaining creditors to file a petition in bankruptcy, or a period of four months must be permitted to elapse between the date of the making of the deed of assignment and the proceedings in the Probate Court.

§ 1544. Jurisdiction of Probate Court.

It is provided by statute, that the Probate Court shall have exclusive jurisdiction to qualify assignees and appoint and qualify trustees and commissioners of insolvent debtors, and control their conduct and settle their accounts.[12]

It is also provided by another section,[13] that the Probate Court shall order payment of incumbrances and liens on any of the property sold or rights and credits collected. It is further provided that in case of sale of real estate, a civil action may be brought in either the Court of Common Pleas or Probate Court, making all persons in interest parties, that the Court may determine the rights of all. Notwithstanding these enactments of our Legislature and the further decisions of the Court, that the Probate Court is capable of receiving any jurisdiction that the Legislature might confer upon it, the proper rights of the Probate Court in assignments, have only been acquired step by step, by contested cases in the Supreme and Inferior Courts. It is now settled that the filing of a deed of assignment and the qualification of the assignee confer upon the Probate Court, jurisdiction of all the assigned property and that the jurisdic-

The better way would be to have the creditors assent to the proceedings in the Probate Court. If they file answers or take moneys from the assignee, they would be precluded from filing the petition. Armour vs. Brown, 79 N. W. 522.

Where the assignee claims the property as his own, the United States Court in a bankruptcy proceeding cannot determine such question. The method to be pursued would be for the trustee to bring action for whatever claims there are against the assignee in a separate proceeding, unless the assignee should by filing his claim with the trustee bring himself within the jurisdiction of such United States Court. Louisville Trust Co. vs. Court. Louisville Trust Co. vs. Comingore, 7 Am. B. Rep. 421, U. S. Sup. Ct., 1902.

In case where proceedings in bankruptcy have been brought and the assignee files his account and settles in the Probate Court, a question might arise as to what compensation he should be allowed. The same rule should here be followed as if the assignee had died and a new one was appointed.

See Loveland on Bankruptcy, 23 and 25.

[12] § 524 R. S. (§ 27). The assignee must qualify in the Probate Court of the county in which the assignor resides.

[13] §§ 11026-11052 G C. (§ 1618).

tion so conferred is exclusive in all respects in which it is adequate.[14]

So the rule seems to be now well settled that in reference to assignment matters in all cases in which the Probate Court has power to grant proper relief to all parties it then has exclusive jurisdiction and where it has not such power then the Court of Common Pleas may grant relief.[15]

The Probate Court cannot hear and determine an action brought by stockholders of an incorporation to set aside an assignment for the benefit of creditors, on the ground that such assignment was uncalled for.[16]

[14] Mercer vs. Cunningham, 53 O. S. 353, citing Sayler vs. Simpson, 45 O. S. 141; Havens vs. Horton, 53 O. S. 342.

[15] See next section. See § 18 *et seq.*

Before these decisions of the Supreme Court were made, the jurisdiction of the Probate Court came before the writer in the case of Wilson vs. Swigart, 31 Bull. 353, and it was there held that in all matters of assignment when the Probate Court has power to grant complete relief to all the parties, its jurisdiction is exclusive, unless expressly taken therefrom by statute; and that a mortgagee cannot maintain an action of foreclosure of his mortgage claim in the Court of Common Pleas, after the debtor and owner of the lands has made an assignment for the benefit of creditors. In this case the assignor was a resident of Clark county, owning real estate in Richland county. After he made an assignment, a mortgagor commenced proceedings in the Richland County Court and obtained a decree, the assignee likewise brought a civil action in the Probate Court of Clark county and asked for the sale of all the real estate of the assignor, including the land in Richland county. To this petition an answer was filed setting up the facts of the proceedings brought in Richland county. This Court held that the Richland County Court of Common Pleas had no jurisdiction. This decision was affirmed by the Common Pleas and Circuit Courts. It received considerable comment in the Bulletin, but was sustained by the case of Havens vs. Horton, 53 O. S. 342.

[16] Jones vs. Standard, etc., 18 C. C. 189; 10 C. D. 41; aff. 64 O. S. 147.

See Farwell vs. Findlay Dry Goods Co., 11 C. C. 100; 5 C. D. 303, where it was held that a suit to avoid an assignment as being a fraud of creditors will not lie in the Common Pleas.

The Probate Court has jurisdiction to act under the deed of assignment, not in opposition to it. Home Ass'n vs. Jones, 64 O. S. 147.

An assignee for creditors bringing suit to sell real estate, a mortgagee may, by cross-petition, obtain reformation of the mortgage, which described the lot as No. 328 instead of 338. The Probate Court has jurisdiction to grant the relief. Adlard vs. Stockstill, 5 N. P. 487; 5 Dec 493.

See Harrison vs. Ellis, 15 Dec. 501 (1905).

§ 1545. Jurisdiction of Court of Common Pleas.

As stated in the above section where the Probate Court has power to grant relief its jurisdiction is exclusive; where for any reason it has not such power, the Court of Common Pleas may exercise jurisdiction. Thus where the assignment did not include all the property covered by a mortgage, and where the mortgagor after making the mortgage platted the land into lots and made an addition to the city, and without the consent of the mortgagee disposed of some of the lots, it was held that a suit might be brought in the Court of Common Pleas to foreclose the mortgage and that in such case, the Probate Court could not grant adequate relief.[17]

It was held that the jurisdiction of the Court of Common Pleas of an action in the nature of a creditor's bill brought under the authority of sec. 11760 G. C., is not ousted because of the pendency in the Probate Court of a petition for an order to sell lands for the benefit of creditors. The reason being that the wife of the assignor was liable and that over her property the assignee had no jurisdiction.[18]

And where the owner of an estate for life and the owner of an estate in remainder in the same land, joined in a mortgage upon both estates and the remainderman afterward made an assignment of his estate for the benefit of creditors, it was held that the Probate Court had no jurisdiction to order a sale of the life estate upon the petition of the assignee.[19]

There seems to be some controversy whether proceedings to set aside an assignment may be brought in the Probate Court or should be brought in the Common Pleas. In Jones v. Standard, etc., Co.,[20] it was held that the Probate Court had no such jurisdiction and the law does not permit the Court to adjudicate upon its legality or its execution, or whether the party had the right to make the assignment or not. No inquiry is to be made by the Probate Judge in regard to it whatever. What further

[17] Robinson vs. Williams, 62 O. S. 401.

[18] Vandenbark vs. Mattingly, 62 O. S. 25.

[19] Brock vs. Gregg, 63 O. S. 289.

[20] 18 C. C. 189; 10 C. D. 41; affirmed 64 O. S. 147.

duties he has to perform is in regard to directing the assignee in the disposition of the property, and in the management of the trust. The above decision seems to be contrary to that of Fairwell vs. Findley, etc.[21]

The insolvency Court in Cincinnati has held that it has no jurisdiction to hear an attack upon the validity of an assignment based upon facts occurring prior to the filing of the deed,[22] and, therefore, such an action would be required to be brought in the Court of Common Pleas. But such insolvency Court may pass upon the question whether the deed has been properly executed.[23]

§ 1546. Assignee must give bond in Probate Court. Additional bond. "When a person, partnership, association, or corporation, makes an assignment to a trustee of property, money, rights or credits, in trust for the benefit of creditors, within ten days after the delivery of the assignment to him and before disposing of any property so assigned, such assignee shall appear before the probate judge of the county in which the assignor resided at the time of executing the assignment, produce the original assignment, or a copy of it, cause it to be filed in the probate court, and enter into a bond, payable to the state, in such sum and with such sureties as the court approves, conditioned for the faithful performance of his duties according to law. The court may require the assignee, or any trustee subsequently appointed, to execute an additional bond whenever the interests of the creditors of the assignor demand it." [R. S. § 6335.][24]

§ 1546a. Assignment; when to take effect. "Such assignment shall take effect only from the time of its delivery to the probate judge, and the exact time of such delivery shall be indorsed thereon by the judge, who immediately shall note the filing on the journal of the court. It may be delivered by the assignor to the judge either before or after its delivery to the assignee." [R. S. § 6335.][24*]

[21] 11 C. C. 100; 5 C. D. 303.

See Paddock vs. Daggett, 6 N. P. 385; 9 Dec. 371.

[22] Assignment of Consumers' Ice Co., 4 N. P. 172; 6 Dec. 132.

[23] *In re Roberg*, 7 N. P. 446; 5 Dec. 585.

See § 1620, Sale of real estate.

The tendency of the courts now is to hold that all matters relating to the property of an assignee may be worked out through the Probate Court, and unless there be a decision of a court of final resort to the contrary, it will be safe to say that the power and jurisdiction of the Probate Court will be upheld in all matters pertaining to the settlement of the assignment.

[24] §11092 G. C.

[24*] §11093 G. C.

As to form of deed, etc., see *In re* Jones, 5 N. P. 102; 7 Dec. 172.

It only applies to residents of Ohio, Wright vs. Youtsey, 5 N. P. 57.

§ 1547. Who may make.

The statute evidently contemplates that assignments shall not only be confined to individual persons, but that partnerships, associations or corporations may make an assignment. When confined to a person it may be said that any person who is capable of making other legal contract may make a valid assignment for the benefit of his creditors. The right to make such assignment results from the right of absolute ownership which every man claims over that which is his own.[25]

In some States it seems that the person making the assignment must be in embarrassed or failing circumstances. Under our statute an assignment would be valid even though the assignor was not in an embarrassed condition.[26]

While it is recognized that a partnership may make an assignment, some question has arisen about the rights of individual partners. In this respect our Supreme Court has held [27] "That one of the members of an insolvent firm can not, either before or after dissolution of the partnership, make a valid assignment of all its effects for the benefit of creditors, against the will of a copartner, or without his assent when he is present or accessible."

In another case it was held,[28] "That a managing partner entrusted with the sole charge of the business and effects of the firm, may in case of its insolvency, make a valid assignment of his property for the benefit of creditors without having obtained the consent of a copartner who is a non-resident of the State and absent therefrom. In such a case, the assent of the absent partner will be presumed."[29]

It is probable that a surviving partner could make an assignment.[30]

[25] It is said "every debtor has a legal right to assign property for the security of the debts due by him, and so far from such an act being reprehended by the law, it is justified and approved."

Story, J., in Brown vs. Minturn, 2 Gall. 557.

[26] Wambaugh vs. Insurance Co., 59 O. S. 228.

[27] Holland vs. Drake, 29 O. S. 441.

[28] Clafflin vs. Evans, 55 O. S. 183.

[29] See McAlpin Co. vs. Finsterwald, 57 O. S. 524.

[30] Of course an assignment of a partner of partnership property

An insolvent corporation may make an assignment by a *de facto* Board of Directors. Harrison vs. Ellis, 15 Dec. 501.

While it is recognized that a corporation may make a valid assignment, yet it is held that after it has become insolvent, and ceases to prosecute the objects for which it was created, that while it might make an assignment, it could not when in that condition give preference otherwise to any of its creditors.[31]

It is said that such an assignment may be made by the board of directors without the express authority or consent of the stockholders.[32] But directors cannot make an assignment after they have ceased to act in that capacity, and a deed so executed by them would be set aside in an action brought in the Court of Common Pleas.[33]

The proper method for a corporation to make an assignment would be for the board of directors to pass a resolution to that effect authorizing some member of their body to execute such power. If an unincorporated association desires to make an assignment, it could probably do so, through its board of trustees, although the liability of its members might be the same as partners. Corporations and partnerships are very often when in failing circumstances wound up by receivership in the Court of Common Pleas.

§ 1548. Who may be assignee.

No restriction is placed by the statute upon the assignor's choice of an asssignee; the person selected, however, should in all cases be a fit or suitable one. He may be a creditor of the assignor or a relative.[34] Of course he should be a person ca-

could not carry with it the individual property of the partners.

An assignment for creditors of all "property belonging to us," signed by persons individually, conveys the individual property of each, including a life estate, as well as the firm property. Perins' Assignment, 6 Dec. 347; 4 N. P. 262.

Paddock vs. Daggett, 9 Dec. 371; 6 N. P. 385.

[31] Rouse vs. Merchants' Bank, 46 O. S. 493.

[32] Henry Pro. Law, 586, citing Dana vs. Bank, etc., 5 W. & S. 223; De Camp vs. Alward, 52 Ind. 468.

[33] Home, etc., vs. Jones, 64 O. S. 147.

[34] Henry Pro. Law, 588, citing Jennings vs. Prentice, 39 Mich. 421; Guerin vs. Hunt, 6 Minn. 375; Caldwell vs. Williams, 1 Ind. 405; Dunlap vs. Bournonville, 26 Pa. St. 72; Caldwell vs. Rose (Ind.), Smith, 190; Frink vs. Buss, 45 N. H. 325; Schultz vs. Hoagland, 85 N. Y. 464.

pable of contracting. The Court may at any time remove an unsuitable person, and the statute gives to creditors a right to select an assignee or trustee.[35] No one is qualified to act until he accepts the appointment and gives bond as required by statute.[36]

§ 1549. What property may be assigned.

The statute says that " any property, money rights or credits may be transferred to the assignee for the benefit of creditors. These terms are broad enough to include almost every kind of property. The statute expressly reserves or excepts the debtor's homestead rights, etc.[37]

It would not include subsequent services of the assignor and likewise goods *in transitu* might be stopped before coming into possession of the assignee. Claims arising out of personal torts which do not survive the death of a person injured, would not pass. So goods sold upon condition might be retaken if the condition was broken. Property incumbered by liens would pass to the assignee and be sold, the lienor's interest being transferred to the fund.[38]

There can be no question, but that as a general rule, the statute means that every kind of property no matter of what nature or description which is then in a vested form, may be transferred to the assignee. The statute even contemplates that property situate in other States shall pass. Whatever would be assets in the hands of an administrator, would be such in the hands of an assignee.[39]

[35] §§ 11096 and 11098 G. C. (§§ 1564, 1562).

[36] § 1251 as to who may be trustee.

[37] § 11111 G. C. (§ 1598).

[38] It has recently been held that an assignee for the benefit of creditors by accepting the trust does not become the assignee of a lease belonging to his assignor, nor personally liable on the covenants of the lessee. Nor is he bound to accept the assignment of the lease if, in his opinion, it would be unprofitable to the creditors to do so. Wilder vs. McDonald, 63 O. S. 383.

[39] § 363 *et seq.* Articles bought on the installment plan without making any payment are not assets. Siebern's Assignment, 7 Dec. 280.

§ 1550. How made.

Assignments are usually made by deed. If it is intended to transfer real estate, the deed must be executed according to the law for transferring real estate. If only personal property it would not need to be executed with such formalities.[40] It is immaterial as to the form of such deed.[41]

The following may serve as a general form for a deed of assignment:

Deed of assignment.

Know all Men by these Presents:

That, whereas,....., of.....county, Ohio, being unable at this time to make payment of his debts in full, and being desirous that none of his just creditors should have preference over others of said creditors in payment of their several claims: Now, in consideration of the premises and of one dollar to.....in hand paid by..... ....., of....., the receipt whereof is hereby acknowledged, the said.....do....hereby grant, bargain, sell and convey, transfer and assign unto the said....., ..s....heirs and assigns forever, all.....property and estate of every kind, character and description whatsoever and wheresoever situate, be the same real, personal or mixed: This conveyance, assignment and delivery to the said..... being made in trust nevertheless for the benefit of.....creditors, to be by..h....administered under and according to the requirements and provisions of the assignment and insolvent laws of the State of Ohio, in such case made and provided, reserving unto.....however all exemptions, homesteads and other rights secured to.....in any way or manner whatsoever, under the said laws: To have and to hold the above granted property (subject to said exemptions) to the said..... ....., ..h....heirs, executors, administrators and successors in this trust forever, for the uses and purposes aforesaid.

It witness whereof.....ha..hereunto set.....hand this..... day of.....A. D. 190..

Executed in the presence of us:

..... } .....
..... } .....

The State of Ohio,.....County, ss.

Before the undersigned.....in and for said county, personally appeared....., the grantor..in the foregoing conveyance, and acknowledged the signing and sealing thereof to be..h....voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal this.....day of.....A. D. 190...

.....
.....

.....hereby accept the foregoing trust, and undertake..the discharge of the duties hereof, this.....day of.....A. D. 190...

.....
.....

[40] Kingman vs. Loyer, 40 O. S. 109; Pfieffer vs. Cook, 11 Bull. 320; 12 Bull. 53.

[41] Lee vs. Hennick, 52 O. S. 177; Wambaugh vs. Insurance Co., 59 O. S. 242.

§ 1551. Filing in Probate Court, etc.

The deed must be filed in the Probate Court in which the assignor resides and a delivery of the same to the Probate Judge is such a delivery as will immediately pass the title to the property to the assignee, although the assignee may not acquire actual possession until some time thereafter. Such assignment takes effect from the time that it is delivered to the Probate Judge, and it is the duty of the Probate Judge to endorse on such deed the exact time of its delivery, and he shall also note the filing on the journal of his Court.[42]

In one case it was held that where a person resided in another State, when he made out a deed of assignment and mailed it to the assignee in this State, the assignment was complete and passed the title to the assignee from the time the deed was placed in the postoffice.[43]

§ 1552. Filing deed in recorder's office.

As a general rule, it may be said that it is not necessary to file the deed of assignment in the recorder's office. Yet our Supreme Court has held that if the deed of assignment embraces land situate in a county other than that of the assignor's residence, in order to be effective as against *bona fide* purchasers, it must be recorded in the county in which the land is situate; and if a *bona fide* purchaser duly enters his deed for record in the office of the county in which the land is situate, as against the assignee, he will take a good title.[44] It therefore becomes highly important that the deed of assignment should be filed in the office of the recorder in the county in which the land is situate where the assignor does not reside in such county. In order to show a complete chain of title, the deed ought also to be filed in the county of the residence of the assignor, provided he has any real estate therein.

[42] Clafflin Co. vs. Evans, 55 O. S. 193; Betz vs. Snyder, 48 O. S. 492.

[43] Johnson vs. Sharp, 31 O. S. 611.

[44] Eggleston vs. Harrison, 61 O. S. 397.

§ 1553. Qualification of assignee.

Within ten days after the delivery of the deed of assignment to the Probate Judge, and before the assignee disposes of any property, it is the duty of the assignee to appear in Court and give bond. No doubt the assignee may and should take possession of the property immediately upon the filing of the deed; and for various reasons, he ought at as early a date as can conveniently be done, appear in Court and qualify as the statute requires. It is common practice in such cases for the assignee to appear and file an application for appointment. This may be in the following form: [45]

Application and statement for appointment of assignee.

Probate Court,.....County, Ohio.

In the matter of
The Assignment of
.....
in trust for the benefit of..h....
creditors.
No.....

.....of.....county, Ohio, having accepted the trust as assignee.., submit..the following statement of the estate and property, of said.....so assigned.

The amount of personal estate will be about - - $.....
And the real estate about - - - - - - - $.....
.....offer in bond the sum of - - - - - - $.....
with....., ...and....., all freeholders of this county, as sureties.

.....
.....

The State of Ohio,.....County, ss.
....., being duly sworn, says that the statements in the foregoing application are true as he verily believes.

.....
.....

Sworn to before me and signed in my presence this.....day of.....
.....A. D. 190...

....., Probate Judge.

APPLICATION FOR APPOINTMENT OF APPRAISERS.

To the Probate Court of.....County, Ohio:

The undersigned make..application for the appointment of appraisers of the property and assets of....., assignor.., and suggest..the names of....., ...and.....as suitable, disinterested persons for such appraisers.

.....
.....

[45] Acceptance by assignee is presumed. Fleming vs. Stiefel, 9 Bull. 350.

Renounced after acceptance must be by order of Court. Gaylord vs. Cramer & Watson, 1 H. 369.

§ 1554. Bond, etc.

The bond must be payable to the State, and in such a sum and with such sureties as shall be approved by the Court. What has been heretofore said in reference to the bonds of administrators and executors would apply as to the bond of an assignee.[46]

The statute gives the sureties a right to be released on such bond,[47] and the practice in cases of release of sureties on administrator's bond might be followed.[48] And the statute gives to the Probate Court a right to require an additional bond whenever the interest of the estate demand the same.[49] The assignee might give a bond of indemnity if the sureties so require.[50] The following may serve as a form for bond:

Assignee's bond.

Know all Men by these Presents:

That we.....
are held and firmly bound unto the State of Ohio in the sum of..... dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors and administrators.

Signed by us and dated at....., Ohio, this.....day of .....A. D. 190..

The condition of the above obligation is such, that whereas the above bound..... has been appointed assignee in trust for the benefit of the creditors of.....of.....county, State of Ohio, and has accepted said trust, and.....approved as such assignee..by the Probate Court of said county.

Now, if the said.....shall faithfully perform..h....duties as such assignee..according to law, then this obligation to be void, otherwise to remain in full force.

Executed in presence of

.....)
.....)
.....)

This bond approved in open Court, this.....day of.....190..
....., Probate Judge.

The assignee having appeared in Court and filed the proper application and the proper bond, the Court should make an entry of such fact. There may be several entries required in the Probate Court previous to this. When the deed is filed in the

[46] See § 233 *et seq.* as to execution and form of bond.

[47] § 11098 G. C., § 1562.

[48] See § 243 *et seq.*

[49] See § 250 *et seq.* as to liability of sureties.

[50] See § 253.

Probate Court, an entry should be made of such fact, which may be as follows:

§ 1555. Order of appointment.

(Title.)

On this.....day of....., 190.., at.....o'clock ...M., came.....and filed in this Court a deed of assignment to him from one A. B. in trust for the benefit of his creditors (if at the same time the assignee files his application and his bond, the entry may proceed in the following manner), and the said....., having filed his application herein and accepted said trust and filed his bond in the sum of.....dollars, conditioned according to law, with .....and.....sureties, which bond is approved by the Court. It is therefore by the Court ordered that said..... be and is hereby qualified as assignee in trust for the benefit of creditors for the said A. B.; and.....and.....and....., three suitable disinterested persons, are appointed appraisers of the property assigned.[51]

§ 1556. Effect of order and issue of letters.

The order of the Probate Court qualifying the assignee and accepting bond, like every other order made by the Probate Court coming properly within its jurisdiction, cannot be attacked or set aside in a collateral proceeding. The following may be used for a form of letters:[52]

Letters of Authority to assignee.

The State of Ohio,
.....County, ss.
Probate Court.

To all Whom these Presents shall Come, Greeting:

Know ye, That whereas,....., of.....county, Ohio, ha....made an assignment of..h....real and personal estate, in trust for the benefit of..h....creditors.

And, whereas.....ha....been duly appointed assignee..of said.....and ha....accepted said trust and given bond as required by law, in said Probate Court, and in all things complied with the provisions of the statute in that behalf.

Now, therefore, the said.....hereby authorized and empowered as such assignee..to administer said trust according to law, and to do and perform all things necessary and proper in the premises, to the just and faithful administration thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Probate Court at....., Ohio, this.....day of .....A. D. 190..

....., Probate Judge.

[51] If the bond is not filed at the time the deed of assignment, the above should be made in a separate entry in accordance with the facts.

[52] § 90.

The State of Ohio,.....County, ss.
I,....., Judge and ex-officio Clerk of the Probate Court within and for said county, do hereby certify that the foregoing is a true and correct copy of the original letters of authority, granted in the premises by said Court, and remaining on file in my office.
In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court, at....., Ohio, this.....day of.....
.....A. D. 190...

.....
Judge and ex-officio Clerk of the Probate Court.

§ 1557. Notice of appointment.

Immediately upon the issuance of letters, the statute makes it the duty of the assignee to give notice of such appointment. As was said when speaking of this matter of giving notice in the administration of estates of deceased persons,[53] the object and purpose of this notice is probably not only to give notice to creditors, but to serve as a proclamation or notice generally which will give the Court jurisdiction to proceed in the assignment. The statute and form of notice relating thereto is as follows:

"Each assignee, or trustee appointed on the failure of the assignee to qualify within thirty days after giving bond, must give notice of his appointment in some newspaper of general circulation in the county, for three successive weeks." [R. S. § 6346.][54]

Notice is hereby given that the undersigned has been duly appointed and qualified as assignee in trust (or trustee) for the benefit of the creditors of A. B., of ..... county, Ohio, by the Probate Court of ..... county, Ohio.

A. B., Assignee (or trustee), etc.
Office, ...

[53] § 534 *et seq.*

[54] § 11108 G. C.

CHAPTER LXXXV.

RESIGNATION. REMOVAL OF ASSIGNEE, ETC.

§ 1558 Introductory.
§ 1559 On failure to file assignment or give bond, Court to appoint a trustee.
§ 1560 Comments. Removal of assignee.
§ 1561 Resignation of assignee. Appointment of trustee. Filling vacancy. Additional trustees.
§ 1562 Removal of assignee, etc., by the Court. Effect of new bond.
§ 1562a Application for release of surety, etc.
§ 1562b Application by trustee for release of surety.
§ 1562c Removal for failure to give new bond.
§ 1563 Procedure, etc.
§ 1564 Election of trustee or trustees by creditors.
§ 1564a Proceedings.
§ 1565 Application for election of trustee.
§ 1566 Form of petition for election of trustee.
§ 1567 Entry ordering citation, etc.
§ 1568 Form of citation, service, etc.
§ 1569 Hearing, etc.
§ 1570 Election by creditors, etc.
§ 1571 Entry. Form, etc.
§ 1572 Trustee appointed to give bond. His rights on giving bond.
§ 1573 Settlement on resignation, removal or death. How enforced.
§ 1574 Appointment and qualification of trustee to operate as a conveyance.
§ 1575 Appeal and Error.
§ 1576 Unsettled assignments heretofore made. Citation of assignee to give bail.
§ 1577 Raising an assignment.

§ 1558. Introductory.

When the person designated in the deed of assignment is removed and a successor is appointed, such successor is designated as a trustee instead of retaining the name of assignee. The statute relating to resignation and removal of assignees, excepting the section which permits creditors to petition the Court for a removal, are very analogous to those providing for removal and resignation of administrators and executors.[55] For a full discussion of the powers of the Court, etc., reference is made thereto. It will be observed in the subsequent sections that a trustee may be appointed, first, where the assignee fails to give bond within ten days; second, where the assignee resigns or dies; third, where the assignee is removed for cause;

[55] § 208 *et seq.*

See § 1300 for removal of trustee and § 1358 for removal of guardian.

fourth, where he is ordered to give a new bond and fails so to do; fifth, where the creditors petition for his removal; and sixth, where the creditors are paid in full. These will be considered in their order.

§ 1559. **On failure to file assignment or give bond, Court to appoint a trustee.** "If, for ten days after the execution of the assignment, the original or a copy of it, be not filed in the probate court, or if the assignee named thereon fails for that time to give bond, on application of the assignor, or any of his creditors, the court shall make an order removing such assignee and appoint a trustee in his place; but if more than one assignee be named in the assignment, and some so fail to give bond, the court may permit the assignee or assignees complying with the two next preceding sections to qualify and enter upon the discharge of the duties of the trust." [R. S. § 6336.][56]

§ 1560. **Comments. Removal of assignee.**

An inference might be gathered from the above section, that the court is not to act thereon except upon application of the assignor or of one of his creditors. But I have no doubt that the court may act of its own motion. While the assignee may be removed if he does not qualify within ten days, yet he may legally qualify and give bond at any time even though it be after the ten days' limit. While an assignee can not dispose of property until he has given bond, yet the title vests in him to the property from the time that the deed is delivered to the Probate Court, and for that reason it requires an order of the court to remove him, even though he has not accepted or has failed to file the required bond; and the usual practice in such cases is for the assignor, or some creditor, to make an application for that purpose. This application need be very brief and simply set up the fact that ten days has elapsed and the assignee has not given the required bond. The statute does not require any notice to be given, but it seems that it would be proper to give notice and thus afford the assignee an opportunity to give the required bond. If he does not give the bond the entry given in a subsequent section for removal of an assignee upon election of creditors might easily be adopted.[57]

§ 1561. **Resignation of assignee. Appointment of trustee. Filling vacancy. Additional trustees.** "An assignee, or trustee appointed by the court, who has qualified, with its consent, may resign his trust. In case of the death, removal, or resignation of a sole assignee or trustee, the court shall appoint one or more trustees in his place; but if there be one or more

[56] § 11094 G. C.

[57] See § 1571.

assignees or trustees who have not died, resigned, or been removed, the court either may fill the vacancy thus caused, or allow the remaining assignee or assignees, trustee or trustees, to execute the trust, as it deems best for the trust. At any time, on application of a majority of the creditors in amount, the court may appoint an additional trustee." [R. S. § 6337.][58]

§ 1562. **Removal of assignee, etc., by the Court. Effect of new bond.** "The court may remove an assignee or trustee, specifying in the order the cause of removal. [R. S. § 6339; 107 v. 421.][59]

§ 1562a. **Application for release of surety, etc.** A surety of an assignee or trustee, or the executor or an administrator of a surety, at any time may make application to the proper probate court to be released from the bond of such assignee or trustee, by filing his written request therefor with the judge of such court, and giving at least five days notice, in writing, to such assignee or trustee. If, upon the hearing, the court is of opinion that there is good reason therefor, it shall release such surety. The death of a surety always shall be good cause. [107 v. 421.][59*]

§ 1562b. **Application by trustee for release of surety.** An assignee or trustee at any time may make application to the proper probate court for the release of his sureties, by filing his written request therefor with the judge of such court, and giving at least five days notice, in writing, to such sureties. If, upon the hearing, the court is of opinion that there is good reason to release said sureties, it shall order said assignee or trustee to file an account, as provided by law, and said sureties shall be released upon said assignee or trustee filing a new bond and its approval by the court. [107 v. 421.][59†]

§ 1562c. **Removal for failure to give new bond.** If such assignee or trustee fails to give new bond, as by the court directed, he must be removed and his letters superceded. Such original surety or sureties shall not be released until the assignee or trustee so give bond but the original surety or sureties shall be liable for said assignee or trustee's acts only from the time of executing the original bond to the filing and approval by the court of the new bond. [107 v. 421.][59‡]

§ 1563. Procedure, etc.

The above section does not state for what cause the Court may remove an assignee, but I have no doubt any of the causes which would be sufficient to remove an administrator would be sufficient to remove an assignee,[60] or trustee,[61] or guardian.[62]

[58] § 11095 G. C.
The above section is very much similar to § 10627 G. C. (§ 210) and § 10629 G. C. (§ 213) and reference will be had to previous chapters for the method of procedure, etc.

[59] § 11098 G. C.

[59*] § 11098-1 G. C.

[59†] § 11098-2 G. C.

[59‡] § 11098-3 G. C.

[60] See § 220 *et seq.*

[61] § 1256.

[62] § 1354 *et seq.*
A trustee who is not free from bias, etc., will be removed. Com-

As to the requirement of a new bond, the same procedure could be followed as is required when giving a new bond for executors and administrators.[63] Before the Court should for any cause appoint a successor to an assignee or trustee, there should be filed by some interested person an application for such removal. This application should set forth the cause, and the form of procedure used in removing an administrator can easily be adopted and followed for the removal of an assignee.[64]

§ 1564. **Election of trustee or trustees by creditors.** "When a creditor or creditors of the assignor file a complaint alleging that the assignee or assignees named in the deed of assignment, or the trustee or trustees appointed by the court are not suitable persons to administer the trust, or that their administration thereof will not be for the best interests of the creditors and assignor, the court thereupon shall issue a citation to such assignee or assignees, or trustee or trustees, and to the assignor if resident within the state, to appear before it at a time to be named therein. If, on the hearing, it be made to appear to the court that such complaint is true, and a petition is filed with the court, signed by creditors of the assignor, who own not less than one thousand dollars of debts against him, and their validity is shown by the schedule of debts on file or otherwise established to its satisfaction, praying for permission to elect a trustee or trustees, the court by its order shall fix a time for such election and cause notices to be sent by mail or otherwise to each creditor of the assignor, specifying a time when the creditors shall meet at the court room for the election of a trustee or trustees." [R. S. § 6338.][65]

§ 1564a. **Proceedings.** "At the time named in such order, if creditors representing fifty per cent or more of the debts of the assignor are present or represented by attorney, they may proceed to the election of a trustee or trustees, a majority in value of all the debts so represented at such meeting being necessary to a choice. The proceedings of the meeting showing what creditors were present, the amount of the debts held by them respectively, and who cast their several votes, must be made out and signed by the president and secretary of the meeting and filed with the court. If the court approves the

mercial Bank *In re*, 4 N. P. (N.S.) 99; 6 Dec. 105.

Assignee has no such title as will entitle him to litigate question of his removal. Campbell vs. Minor, 3 N. P. (N.S.) 138; 4 Dec. 96.

See Phillips vs. Ross, 36 O. S. 458; *In re* Jones, 5 N. P. (N.S.) 112; 8 Dec. 123; State vs. Millard, 15 O. C. C. 460; 8 C. D. 612.

63 See § 243 *et seq.*

64 See § 214 *et seq.*

choice, and the trustee or trustees so elected appear within ten days thereafter and give bond, it shall appoint him or them as such trustee or trustees, and remove the preceding assignee or trustee. The summary determination of the court as to who are creditors and the amount of their claims in the next preceding section provided, shall have no effect as to the validity of such claims, except for the purpose of such election." [R. S. § 6338.][65*]

§ 1565. Application for election of trustee.

There may be some question under the above section as to whether it confers an absolute right on the creditors to have an assignee removed, or whether the matter rests in the discretion of the Court. Several things unquestionably rest in the discretion of the Court. In the first place, the Court must be satisfied that the assignee is an unsuitable person or that his administration of the trust will not result to the best interest of the estate; and secondly, the Court must be satisfied that the choice made by the creditors is a proper one. Undoubtedly the Court must entertain the application, and usually, if made and proceeded with as the law requires, the Court will obey the request of the creditors. The application must set out several facts. First, it must be shown that the assignee is not a suitable person to administer the trust; or, if suitable, that his administration will not be to the best interest of the creditors and the assignor. The petition must also show that the creditors filing the same own at least one thousand dollars of debts against the assignor. The petition ought to be sworn to, as upon its statements the Court will proceed and issue a citation for the assignor and assignee, etc. The application may be in the following form:

§ 1566. Form of petition for election of trustee.

(*Title.*)

The undersigned respectfully represent that they are creditors of A. B. who has made an assignment in trust for the benefit of his creditors to C. D., which deed of assignment was filed in this Court. They further allege that the said C. D. is not a suitable person to administer said trust in this, to-wit: (Here set out facts) and that the administration thereon by the

65 § 11096 G. C.

65* § 11097 G. C. Petition is used in sense of motion. Rahe *In re,* 12 Dec. 594.

said C. D. will not be for the best interest of the creditors of the said A. B., for the reason following, to-wit: (Here insert reason.)

The said undersigned further allege that they are the owners of not less than one thousand dollars of debts against said assignor as will appear in the schedule of the debts in said assignment. Wherefore the undersigned pray that their said petition be set for hearing and that a citation thereof shall issue to the assignee and to the assignor to appear before this Court at a time to be designated by the Court.

And they further pray for permission to elect a trustee at such a time as the Court may indicate, and as is provided by law.

.....

The State of Ohio,.....County, ss.

....., being first duly sworn, says that he is one of the creditors joining in the petition, and that the allegations therein are true, as he verily believes.

Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

§ 1567. Entry ordering citation, etc.

Upon the filing of such petition, the Court should fix the time for hearing the same and order a citation to be issued to the assignor and the assignee, which entry may be in the following form:

(*Title.*)

This day came E. F. and other creditors of A. B., representing one thousand dollars of debts against such assignor as appears in the schedule of indebtedness on file in this office, and filed their petition herein alleging that the said C. D. is not a suitable person to administer said trust, and that his administration thereof will not be for the best interest of said estate, and praying for permission to elect a trustee to execute said trust instead of said C. D., assignee.

It is therefore ordered that said cause be set for hearing on the..... day of....., at.....o'clock, 190.., and that a citation be issued to A. B., assignor, and C. D., assignee, ordering them to appear in Court at said time and show cause why said permission should not be granted.

§ 1568. Form of citation, service, etc.

There is no particular time stated in the statute within which this citation should be served or how long before the time of hearing. A reasonable time under all the circumstances should be given. The form of notice providing for the removal of administrators might be used.[66]

§ 1569. Hearing, etc.

Upon the day set for hearing, the Court being satisfied that the petitioners are the owners of debts of the amount of one

[66] See § 219. See also § 1003.

thousand dollars, as shown by the schedule or otherwise, and being satisfied that the assignee is not a suitable person to administer the trust or that his administration will not be for the best interest of the creditors, and being further satisfied that the assignee and assignor have both been notified as required by law, the Court should make a finding of that fact and order and fix a time for election of a trustee. The entry therefor may be in the following form:

(*Title.*)

This day this matter came on to be heard upon the petition of E. F. and other creditors of A. B., asking for permission to elect a trustee instead of C. D., the assignee; and it appearing to the Court that A. B., the assignor, and C. D., the assignee, have both been notified of the time and hearing of said petition, as required by law; and it further appearing to the Court that said C. D. is an unsuitable person to administer said trust, and that his administration will not be for the best interest of the reditors of the assignor and such assignees, it is therefore ordered by the Court that the creditors of said assignor shall be granted permission to elect a trustee to execute said trust instead of said C. D., the assignee thereof.

It is therefore ordered by the Court that said election be held in this court room for the election of a trustee, on the.....day of..... 190.., at.....o'clock; and that notice thereof shall be given by (here insert person or officer who is to give notice) to all the creditors of such assignor of the time of hearing said election. (Here state in what manner notice shall be given. The statute permits such notice to be served by mail, if the Court so order.)

FORM OF NOTICE.

To.....

You are hereby notified that by order of the Probate Court of..... .....county, in the matter of the assignment of A. B. to C. D., in trust for the benefit of his creditors, that permission has been granted to the creditors of such assignor to elect a trustee, and that the said creditors will meet at this court room in the city of....., in said county on the.....day of....., 190.., at.....o'clock, for the purpose of electing a trustee to execute said trust.

§ 1570. Election by creditors, etc.

At the time mentioned in the order, if creditors representing fifty per cent. or more of the debts of the assignor are present, or represented by an attorney, they may proceed to the election of a trustee — a majority in value of all the debts represented shall be necessary to a choice. It would be proper for such a meeting to organize and elect a chairman and secretary and proceed to take a vote. Their minutes should show the creditors present and amount of the claims of each, and by whom repre-

sented, and should be signed by the president and secretary and filed with the Court. Then, if the Court approves the choice, an entry should be made of such fact, and if the person chosen appears and gives bond within ten days from the time of such meeting, then the Court should remove the former assignee and appoint the person so selected. If the person so chosen files his bond immediately, this may be in one entry, otherwise it should be in two entries. The first approving the choice, and ordering the person so chosen to be notified, and the second making the appointment. The following entry is intended where the person who is chosen appears at once and files his bond:

§ 1571. Entry, form, etc.

(*Title.*)

This day this matter came on to be further heard upon the petition heretofore filed herein, and the order made electing a trustee, and it appearing to the Court that due and proper notice has been given to all the creditors of the assignor, as required by law and the former order of the Court, and that in pursuance to said notice the creditors of the assignor had met in this Court as required by the former order, and that there was then present creditors representing more than fifty per cent. of the debts of said assignor, and that at said meeting G. H. was duly elected a trustee by persons representing a majority in value of all the debts presented at said meeting; and that the proceedings of said meeting show what creditors were present and the amount of debts held by them respectively, which has been filed in this Court. And it appearing to the Court that said G. H. is a suitable person to act as trustee in said matter, the choice of said creditors is hereby approved by the Court.

It is therefore ordered that C. D., the assignee, be and is hereby removed from his said trust, and he is ordered to file forthwith in this Court, a full and complete account of his proceedings.

It is further ordered that said G. H. be appointed trustee to execute said trust, in place of said assignee, and that he appear and file bond in the sum of.....dollars.

Thereupon came the said G. H. in Court and accepted said appointment and filed his bond in the sum of.....dollars, conditioned according to law, with.....and.....sureties thereon, which bond is approved by the Court; and it is further ordered that letters showing such appointment be issued to said G. H.[67]

§ 1572. Trustee appointed, to give bond. His rights on giving bond. "When the probate court appoints a trustee whether in place of an assignee, or of a trustee before appointed, such trustee, within ten days after his appointment shall give bond as aforesaid, or, failing so to do, he may be considered as declining the appointment, and the place be filled. When a trustee has given bond, he will succeed to all the rights,

[67] The statute does not provide for a second election of a trustee. Brigel vs. Starbuck, 4 Bull. 83.

powers, and privileges of the preceding assignee or trustee. The court may make and enforce all orders necessary to put him into possession of all property, moneys, books, papers, evidences of title, and other effects covered by the assignment, or in any way belonging to the trust. By suit in the court of common pleas, or otherwise, such trustee may compel the delivery to him of all such property, moneys, books, papers, evidences of title, and other effects." [R. S. § 6340.][68]

When the Probate Court appoints or approves the choice of the creditors for a trustee, then, if such trustee does not qualify within ten days, he is proceeded against the same as the original assignee and removed. Bond is required, and in all respects such trustee proceeds with the same powers as an assignee.

§ 1573. **Settlement on resignation, removal, or death. How enforced.** "On the resignation or removal of an assignee or trustee, appointed by the court, he forthwith shall file and settle his account, and on the death of such assignee or trustee, his legal representative forthwith must file and settle such account. Immediately after the settlement, the assignee or trustee, or his legal representative, shall pay over to his successor all moneys found due from him to the trust. On failure so to do, or to file and settle such account, or deliver over to his successor all property, moneys, books, evidences of title, papers, and other effects belonging to the trust, such successor may proceed against such assignee, or trustee, by action in the common pleas court or otherwise, on his bond or his legal representative and the sureties in such bond." [R. S. § 6341.][69]

While the assignee when removed at once loses all power over the assigned estate, yet the Court does not lose jurisdiction over him until he has filed his account and the Court has passed thereon.[69*] It seems as if no action can be brought in the Pro-

[68] § 11099 G. C.

No doubt the Court may make whatever order it deems sufficient or proper in reference to putting the trustee into possession of the property belonging to the assignee. But the question as to the manner in which such order may be enforced is not so clear, possibly the assignee could be proceeded against in contempt. But without exception the trustee could institute an action in replevin and recover such property. After the account is filed, then suit could be brought on the bond.

[69] § 11100 G. C.

The successor of an assignee takes his place in a pending action. Greer vs. Howard, 41 O. S. 597.

bate Court enforcing the payment of money. Such an action must be brought in a Court of general jurisdiction. The payment of money cannot be enforced by contempt proceedings.[70]

§ 1574. Appointment and qualification of trustee to operate as a conveyance. "When the court appoints a trustee to act in place of the assignee of the debtor, the appointment and qualification of the trustee so appointed shall operate as a conveyance to him of all the property originally assigned to such assignee." [R. S. § 6342.][71]

§ 1575. Appeal and error.

In a case passed upon by the Supreme Court some years ago, it was held that there was no right of appeal from an order made by the Probate Court in removing an assignee or trustee, the Court holding that the statute did not apply to such an order.[72] The Court intimated that such order was not definitive or final in its character, and holding that the same rule should be applied as is applied to the removal of an executor, administrator or guardian. It is now well settled that an order of the Court removing an administrator is not reviewable in proceedings in error,[73] and it was formerly held that an order of the Probate Court removing an assignee is not a final order affecting a substantial right of an assignee, and error cannot be predicated thereon.[74]

§ 1576. Unsettled assignments heretofore made. Citation of assignee to give bail. "In all cases of assignments heretofore made, where no final settlement and distribution has been made,

69* Garver vs. Tissinger, 46 O. S. 56.

70 *In re* Rowekamp, 27 Bull. 289; *Ex parte* French, 4 Gaz. 209.

71 § 11101 G. C.

Upon the assignees removal and appointment of a trustee title to all the property rests in the trustee. Wambaugh vs. Insurance Co., 59 O. S. 228.

72 Brigel vs. Starbuck, 34 O. S. 280.

Appeal is now also allowed. § 11205 G. C. (§ 39).

73 § 232.

Statute changed by legislature of 1902, and now allows error. § 11207 G. C. (§ 52).

74 *In re* Jones, 5 N. P. 102; Campbell vs. Minor, 3 N. P. 138; 4 Dec. 96.

See Wambaugh vs. Ins. Co., 59 O. S. 228.

When assignee fails to pay, suit may be on bond. Phillips vs. Ross, 36 O. S. 458; Voss vs. Loomis, 1 C. D. 12; 1 O. C. C. 21; State vs. Goebel, 1 C. D. 307; 1 O. C. C. 550; affirmed 22 Bull. 475; Walsh vs. Miller, 51 O. S. 486.

the Probate Judge of the proper county shall have the power, on the application of any creditor of the assignor, to issue a citation against such assignee, requiring him to appear before such Probate Judge, on the day named in such citation, to show cause why he should not give bail for the execution of his trust according to the provisions of this chapter; and such Probate Judge, on good cause shown, may require such assignee to give bail according to the provisions of this chapter; and in case such assignee shall fail to appear as required by such citation, or shall fail to give bail within the time ordered by such Probate Judge, such Probate Judge shall remove him and appoint another trustee, and after the giving bail by any assignee, or trustee so appointed, as provided in this section, the same proceeding shall be had as provided in this chapter in case of assignments hereafter made." [56 v. 231, § 21.][75]

§ 1577. Raising an assignment.

There is another cause for the removal of an assignee or trustee, and that is where the creditors have all been paid in full and an application is made for the termination of the trust. In such cases, there being no longer any reason for the assignment, the assignee should be removed and ordered to reconvey to the assignor the property remaining in his hands. This proceeding is generally known as "raising an assignment." In such cases it is usual for the assignor to make an application in the Probate Court for that purpose. This application should set forth the fact that all the creditors have been paid in full, and, as an evidence of such fact, there should be an exhibit attached to the application which should contain a receipt from all the creditors, or a consent that the assignment be raised. This exhibit might also contain a complete account of the assignee in his administration of the trust up to such time. The application therefor may be in the following form:

(Title.)

Now comes C. D. and represents that he is the assignor herein and that he made an assignment to A. B. of all his property and effects for the benefit of his creditors, that since said assignment all of his creditors have been paid in full and there are no claims outstanding against him; and he hereby attaches (which is marked Exhibit A.) a complete statement

[75] § 6345 R. S. This section is marked executed by the codifier (1911).

of said A. B., his assignee, of the administration of his said trust, and which exhibit also shows that the payment in full of all claims presented by his creditors.

Wherefore he asks the Court to raise said assignment and order a reconveyance to himself.

Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

The following may serve as an entry:

(*Title.*)

This day this cause came on to be heard upon the application of C. D. to raise the assignment herein upon the proofs and exhibits. The Court being satisfied that all creditors of said C. D. have been paid in full (or have consented to the raising of said assignment) and no reason appearing why the assignment should not be raised, it is ordered that the personal property transferred to said A. B. in said assignment, and yet undisposed of, be delivered to the said assignor and that the real estate of said assignor so held by said assignee, yet undisposed of, be reconveyed by said assignee to said assignor by deed duly executed, and upon his failure to do so, this entry shall operate as a conveyance of the same; and that said assignor shall satisfy the assignee and pay to him the sum of..... dollars for his services, and the sum of.....dollars to his attorney for services rendered in this assignment; and thereupon said assignment is raised and said assignee is discharged.[76]

[76] Although there is no special provision made in the statutes to that effect, yet under the decision of the Supreme Court in Garver vs. Tissinger, 46 O. S. 56, it is competent for the creditors and for the assignee and assignor all agreeing, in cases of assignment for the benefit of creditors under the statutes, to consent to the discharge of the assignee and to the closing up of the affairs of the estate, and where all creditors except four consent that the assignment be closed up, and it appears that these four creditors have failed to present their claims for more than six months after due publication of the notice to creditors to present their claims, the fact that such creditors do not appear, and the want of their consent to the closing up of the assignment, will not prevent this being done and the assignee being ordered to pay over to the assignor the balance of the money in his hands belonging to such estate. Backus & Sons Co. vs. Backus, 18 C. C. 341; 9 C. D. 789.

Where the Probate Court makes an order discharging an assignee for the benefit of creditors, at his own request and vacating the assignment, such order is binding on such assignee and on all parties having notice of such application until set aside by proper proceeding or reversed on error. State vs. Millard, 15 C. C. 460; 8 C. D. 672.

See § 1661, Report of payment.

The Probate Court has no jurisdiction to raise an assignment unless all the parties in interest, including the assignor, assignee and creditors, consent. But a Court of Equity may, when the interest of all parties are preserved. As where a bond is given to pay all creditors in full. Harrison vs. Ellis, 15 Dec. 501.

CHAPTER LXXXVI.

DUTY OF ASSIGNEE AS TO CARE AND MANAGEMENT OF PROPERTY.

§ 1578 Introductory.
§ 1579 When transfer or assignment void.
§ 1579a To whom act applies.
§ 1579aa When purchaser or assignee becomes trustee.
§ 1579b Receiver; appointment of.
§ 1579c Knowledge of fraudulent intent material; mortgage, provisions as to.
§ 1580 How suit brought.
§ 1580a When creditor may bring suit.
§ 1581 For what cause action may be brought.
§ 1582 When sale conclusively presumed to be fraudulent.
§ 1583 Who may bring the action.
§ 1584 Jurisdiction.
§ 1585 Examination of assignor, etc. Orders to prevent fraudulent transfer.
§ 1585a Order to prevent fraudulent transfer.
§ 1586 Procedure, etc.
§ 1587 Court, on application of three-fourths of creditors, may order business of assignor carried on by assignee.
§ 1588 Liability of assignee.
§ 1589 Application.
§ 1590 Form of application, etc.
§ 1591 Assignee may complete sales of real estate, etc.
§ 1592 Property taken possession of by another under lien or execution.

§ 1578. Introductory.

It is the first duty of an assignee to ascertain and get possession of all the property assigned, and to accomplish this, he is possessed of whatever rights and remedies the law affords to other trustees or individuals. In reference to the care and management of the property, his duties are very much similar to those of an administrator, except as to real estate, and then the assignee occupies a similar position as an executor directed to sell the same, and reference will be had to the chapter thereon, under the administration of estates.[1] It is not only the duty of the assignee to get possession of all the property assigned, but may under certain circumstances be his duty to recover property that has been conveyed away, provided the same has been sold in violation of the succeeding sections.

[1] See § 506 *et seq.*

The assignee is entitled to possession of real estate in possession of assignor, and held under a secret arrangement that the title is to remain in the seller, and in such cases the fund derived from the sale of same belongs to the assignee for the benefit of general creditors. *In re* Cook, 6 N. P. (N.S.) 298; 18 Dec. 541.

Where the assignee permitted the assignor to retain possession of the premises, it was held that he was not chargeable with failure to collect rent. *In re* McCray, 22 Dec. 697.

§ 1579. **When transfer or assignment void.** Sec. 11102. The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the sellers, transferrer or assignor, shall be void as against the creditors of the seller, transferrer, assignor, unless the purchaser, transferee or assignee demands and receives from the seller, transferrer or assignor a written list of names and addresses of the creditors of the seller, transferrer and assignor, with the amount of the indebtedness due or owing to each and certified by the seller, transferrer and assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee or assignee shall, at least five (5) days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address appears in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. [103 v. 462.][2]

§ 1579a. **To whom act applies.** Sec. 11103. Sellers, transferrers and assignors, purchasers, transferees and assignees, under this act shall include corporations, associations, co-partnerships and individuals, but nothing contained in this act shall apply to sales by executors, administrators, guardians, receivers, trustees in bankruptcy or by any public officer under judicial process. [103 v. 462.][2*]

§ 1579aa. **When purchaser or assignee becomes trustee.** Sec. 11103-1. Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall at any time within ninety days after such sale upon application of any of the creditors of the seller, transferrer, or assignor, become a trustee and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment, provided, however, that any purchaser, transferee, or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of

[2] § 11102 G. C.

[2*] § 11103 G. C.

This statute is constitutional. Steele, Hopkins and Meredith, 92 O. S. 115. It is strictly construed. Mollen, Thompson & James Co. vs. Klein, 19 N. P. 415. Must be literally complied with. Romeo vs. Nassif, 26 O. C. C. (N.S.) 542. Honest intention does not aid. Gragdon vs. Atlantic Pho., 17 O. C. C. (N.S.) 236. A valid preference. Pabst Brewing Co. vs. Johnson, 17 O. C. C. (N.S.) 1. See 245 U. S. 611; 176 Fed. 510; 218 Fed. 733.

the seller, transferrer or assignor, or to the seller, transferrer or assignor for any of the goods, wares, merchandise or fixtures that have come into possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment. [103 v. 462.]

§ 1579b. Receiver, appointment of. "A sale, conveyance, transfer, mortgage or assignment, made in trust or otherwise, by a debtor or debtors, and every judgment suffered by him or them against himself or themselves in contemplation of insolvency and with a design to prefer one or more creditors to the exclusion in whole or in part of others, and a sale, conveyance, transfer, mortgage or assignment made, or judgment procured by him or them to be rendered, in any manner, with intent to hinder, delay or defraud creditors, shall be void as to creditors of such debtor, or debtors at the suit of any creditor or creditors. In a suit brought by a creditor or creditors of such debtor or debtors for the purpose of declaring such sale void, a receiver may be appointed who shall take charge of all the assets of such debtor or debtors, including the property so sold, conveyed, transferred, mortgaged, or assigned, and also administer all the assets of the debtor or debtors for the equal benefit of the creditors of the debtor or debtors in proportion to the amount of their respective demands, including those which are unmatured." [R. S. § 6343.][2†]

§ 1579c. Knowledge of fraudulent intent, material; mortgage, provisions as to. "The provisions of the next preceding section shall not apply unless the person or persons to whom such sale, conveyance, transfer, mortgage or assignment is made, knew of such fraudulent intent on the part of such debtor or debtors, nor shall anything in such section contained vitiate or affect any mortgage made in good faith, to secure any debt or liability created simultaneously with such mortgage, if such mortgage be filed for record in the county wherein the property is situated, or as otherwise provided by law, within three days after its execution, and when, upon foreclosure or taking possession of such property, the mortgagee fully accounts for the proceeds thereof." [R. S. § 6343.][2‡]

[2†] § 11104 G. C.

[2‡] § 11105 G. C.

§§ 6343 R. S. and 6344 R. S. as now standing, while containing substantially the law as contained in the former sections, is a complete rearrangement of the matter therein. The present sections make some additions and eliminations. In the former statutes it was provided that after the suit was brought in the Court of Common Pleas to set aside a sale and was sustained, then the matter was taken to the Probate Court and there the trustee was appointed to sell the property and proceed as in assignments. Under the present statute if an action is

§ 1580. How suit brought. "Any creditor or creditors, as to whom any of the acts or things prohibited in the next four preceding sections are void, whether the claim of such creditor or creditors has matured or will thereafter mature, may commence an action in a court of competent jurisdiction to have such acts or things declared void. Such court shall appoint a trustee or receiver according to the provisions of this chapter, who, upon being duly qualified, must proceed by due course of law to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and to administer it for the equal benefit of all creditors, as in other cases of assignments to trustees for the benefit of creditors. And an assignee as to whom anything or act mentioned in the next four preceding sections shall be void, likewise must commence a suit in a court of competent jurisdiction to recover possession of all property so sold, conveyed, transferred, mortgaged or assigned, and if recovered, shall administer it for the equal benefit of all creditors as in other cases of assignments to trustees for the benefit of creditors." [R. S. § 6344.][3]

§ 1580a. When creditor may bring suit. "If such assignee fails or declines, upon notice by any creditor or creditors to institute such suit, such creditors may themselves commence it within five days after serving notice upon the assignee to commence suit, and the procedure and administration shall be the same as is hereinbefore provided for suits begun by any creditor or creditors." [R. S. § 6344.][3*]

§ 1581. For what cause action may be brought.

In order that the action may be sustained several things are necessary. In the first place, there must be a fraudulent act of some kind done by the assignor. If the sale is made upon a good consideration, even though it is then contemplated to make an assignment, the sale would be valid; and if a transfer were made in good faith to a preferred creditor, and secure to him

brought and maintained, the Court declaring the same to be void, shall appoint a trustee. The present statute allows an assignee to bring such action and if the action is sustained then it is the assignee's duty to recover possession.

Two causes of action, one at law, and one under § 6343 R. S., may be joined in one petition, but must be separately numbered. Kennedy vs. Dodge, 19 C. C. 425; 10 C. D. 360.

See Whitt. Forms, p. 252, and Kinkead's Code Pl. § 624 *et seq.*, for proper forms, etc.

[3] § 11106 G. C.

[3*] § 11107 G. C.

If a conveyance be made to a wife, it is good so far as she has a valid claim against her husband. German Bank vs. Gunther, 3 N. P. 311; 3 Dec. 686.

the payment of a valid existing debt, such act would not be sufficient to set the sale aside. It will not be within the scope of this work to go into these matters in detail. Our Supreme Court has held "that a failing debtor, knowing his insolvency, and in contemplation of making an assignment for the benefit of creditors, may prefer one or more creditors to others, provided he does so in good faith, and by means calculated to hinder other creditors no more than is incidental to the preference, and this he may do by a chattel mortgage delivered to the mortgagee before the deed of assignment is delivered to the Probate Judge. Such transaction is not within the operation of sec. 11102, G. C., *et seq.*, which provides that 'all assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims.'" [4]

In another case it is said: "The good faith of the parties to such a transaction must be determined by its legal effect on the rights of others. If its legal effect works a fraud on their rights, the finding of a Court that the parties acted in good faith is simply an erroneous conclusion of law from the facts." [5]

[4] Cross vs. Carstens, 49 O. S. 548.

[5] Bank vs. Trebein, 59 O. S. 316.

Where a corporation for profit has ceased to prosecute the objects for which it was created, it was held it could not give a valid preference. Rouse vs. Merch. Nat. Bank, 46 O. S. 493.

The burden of proof is upon the person assailing the sale.

A creditor of an insolvent debtor acting in good faith and with a purpose, single to his own interest, may take from his failing debtor a preference even though he know that his debtor is insolvent, and knows also that it is the intent of his debtor in giving the preference to him to hinder and delay his other creditors.

In order to maintain a preference made by an insolvent debtor, there are three essential elements that the creditor must make appear: First — An adequate consideration. Second — Scrupulous good faith on the part of the creditor. Third — A purpose single and sole to the security of his claim. Without either of these the preference must fall.

Where an insolvent debtor makes members of his immediate family his preferential creditors, the transaction is suspicious and calls for the closest scrutiny, and the disclosure of an adequate consideration and the *bona fides* on the part of the creditors. In all this class of cases the *bona fides* of the whole transaction is assailed by the creditors, and where so assailed, the burden of

§ 1582. When sale conclusively presumed to be fraudulent.

By the act of 1900, a clause was inserted in sec. 6343, R. S., providing that every sale, etc., and every judgment suffered, etc., by any debtor or debtors, in the event of a deed of assignment being filed within ninety (90) days after the giving or doing of such act, shall be conclusively deemed and held fraudulent. This portion was stricken out in 1902, and as to the fact of such matter being conclusively presumed to be fraudulent, it remains as it was before, and the burden of showing that a sale or judgment suffered was fraudulent would devolve upon the party attacking the same. However, if preference was given by a chattel mortgage, and such mortgage was not recorded within three days after its execution, it would be considered fraudulent, and it would devolve upon the party holding the same to show the contrary. The same thing would result if a chattel mortgage was taken on property and possession allowed to remain in the owner, and the owner allowed to sell the same, unless such owner was obliged to account for the proceeds of such sale. It is generally held that a chattel mortgage of personal property, where the mortgagor is permitted to retain possession and make sales, is invalid and conclusively fraudulent.[6] But if the agreement is that the mortgagor shall retain possession as agent of the mortgagee and pay the mortgagee the proceeds, it is valid.[7] Mere possession by sufferance, and selling without an agreement to account, is not *per se* fraudulent.[8]

proof is upon the creditor not only to show that the preference was upon an adequate consideration, but that it was done in the utmost good faith, and the introduction of the mere formal transfer raises no presumption whatever of good faith. Walker vs. Walker, 4 N. P. 324; 6 Dec. 355.

See Remington vs. Cen. Press Assoc., 3 N. P. 258; 4 Dec. 337; See Brinkerhoff vs. Tracy, 55 O. S. 558.

[6] Kleine vs. Katzenberger, 20 O. S. 110.

[7] Brubaker vs. Brubaker, 37 Bull. 38.

[8] Ford vs. Miller, 5 N. P. 512; 5 Dec. 603.

The understanding that the mortgagor may retain and dispose of the goods for his benefit invalidates the mortgage, but must be strictly proved. Canfield vs. Lathrop, Cleve. Rec. 67.

§ 1583. Who may bring action.

The action to set aside a fraudulent sale may be brought by any creditor if no assignment has been made. If an assignment has been made, it is the duty of the assignee to bring the action. But if such assignee fails or declines upon notice to institute such a suit, then a creditor may bring the suit.[9]

§ 1584. Jurisdiction.

Unquestionably, the action brought to set aside a sale must be brought in a Court of general jurisdiction, and not in the Probate Court. If a creditor brings a suit before an assignment is made, the statute is clear that the Court in which such suit is brought, if the sale is set aside, must appoint a trustee, and such trustee shall administer the estate the same as an assignee. But if the action is brought by an assignee, or by a creditor, after an assignment is made, some question may arise whether, if the sale be set aside, the Court should appoint a trustee or merely direct that the assignee should take possession of such property and convert it into assets under and by virtue of the orders of the Probate Court. The language of the statute will bear a construction that the assignee, if he recovers, may administer the same in his capacity as assignee, acting under the orders of the Probate Court; and likewise, if the same were set aside by a creditor after an assignment had been made, in order that the trust might be administered by one person, it would be proper that the assignee take possession of the property when the sale was set aside. In such cases it would be well for the creditor when bringing the suit to make the assignee a party.

§ 1585. Examination of assignor, etc. Orders to prevent fraudulent transfer. "On application of the assignee or of a creditor, or without application, the probate judge at all times

[9] As this action must be brought in the Court of Common Pleas it does not strictly come within Probate Practice. See Kinkead's Code Pl. § 624; Whitt. Forms, p. 252.

may require the assignor, upon reasonable notice, to attend and submit to an examination on oath as to the disposal of his property, his trade and dealings with others, and his accounts concerning them, as to all debts due or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof, which examination, at the request of any party to the proceeding, may be reduced to writing." [R. S. § 6349.][10]

§ 1585a. **Order to prevent fraudulent transfer.** "The probate judge, in like manner at any time before the final settlement of the accounts of the assignee, may require his attendance, or that of any other person as a witness, and examine him upon oath, as to all matters appertaining to the estate of the assignor or to the administration of the trust, and, upon or after such examination, make and enforce any orders upon proper parties, which he deems necessary to prevent a fraudulent transfer or change in the property or effects of the assignor or the allowance or payment of any unjust or fraudulent claim out of his estate." [R. S. § 6349.][10*]

§ 1586. Procedure, etc.

The above section is very analogous in the provisions made for the examination of persons charged with having concealed assets belonging to the estate of a deceased person,[11] and the method of procedure adopted therein can very easily be followed when seeking to enforce the provisions of the above section. This would probably permit the Court to imprison the party failing to obey the citation, and it would permit the Court to enjoin any person from making a fraudulent transfer or change of property or effects of the assignor.

§ 1587. **Court, on application of three-fourths of creditors, may order business of assignor carried on by assignee.** "When satisfied that it would be for the advantage of the creditors of the assignor, and on written application therefor by three-fourths in number and amount of such creditors, the court may order any business carried on by the assignor at the time of the assignment, to be continued by the assignee or trustee. When the court deems it to the advantage of the creditors to discontinue the business, it shall order that to be done, and also

[10] § 11113 G. C.

[10*] § 11114 G. C.

[11] See § 394 *et seq.*

allow such compensation for conducting it, to the assignee or trustee, in addition to the fees now allowed by law, as may be just." [R. S. § 6350h.][12]

§ 1588. Liability of assignee.

In a previous part of this work the liability of an administrator or executor carrying on the business of a decedent has been discussed, and as the duties of an assignee are very analogous, reference thereto may be made with profit.[13] An assignee continuing the business as to all persons dealing with him in the conduct of such business is personally liable the same as an administrator.[14] There is no doubt, however, that if an assignee carries on the business by order of the Court, and especially, if under the provisions of the above section, that the estate will be liable in the absence of fraud or gross negligence, to reimburse him for all liabilities incurred; and this would be true even though the business resulted disastrously to the creditors. It has been held that where it is necessary to preserve the property, the Court may make an order continuing the business even though there has been no application for that purpose by the creditors; and that even if conducted at a loss, the assignee must be first compensated or reimbursed for credits made.[15]

§ 1589. Application.

Unless for the preservation of the property the Court should not make an order for the continuation of the business without a written application therefor. This application must be made by three-fourths in number and amount of the creditors. The application need not be granted unless the Court be satisfied that it would be to the interest of the estate, and the Court may make an order discontinuing such business any time it thinks it would be advantageous to the creditors to do so. It has been held that an assignee might continue the business for

[12] § 11125 G. C.
[13] § 518 *et seq.*
[14] Cin. Ice Co. vs. Peat, 5 Bull. 710; Goepper vs. Pfau, 6 Bull. 17; *In re* Thompson, 8 N. P. 373; 11 Dec. 303.
[15] St. James Hotel Assignment, 3 N. P. 42; 4 Dec. 209.

a reasonable time without an order of the Court, but this should not be done; and rarely should an order be granted without an application of the creditors. It may be well to know here that there is a distinction between power granted to continue a business and an order made to sell the property at retail. "Continuing the business" means not only selling the materials that were assigned, but buying new material and replenishing the stock and manufacturing new articles, etc. It is frequently the practice to order an assignee to close out a business under an order of private sale, requiring the assignee to sell the stock for not less than two-thirds of its appraised value.[16]

§ 1590. Form of application, etc.

(*Title.*)

Now comes A. B. *et al.*, creditors of the said C. D., who has made an assignment to E. F., and respectfully represents that the creditors of said assignor, three-fourths in number, and holding three-fourths in amount of the debts of said assignor, have and do hereby petition that the Court may grant an order to such assignee to continue and carry on the business, to-wit: (here describe) of said assignor, for the reason that the same will be for the advantage of the creditors of said assignor in this, to-wit: (Here insert reason.)

They further represent that the entire number of creditors of such assignor is.....and the entire amount of claims presented is .....

.....[17]

The entry thereon may be in the following form:

(*Title.*)

This day this matter came on to be heard upon the application of A. B. *et al.*, creditors of said assignor, for an order of this Court directing said assignee to continue said business; and the same was submitted to the Court. Whereupon the Court finds that three-fourths in number and amount of said creditors have signed said application, and that it would be for the advantage of the creditors of said assignor to continue said business. It is therefore ordered that said assignee continue said business of..... .....(here insert) until such further order of the Court.

§ 1591. Assignee may complete sales of real estate, etc.

The statute provides[18] that the assignee may, with the approval of the Court, complete and enforce all sales of real estate made by the assignor. The provisions of this section are some-

[16] See § 1379, Gdns.
See § 518, Adm'rs.

[17] The creditors signing this petition should state after their names the amounts of their claims; and the assignee should endorse on such application his consent to continue the business.

[18] §§ 11119, 11120 G. C. (§ 1611).

what similar to that in reference to an administrator, etc.,[19] and proceedings brought by an administrator can very easily be followed by an assignee, and reference will be made to the discussion hereinbefore had of the same in the administration of an estate.[20]

§ 1592. Property taken possession of by another under lien or execution.

It sometimes happens that shortly previous to an assignment a levy to enforce an execution has been made on the property of the assignor, or that possession of property covered by a mortgage has been delivered to the mortgagee to be sold, and the remainder returned to the assignor. In such cases the surplus, if any, being properly the property of the assignee, it will very often be found to be to the interest of the creditors of the assignor that the entire property be turned over to the assignee to be by him disposed of. The Courts have held that this can be done and the rights of the execution or lien creditor be sustained.[21] In such cases it would be proper for the Court to make an entry reciting the fact of such prior levy and lien, etc., and that the same was turned over to the assignee, reserving the rights of the execution creditor, etc.[22]

[19] § 11922 G. C. (§ 523).

[20] § 523 to § 532.

[21] Hughes vs. City Hall Bank, 61 O. S. 386; 16 C. C. 645; 9 C. D. 270; 2 N. P. 77; 3 Dec. 166.

[22] An assignee for creditors may take possession of the assignor's property, notwithstanding the pendency of a suit in which a receiver is asked, when such receiver has not been appointed. Callahan vs. Ice Co., 7 C. D. 349; 13 C. C. 479.

See assignment of Winchell, 1 N. P. 136; 1 Dec. 310; where it was held that liens could not be determined when assignment was filed.

See § 1646.

CHAPTER LXXXVII.

APPRAISEMENT. EXEMPTION, ETC.

§ 1593 Introductory.
§ 1594 Appointment of appraisers.
§ 1594a Real estate without the State.
§ 1595 Appraisers, etc.
§ 1596 What must be appraised.
§ 1597 Return of inventory and schedule.
§ 1598 Exempt property excepted unless expressly waived, and wife's property. Homestead to be set-off.
§ 1598a Homestead.
§ 1599 Who entitled to exemption.
§ 1600 Dower.
§ 1601 When Court may order property sold.
§ 1601a $500 in lieu of exemption.

§ 1593. Introductory.

What was said about the importance of an inventory when treating of the administration of estates of deceased persons is equally applicable to the necessity of an inventory under assignments.[1] Likewise what was said as to the manner in which such appraisement should be conducted will be applicable here. No notice is required to be given to any one, yet it would be well if the assignor were notified; his presence would be of very much assistance, especially in setting aside real estate or personal property exempt, dower, etc. The statute intends that this appraisement should be made at the very earliest date after the assignee files his bond, that the same can be conveniently done. It must be filed within thirty days, unless longer time is granted. Real estate in all cases must be appraised, unless where located in another State, and the method to be followed is very much similar to that of the appraisement of real estate by an administrator.[2] The statute relating thereto is as follows:

§ 1594. Appointment of appraisers. "Immediately upon the assignee giving bond, or if he fails to give bond, then upon the trustee appointed giving bond, the court shall appoint three

[1] § 280.

[2] See § 855 *et seq.*

suitable disinterested persons appraisers of the property and assets of the assignor. Such assignee, or trustee, within thirty days after giving bond, unless for good cause the court allows a longer time, must make and file therein an inventory, verified by his oath, of all the property, moneys, rights, and credits of the assignor included in the assignment, which have come to his possession or knowledge, together with an appraisement thereof by such appraisers under oath. If any part of the estate or effects be in any other county, the assignee or trustee may have appraisers as to such part of the estate and effects appointed by a disinterested justice of such county." [R. S. § 6347.][4]

§ 1594a. Real estate without the state. "If the assignment includes real estate situated without this state, it shall not be necessary to have it appraised, but the assignee, or trustee appointed, shall sell such real estate at public or private sale, and the sale be confirmed, if the court finds that it has been made in good faith for a fair price. At the time of filing the inventory, the assignee or trustee also must file a schedule of all the debts and liabilities of the assignor within his knowledge, which shall be verified by the oath of the assignee or trustee; and contain the postoffice address of each of such alleged creditors so far as this can be given." [R. S. § 6347.][4*]

§ 1595. Appraisers, etc.

There is no other requirement of the statute except that the appraisers shall be three suitable, disinterested persons. They are not required to be of the vicinity, neither are they required to be freeholders, although they should be both, and generally, it may be said, that the law applicable to appraisers of the personal and real estate of deceased persons is applicable to appraisers in assignments for the benefit of creditors.[5] The appraisers must make an appraisement under oath.[5*] Their duties are similar to appraisers of real estate and personal estate of deceased persons. The statute does not fix any particular sum to be paid them as fees, and this is usually determined by the Court.[6] The oath cannot be administered by the assignee unless he is a notary public or other public official authorized to administer oaths.

[4] § 11109 G. C.

[4*] § 11110 G. C.

[5] See §§ 860, 284.

[5*] For form of oath, see § 291; see also § 863.

Trustee must give notice of his appointment. Mansfield vs. Post, 12 Dec. 239.

[6] § 301.

§ 1596. What must be appraised.

All property that comes into the possession of the assignee, or of which he has any knowledge, must be appraised. Property specifically exempt to heads of families and widows,[7] and unmarried women,[8] need not be appraised. Likewise real estate situate in another State need not be appraised.[9] In appraising such real estate, the same must be done under actual view of the premises.[10] Questions of assigning dower and homestead exemption in real estate usually are raised upon a petition for the sale of such real estate.[11]

§ 1597. Return of inventory and schedule.

The inventory must be returned within thirty days, and at the time the inventory is filed there must be returned a schedule of debts. This schedule of debts should be a list of the creditors, the postoffice address of each, the kind of claim and the amount of the claim. Forms for schedules and inventories are now kept by all Probate Judges, and they will be omitted from this work. The Court should enforce prompt obedience to this statutory provision. Very seldom can there be a sufficient excuse to allow more than thirty days in which an inventory should be filed. If the assignee is negligent in this respect, the Court should remove him, and proceedings might be had for that purpose similar to those for removing an administrator for failing to file an inventory.[12]

§ 1598. **Exempt property excepted unless expressly waived, and wife's property; homestead to be set off.** "No assignment for the benefit of creditors shall include or cover any property exempt from levy or sale on execution, or from being by any legal process applied to the payment of debts, unless in the

7 § 11726 G. C. (§ 1598).
8 § 11721 G. C.
9 § 11109 G. C. (§ 1594).
10 § 864. Where question is discussed.
11 See § 1617 *et seq.*
12 § 303 *et seq.*
The assignee should see that the appraisers' fees are taxed in the inventory, or they may be missed and cause him some annoyance.

assignment the exemption is expressly waived, nor any property belonging to the wife of the assignor, nor require the assignor to deliver up any of such property." [R. S. § 6348.][13]

[13] § 11111 G. C.

See § 868.

Space forbids entering into an extended discussion of homestead rights. The following are the sections of the General Code which are applicable and are applied in the levy on execution, etc. (Exemptions to heads of families and widows.)

Section 11725. Every person, who has a family, and every widow, may hold property exempt from execution, attachment or sale, for debt, damage, fine or amercement, as follows:

1. The wearing apparel of such person or family, the beds, bedsteads and bedding for their use, one cooking stove and pipe, one stove and pipe used for warming the dwelling, and fuel sufficient for a period of sixty days, actually provided and designed for the use of such person or family;

2. One cow, or if the debtor owns no cow, household furniture to be selected by him or her, not exceeding thirty-five dollars in value, two swine, or the pork therefrom, or if the debtor owns no swine, household furniture to be selected by him or her, not exceeding fifteen dollars in value, six sheep, the wool shorn from them, and the cloth or other articles manufactured therefrom, or, in lieu thereof, household furniture to be selected by the debtor, not exceeding fifteen dollars in value, and sufficient food for such animals for a period of sixty days;

3. The bibles, hymn books, psalm books, testaments and school books used in the family, and all family pictures;

4. Provisions actually provided and designed for the use of such person, or family, not exceeding fifty dollars in value, to be selected by the debtor, and other articles of household and kitchen furniture, or either, necessary for such person or family, to be selected by the debtor, not exceeding fifty dollars in value;

5. One sewing machine, one knitting machine, and the tools and implements of the debtor necessary for carrying on his or her trade or business, whether mechanical or agricultural, to be selected by him or her, not exceeding one hundred dollars in value;

6. The personal earnings of the debtor, and the personal earnings of his or her minor child or children, for three months, when it is made to appear by affidavit of the debtor, or otherwise, that such earnings are necessary to the support of the debtor or of his or her family. Such period of three months shall date from the time of issuing an attachment or other process, the rendition of a judgment, or the making of an order, under which the attempt may be made to subject such earnings to the payment of a debt. If the claim, debt or demand for the payment of which it is sought to subject personal earnings, is one for necessaries furnished to the debtor, his wife or family, only ninety per cent. of such earnings shall be so exempt as against such claim, debt or demand. Nothing herein contained shall render the personal earnings of such debtor's minor child or children, for three months, subject to its payment;

§ 1598a. **Homestead.** "The appraisers appointed by the court, on making the appraisement, shall set off in the way that appraisers of property levied on or attached are required to do, homestead exemption, and exempt property that has to be selected by the debtor and his wife. If this setting off is then omitted, at any time thereafter, before sale, the court may order it to be done by the appraisers." [R. S. § 6348.][13*]

§ 1599. **Who entitled to exemption.** "Husband and wife living together, a widow or a widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale on judgment or order, a family homestead not exceeding one thousand dollars in value. The husband, or in case of his failure or refusal, the wife may make the demand therefor; but neither can be allowed such demand, if the other has a homestead. In case of assignment, for the benefit of creditors, upon filing the written consent of husband and wife to the sale of a homestead property exempt by law, such homestead may be sold subject to the dower and homestead right herein provided." [R. S. § 5435.][13†]

7. All articles, specimens and cabinets of natural history or science, whether animal, vegetable or mineral, except such as may be kept or intended for show or exhibition for money or pecuniary gain. (R. S. § 5430.)

Cases applicable to the above sections are as follows: Spence vs. Basey, 34 O. S. 42; Carpenter vs. Warner, 38 O. S. 416; Riley vs. Hitzler, 49 O. S. 651; Vandal vs. Daiber, 10 C. C. 355; 6 C. D. 585; Driscoll vs. Kelly, 5 N. P. 243; 4 Dec. 124; Kelley vs. Barnett, 36 Bull. 314; Stump vs. Frary, 13 C. C. 619; 6 C. D. 357; Beckett vs. Wishon, 5 N. P. 155.

[13*] § 11112 G. C.

[13†] § 11730 G. C.

An assignor not a resident of Ohio on the day of making the assignment is not entitled to the exemption, even though he should before distribution, become a resident of the state. *In re* Pennick, 57 Bull. 21.

Cases applicable to the above section are as follows: Taylor vs. Thorn, 29 O. S. 569; Dwinnell vs. Edwards, 23 O. S. 603; Wehrle vs. Wehrle, 39 O. S. 365; Ryan vs. Miller, 40 O. S. 232; Bills vs. Bills, 41 O. S. 206; McComb vs. Thompson, 42 O. S. 139; Boettger vs. Fischer, 9 Bull. 337; Curtis vs. Selby, 1 C. C. 40; 1 C. D. 25; Aultman vs. Wilson, 55 O. S. 145; Dittey vs. Ellifritz, 8 C. C. 278; 4 C. D. 465; Weber vs. Beier, 14 C. C. 277; 7 C. D. 381.

A married woman who has wrongfully abandoned her husband cannot claim a homestead exemption. Home Banking Co. vs. Huffman, 1 N. P. (N.S.) 349; 14 Dec. 225.

See § 868, as to sale of real estate by administrator.

Section 11734. On application of the debtor, his wife, agent, or attorney, before sale, if such debtor has a family, and if the lands or tenements about to be levied upon, or any part or parcel thereof, constitute their homestead, the officer executing a writ of execution founded on a judgment or order, shall cause the inquest of appraisers, upon their oaths, to set off to such debtor, by metes and bounds, a homestead not exceeding one thousand dollars in value. Such assignment of home-

§ 1600. Dower.

If the assignor is a married man, in addition to his homestead exemption and personal property exempt, his wife will be entitled to dower in the real estate. As the statute now stands, where an assignment is made, the wife or husband of the assignor may come into Court and ask that the premises be sold,

stead shall be returned by the officer with the writ, and be copied by the clerk in the execution docket. If no complaint be made by either party, further proceedings shall not be had against the homestead. Upon complaint of either party, and good cause shown, the court out of which the writ issued may order a reappraisement and reassignment of the homestead, but the remainder of the debtor's lands and tenements, if any there be, shall be liable to sale on execution. If no application is made during the life of the debtor it may be made by his widow at any time before a sale. (R. S. § 5438.)

Cases applicable to the above sections are as follows: Colwell vs. Carper, 15 O. S. 279; Frost vs. Shaw, 3 O. S 270; Wetz vs. Beard, 12 O. S. 431; Daviss vs. Dodds, 20 O. S. 473; Cooper vs. Cooper, 24 O. S. 488; Wuest vs. James, 51 O. S. 230; Nixon vs. Vandyke, 2 C. C. 63; 1 C. D. 36.

Section 11738. Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow, and every unmarried female having in good faith the care, maintenance and custody of a minor child or children of a deceased relative, resident of this State, and not the owner of a homestead, in lieu thereof, may hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney, before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property otherwise by law exempted. Such selection and exemption shall not be made by the debtor, his agent or attorney, or allowed to him from money, salary or wages due to him from any person, partnership or corporation as against a claim, debt or demand for necessaries furnished to such debtor, except to the extent of ninety per cent. of such money, salary or wages. No personal property shall be exempt from execution on a judgment rendered for the purchase price or any part thereof. (R. S. § 5441.)

Cases applicable to the above section are as follows: Regan vs. Zeeb, 28 O. S. 483; Mortley vs. Flanagan, 38 O. S. 401; Ryan vs. Miller, 40 O. S. 232; Wells vs. Bricker, 37 W. L. B. 295; Kelly vs. Duffy, 31 O. S. 437; *In re* Knepfle, 4 N. P. 213; 6 Dec. 417; Lippelman vs. Boning, 3 Bull. 296; Johnson vs. Ward, 27 O. S. 517; Spence vs. Basey, 34 O. S. 42; Carpenter vs. Warner, 38 O. S. 416; Bills vs. Bills, 41 O. S. 206; Niehaus vs. Faul, 43 O. S. 63; Conley vs. Chilcote, 25 O. S. 320; Dwinell vs. Edwards, 23 O. S. 603; Kepner vs. Pierce, 5 C. C. 488; 3 C. D. 239. Aff. 32 Bull. 331; Gillett vs. Miller, 12 C. C. 209; 5 C. D. 588.

and receive a reasonable value thereof out of the proceeds. The statute relating thereto is as follows:

"When real estate is to be sold as herein provided, the husband or wife of the assignor may be made a party, and file an answer in the court to have such real estate sold free of his or her contingent right of dower and to allow him or her in lieu thereof, out of the proceeds of the sale, such sum of money as the court deems the just and reasonable value of the dower interest therein. Such answer shall have the force and effect, in all respects, of a deed releasing such contingent dower interest in such real estate." [R. S. § 6350f.][14]

§ 1601. When court may order property sold.

If the husband or wife has not signed a mortgage barring her right of dower, then there is no way in which the real estate could be sold free from the contingent dower right, unless the consort file an answer as provided in a previous section. If she has joined in a mortgage upon the real estate, or if the assignor has executed a mortgage upon the real estate for purchase money, then, whether the consort files an answer or not, the Court will order the sale of the real estate, free from the contingent right of dower. The section relating thereto is as follows:

"When the assignor and his wife jointly have executed a mortgage upon real estate assigned, or when the assignor alone has executed a mortgage upon any of such real estate to secure the payment of purchase money, or a part thereof, the court shall order its sale free from the contingent right of dower of such wife, and find and determine the just and reasonable value

[14] § 11123 G. C.

See §§ 943 and 869, as to sale of real estate.

The provisions of this section, § 11738 G. C., do not apply to non-residents. Campbell vs. Barrington, 4 C. C. (N.S.) 447; 26 O. C. C. 239.

A widow must have in good faith the care and custody of a minor. Brown vs Parham, 1 C. C. (N.S.) 602; 25 O. C. C. 640; affirmed 71 O. S. 516; 4 C. C. (N.S.) 34[illegible].

The matter of the right to an exemption is determined from the condition of the claimant at the time distribution is ordered. Simmons vs. Moore, 3 C. C. (N.S.) 178; 23 O. C. C. 11.

The mere fact that $500 has once been exempted, will not permit a second application to be made, if the same has been used up. Hart & Co. vs. Cole, 73 O. S. 207.

of her dower interests in the proceeds of sale remaining after the payment of such incumbrances as preclude her right to dower therein." [R. S. § 6350g.][15]

One matter should be observed in the above section of the General Code. A different rule is provided as the basis for the calculation of a contingent dower interest in assignments from that which prevails for the calculation of a dower interest in foreclosure, etc. In foreclosure cases, where the debt is not the debt of the wife, the dower is calculated on the entire value of the property or proceeds received from the sale. In assignment cases, the contingent dower interest is calculated on the balance of the *proceeds* after the payment of incumbrances, etc.[16]

§ 1601a. $500 in lieu of exemption.

It frequently happens that it would result beneficially to the creditors, as well as the assignor, if the $500 allowed by law to be selected out of the personal property be allowed out of the proceeds of the sale. If the real estate is mortgaged so that a homestead cannot be set off, then there is no other way than to allow it out of the proceeds of the sale. The following form may be used and so changed as to suit the circumstances of each particular case:

Form assignor's petition for allowance of money in lieu of set-off.

Probate Court,.....County, Ohio.

In the matter of the Assignment of

.....

To.....

Petition.

Said assignor respectfully represents, that..he is married, "husband and wife living together—a widower living with a..unmarried daughter, minor son—a widow—unmarried female, having in good faith the care,

[15] § 11124 G. C

See table in the chapter preceding the index as to method of determining contingent dower.

See § 943 *et seq.* for discussion of dower rights.

See § 869 *et seq.* for discussion in sales of real estate by adm'rs.

[16] Compensation is to be awarded for contingent dower. Smith vs. Rothchild, 4 C. C. 544, 551; 2 C. D. 698.

Unger vs. Leiter, 32 O. S. 210.

maintenance and custody of a minor child.....of a deceased relative, is a resident of Ohio, and not the owner of a homestead, nor is the wife of the petitioner, the owner of a homestead.

Your petitioner hereby waives the setting-off to h....by the appraisers herein, of property to be selected by h...., not exceeding five hundred dollars ($500) in value, in addition to the amount of chattel property otherwise by law exempted in kind, out of property—real or personal—herein assigned, in lieu of such homestead, on condition that the Court orders an allowance to h....in money, in said sum of five hundred dollars, out of the proceeds of the assets so assigned, in lieu of such setting-off to h.....—Said petitioner claiming not to be the owner of a homestead, alleges h.... homestead to be mortgaged to its full value, as evidenced by the inventory and appraisement filed herein, to which reference is made.

.....

.....A. D. 190...

Where the assignor waived specific property and $500, in lieu thereof, there being no homestead, was allowed in the inventory, and this was approved by the Probate Court, and was ordered paid to the assignor. This was not such a final order as would permit the assignee to sue thereon. Such matters can only be finally passed upon at the time of the final account. Circuit Ct. Clerk Co. 1910; Bentzel vs. Goodwin, 14 C. C. (N.S.) 65; 32 O. C. C. —. Husband and wife are living together within the meaning of § 11738 G. C. notwithstanding the fact that the husband, following an assignment for creditors, became unable to support his wife and even that his present domicile is unknown to her if she expects his return to her as soon as he is able to provide for her support. The fact that at the time of the assignment the assignor and his wife were living in the house which belonged to her and was heavily incumbered with liens and from which they removed and she has since collected rent therefor is no bar to an allowance in lieu of a homestead. *In re* C. W. Davis, 23 Dec. 420. See Kunkle vs. Reesor, 5 Dec. 422; 5 N. P. 401.

CHAPTER LXXXVIII.

COLLECTION OF ASSETS AND SALE OF PERSONAL PROPERTY.

§ 1602 Shall convert assets into money.
§ 1603 Diligence required, etc.
§ 1604 When and what to be sold.
§ 1605 How to be sold.
§ 1606 Terms of sale.
§ 1607 Form of application for sale of personal property.
§ 1608 Chattel mortgage claim, etc.
§ 1609 Public sale of personal property.
§ 1610 Court may order property disposed of at private sale.
§ 1611 Property to be sold at auction if not disposed of privately.
§ 1611a Compromise or sale of claims.
§ 1612 Order, etc., where property not sold.
§ 1613 Return and confirmation of sales. Order as to deed, acceptance of cash, sale of notes, etc.
§ 1614 Report of public or private sale.
§ 1615 Compromise of sale of desperate claims.
§ 1616 Title conveyed.

§ 1602. Shall convert assets into money. "The assignee, or trustee, shall proceed to convert the assets received by him into money, and to sell the real and personal property assigned, including stocks and such bonds, notes and other claims as are not due and which can not probably be collected within a reasonable time, at public auction, either for cash or upon such other terms as the court orders." [R. S. § 6350.][17]

§ 1603. Diligence required, etc.

It will be observed from the above section that it is the duty of the assignee to proceed at once to convert the assets into money. The wording of the statute indicates that greater diligence is required on the part of an assignee than from an administrator, for within eight months he is to file his account or report. Creditors are entitled to speedy action, and the Court should enforce activity for this purpose on the part of the assignee. There may be instances when want of diligence

[17] § 11115 G. C.
Probate Court may enforce the provisions of statute. Kiefer vs. Spence, 5 N. P. (N.S.) 522; 5 Dec. 609.

is excusable, but certainly no greater latitude in this respect will be allowed than is permitted to administrators or executors.[18] The power to collect assets would necessarily imply a power to bring suit and defend whatever action may be brought against the assignee in his official capacity.

§ 1604. When and What to be sold.

While the statute contemplates that all assets should be converted into money, it does not direct that at once *all property* be sold. Promissory notes and other demands existing in favor of the estate which can be collected by suit or otherwise within a reasonable time are not expected to be sold. But if for some reason even such property cannot be converted into money in time to make a distribution within eight months, then they should be sold as desperate claims. All other property coming into the hands of the assignee should be sold at the very earliest time the same can be done for the benefit of creditors. Circumstances may arise which will permit the sale of property to be deferred beyond the eight months, but as a general rule the creditors will be most benefitted by a prompt sale of the property, and an expeditious settlement of the estate. Personal property of a perishable and tangible character certainly should be disposed of quickly.[19]

[18] See §§ 442 and 443 for diligence required and negligence permissible on the part of an administrator.

See § 1287 for duties of trustees.

"Although it is the duty of a trustee, under an assignment for the benefit of creditors, to proceed, without delay, and in a proper manner, to convert the property into money and pay the debts, yet it has never been held that he is bound to proceed to make forced sales after the manner of a sheriff holding property on execution, unless the terms of the assignment or manifest interest of the creditors require it. All that is required of a trustee is that he act in good faith, exercise a fair discretion, and do in the premises, according to his instructions, what a man of ordinary prudence and care would do in regard to his own business. Hoffman vs. Mackall, 5 O. S. 124, 137.

[19] Articles bought on the installment plan without paying anything are not assets. Seibern Assignment, 7 Dec. 280.

§ 1605. How to be sold.

The property may be sold at either a public or private sale. It seems that if it is sold at public auction and for cash that no application need be made to the Court. But if it is sold upon other terms than for cash or at private sale, then an order of the Court must be obtained. It may be stated as a general rule that real estate should never be sold except on an order of the Court. If there are no liens on the real estate, and no dower or homestead right existing under the statute, a valid title could be conveyed without an application, merely having the same confirmed by the Court. The sale of real estate will be the subject of the next chapter. While not in the same degree of importance as real estate, yet it may be said that, considering the fact that personal property can only be sold at public auction for cash without an order of the Court fixing other terms, as a general rule an application ought also to be made for the sale of personal property. Especially is this true where there are existing liens on such personal property. It would then be proper for the assignee to file his application for an order of sale and make all lienholders parties defendant. It would also be well in such cases to make the general creditors parties defendant so that they might defend if necessary.

§ 1606. Terms of sale.

The property may be sold for cash or such other terms as the Court may order.[20] From the fact that a final settlement is contemplated at the expiration of eight months, unless where it manifestly appears that a longer time will be required, the Court will not be justified in permitting property to be sold on payments exceeding six months. If deferred payments are given, the law as to security, etc., applicable to administration of estates, time, etc., may be followed.[21] At private sale, in no instance can real estate be sold for less than two-thirds of its appraised value unless such real estate be beyond this State.

[20] § 11115 G. C., § 1602.

[21] §§ 483 and 485. Securing payments; § 897, as to real estate.

For good cause shown, the Court may permit personal property to be sold for less than two-thirds of its appraised value.[22]

§ 1607. Form of application for sale of personal property.

(*Title.*)

Now comes A. B., assignee of C. D., and respectfully represents to the Court that he has heretofore had an appraisement of the property of C. D., which has been returned to this Court and been approved and confirmed. He further represents that upon certain of said personal property, E. F. and G. H. claim to have some lien or interest therein.

Wherefore he prays that they may be notified of this application and be required to answer herein. He further says that it would be to the interest of said estate to offer said property for private sale at not less than two-thirds of its appraised value, and upon the following terms. (Here state terms.)

Wherefore he asks that an order of private sale may be granted for the sale of said property and upon distribution of said funds the right of E. F. and G. H. thereto be determined by the Court for such other and further relief as the nature of the case may require, and as the statute requires.

.....

Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

It is very seldom that either the mortgage creditor or any general creditor would have any right to control the terms of the sale, as our Supreme Court has decided that their liens are transferred to the fund, therefore they would only be interested in the distribution of the fund. The Court might therefore very well hear the matter *ex parte*, and require a notice to be given to such creditors at the time when the matter of distribution will be heard. The following may be used as a form of entry:

(*Title.*)

This day this matter came on to be heard upon the application of A. B., assignee of C. D., to sell the personal property of said assignor at public (or private) sale. Wherefore it is ordered that said assignee proceed to sell said property at public (or private) sale upon the following terms (here insert terms), and that he make report to this Court within three months from this date.

It further appearing from said application that E. F. and G. H. claim to have some lien or interest in said property or the funds arising therefrom, it is ordered that said E. F. and G. H. be notified of the pendency of said application and be required to set up their said claims; and it is also ordered that I. J. and K. L., unsecured creditors, be notified of the claims of E. F. and G. H.

The following may be used as a form of notice to a lienholder and creditors:

[22] § 11121 C. C., § 1613.

To A. B., assignee of C. D.:

You are hereby required to notify E. F. and G. H. and I. J. you have filed an application to sell the personal property of said C. D., and that said E. F. and G. H. are hereby notified of such fact and required to set up in said Court their claims or liens thereon; and said I. J. and K. L., all general creditors, are hereby notified that E. F. and G. H. claim some lien on the funds arising from the sale of said personal property.

....., Probate Judge.[23]

§ 1608. Chattel mortgage claim, etc.

There is no doubt now but that the Probate Court has full and complete authority to determine the priority of liens on personal property and to order distribution accordingly. The question sometimes arises when this order of distribution should be made, and within what time the mortgagor must appear in Court or notify the assignee of the existence of his claim. This question is more theoretical than practical. These secured claims are of necessity required to be filed and be of public record. If such a claim were filed, etc., and the mortgagor was not notified to set forth his claim in an action in the Probate Court, it would not be safe to make such order of distribution before at least the time allowed for the account to be filed, and no order of distribution should be made until the Court is fully satisfied that all persons having a claim on the fund have been notified. The following may be used as a form either by way of application or cross-petition of the holder of a chattel mortgage setting forth his claim:

(*Title.*)

Now comes the said E. F. and represents that said C. D., at the time of making his assignment to A. B., was indebted to the said E. F. in the sum of.....dollars with interest thereon from the.....day of ....., 190.., at.....per cent. per annum, on a promissory note of which the following is a true copy (here describe), and in order to secure the payment of the said note, the said C. D. did on the.....day of .....190.., duly execute to the said E. F. certain chattel mortgage on certain chattels designated in said mortgage (here describe same), on which mortgage was made the affidavit required by law stating the amount of the claim secured thereby, and that it is just and unpaid; and which mortgage on the.....day of....., 190.., at..... .....o'clock....M., was duly filed with the clerk of..... township in which the said C. D. then was a resident (or if C. D. is a resident of the township in which the recorder's office is situate, that it was filed in such office), and that none of said debt has been paid.

[23] If it is desired to make a distribution before eight months all creditors should be notified. Mooney vs. Lindley Fogg, 19 C. C. 327; 10 C. D. 551, 829.

The claim secured by a chattel mortgage is prior to the claim of special exemption in such property. *In re* E. B. Thomas, 30 L. R. 438; 51 Bull. 29; and prior to later claims under § 8339 G. C., § 1651.

The mortgagee should have some kind of notice. Lindeman vs. Ingham, 36 O. S. 1.

That said chattels so mortgaged were afterwards assigned by said C. D. to his assignee, A. B., and have been sold by order of Court. The proceeds of said sale being now in the possession of said assignee.

The undersigned therefore claims a lien on said proceeds by virtue of his said chattel mortgage. Wherefore he asks for an order directing said assignee, out of said proceeds, to pay him, the said E. F., the amount, including interest so due, and secured to him by virtue of said chattel mortgage.

.....

Sworn to before me and subscribed in my presence this.....day of ....., 190...[24]

§ 1609. Public sale of personal property.

If the property be sold at public sale, the law applicable to administrator's sale as to the conduct of assignee's sale would be applicable, and reference to discussion of the same is here made.[25]

The notice is a little more specific than sales by administrators. The principal thing to be observed is that if notice is given by posters, they must be put up at least ten days prior to the day of sale in fifteen public places in the county, five of which must be in the township. The form of notice can be taken from administrators.[26] The following is the statute relating to the notice:

"Notice of the time and place of the sale of the personal property assigned, shall be given for at least ten days prior to the day of sale, by advertisement in some newspaper of general circulation within the county, or by posting written or printed notices thereof, in at least fifteen public places in the county,

[24] See Sayler vs. Simpson, 45 O. S. 141.

The issue formed by pleadings setting forth the claim to liens on the fund are purely equitable, and the party has no right to a trial by jury.

As before remarked where such an order may materially affect the rights of other creditors, such other creditors should be notified of the pendency of the application so that they may defend if desired. If none of the lien holders make application of this kind, no doubt the assignee could come into Court and set up the facts and ask an order of distribution. It has been held, however, that the Probate Court in such a proceeding has no right to try a question of title to the property.

Unless all creditors have actual notice no order of distribution can be legally made until eight months has elapsed. Mooney vs. Fogg, 19 C. C. 327; 10 C. D. 551.

[25] §§ 479 and 481.

[26] § 480.

not less than five of which must be posted in the township in which the sale is to be held." [R. S. § 6350b.][27]

§ 1610. Court may order property disposed of at private sale. "When the court is satisfied that it would be for the advantage of the creditors of the assignor to sell part, or all, of the real or personal property in this state assigned at private sale, it may authorize the assignee or trustee thus to sell it either for cash, or upon such other terms as the court orders. No real estate lying in this state shall be sold for less than two-thirds of its appraised value, nor shall any personal property, be sold for less than two-thirds of its appraisement, unless upon good cause shown, the court orders the assignee or trustee to sell it for a less amount." [R. S. § 6350c.][28]

§ 1611. Property to be sold at auction if not disposed of privately. "Should any property, ordered to be sold by the court at private sale, not be sold within the time prescribed, then the court shall order its sale at public auction, as though a private sale had not been ordered." [R. S. § 6350d.][29]

§ 1611a. Compromise or sale of claims. "With the approval of the court the assignee or trustee may compromise or sell any claim or demand, due or owing to the assignor, which is desperate or difficult of collection, and also, with like approval, complete and enforce all sales of the real estate made by the assignor." [R. S. § 6350d.][29*]

§ 1612. Order, etc., where property not sold.

If property is not sold for some reason within the time granted, such fact should be reported to the Court, and the Court should then make a further order in reference thereto. The report may be as follows:

(*Title.*)

This day came A. B., assignee of C. D., and respectfully represents to the Court that the following personal property belonging to said estate, which was ordered to be sold by a former order of this Court, at public (or private) sale remains unsold.

[27] § 11117 G. C.

[28] § 11118 G. C.

See § 495 as to private sale, etc., for forms, etc.

[29] § 11119 G. C.

[29*] § 11120 G. C.

See § 528 as to conveyance of real estate.

Wherefore said assignee asks that the Court order that said property be sold at public sale within.....days and for cash (or such other terms as may be desired).

ENTRY.

(*Title.*)

This day this matter came on to be heard upon the report of A. B., assignee of C. D., as to certain personal property remaining unsold.

Wherefore it is ordered that said assignee proceed to sell the same at public auction, as required by law, and for cash, and that he make report of the same to this Court within.....days.

§ 1613. Return and confirmation of sales. Order as to deed, acceptance of cash, sale of notes, etc. "Reports of sales of real estate and personal property, made as herein provided, shall be returned to the court within the time prescribed. After having carefully examined the return, if satisfied that the sale has been legally made, the court shall confirm it and order the assignee or trustee to make a deed to the purchaser for the estate sold. In the order it also may require that before delivery of such deed the deferred installments of the purchase money be secured by mortgage. When the buyer offers to pay the full amount of the purchase money in cash, if best for the interests of the creditors of the assignor, the court may order that it be accepted, and direct its distribution." [R. S. § 6350e.][30]

§ 1614. Report of sale.

The above section of the General Code requires that all reports of sales, either personal or real estate, be made to the Court, and that the Court shall approve the same before they shall be binding and complete. The requirement that the same shall not be complete until confirmed, evidently applies to the sale of real estate and private sale of personal property. It would be inconsistent to apply the same to the public sale of personal property. It is no doubt intended to prevent an unjust sale of real estate or private sale of personal property. The form of return of public sale of personal property by an ad-

Rule of *caveat emptor* does not apply to sale of chattels. Ludeman vs. Ingham, 36 O. S. 14.

A sale of goods on credit of one, two and three years is improper. Conkling vs. Conrad, 6 O. S. 611.

[30] § 11121 G. C.

When premises have been three times appraised, court cannot direct amount for which may be sold. Brown vs Insurance, 3 C. D. 350; 6 O. C. C. 62.

Reappraisement may be sold on time. *Id.*

ministrator would be proper to use in the public sale by an assignee.[31] It should not be forgotten that a return of private sale must have attached to it the affidavit required by sec. 11213, G. C.[32] The following entry of confirmation of sale may be used:

(*Title.*)

On this day came A. B., assignee of C. D., and filed in this Court a report of private (or public) sale of personal property assigned him; and the same was submitted to the Court. Whereupon the Court finds that said sale is regular and in conformity to law and the former orders of the Court, and does hereby approve and confirm the same; and the same came on to be heard upon the distribution of the proceeds of said sale. Wherefore the Court finds that E. F. and G. H. have been duly notified of the pendency of the application of the sale of said property and that I. J. and K. L., all the general creditors of said estate, have also had notice thereof; and the Court finds that the mortgage lien of said E. F. is a valid and subsisting first mortgage lien upon the following personal property sold by said assignee, and the amount realized from the sale of said personal property by said assignee is.....dollars.

That the amount of the lien of E. F. thereon is.....dollars, and Court further finds that the mortgage of G. H. is a first and valid lien on the following personal property, sold of said assignor (here set out) and that the amount received from said property by said assignee is .....dollars, and the amount of the lien of said G. H. is .....dollars.

Wherefore it is ordered that the same be distributed as follows:

First, the costs and expenses of said administration and the sale of said property as follows: (Here insert, and the proportion of said proceeds is to be paid the assignee, etc.)[33]

Second, to E. F. on his mortgage lien the sum of.....dollars

Third, to G. H. on his mortgage lien, the sum of.....dollars.

The remainder thereof to be distributed to said general creditors presenting their claims as required by law.

§ 1615. Compromise or sale of desperate claims.

If an assignee is unable to collect a claim within a reasonable time, and I will say a reasonable time would be six months, then the Court may authorize the assignee to compromise or sell such desperate claim. The statute does not designate the manner or the terms of such sale. It seems that the matter is purely an *ex parte* proceeding, and that the Court may make the order without notice to any one. The form of application given in proceedings by an administrator to sell a desperate

[31] § 490. Public sale, and § 497, Private sale.

[32] See § 882. For form, see § 500.

[33] Unless all creditors are notified distribution cannot be made before eight months. Mooney vs. Lindley Fogg, 19 C. C. 327; 10 C. D. 551.

claim might very well be used here,[34] and the form given in proceedings by an administrator to compromise a claim might be used,[35] and the entry used in an application by an administrator to compromise might easily be adopted.[36]

§ 1616. Title conveyed.

It is a well established principle that no trustee can be a purchaser at his own sale,[37] and like administrators' sales of property, assignees do not warrant the title to the property conveyed.[38] The sale is a judicial sale and the doctrine of *caveat emptor* applies.[39]

§ 458, Application for.

[34] See § 558, Proof of claim, when not required.

[35] § 452, Application for.

[36] § 454 as to order of compromise. § 464 as to order of public sale, etc.

[37] See § 492, Purchase by administrator.

[38] See § 493, Warranty of title.

[39] § 902, Purchase right and title.

CHAPTER LXXXIX.

ASSIGNEE SALE OF REAL ESTATE.

§ 1617 Introductory.
§ 1618 Payment of liens, etc.
§ 1618a Question of title.
§ 1618b Sale of premises.
§ 1618c Disposition of proceeds.
§ 1618d Application of preceding section.
§ 1618e Homestead exemptions.
§ 1618f Jurisdiction of court in action to foreclose mortgage, quiet title, etc.
§ 1619 Nature of action.
§ 1620 Where action brought.
§ 1621 Parties defendant.
§ 1622 Form of petition.
§ 1623 Procedure, etc.
§ 1624 Proceedings to lay out land into town lots.
§ 1625 Notice and sale of real estate.
§ 1626 Return of sale, confirmation, etc.
§ 1627 Form of deed of assignee or trustee. Public or private sale.

§ 1617. Introductory.

There is no doubt but that under the statute of our State an assignee might convey a good title to real estate without having a special order of the Court for that purpose. It is therefore not so essential to the passing of a good title to the purchaser that the statute in relation to obtaining an order of Court for the sale of real estate be as strictly followed as it is in the sale of real estate by administrators and guardians. The statute, however, makes it essential before such a sale becomes binding, that it be confirmed and approved by the Court.[40] But, in order that the question of priority of all liens may be speedily and properly brought to the attention of the Court, there ought to be no sale of real estate by an assignee without the filing of a petition as provided for in the section following of the General Code. Under this provision the Probate Court has full and ample power conferred upon it to settle every and any question that may affect the title to the real estate sold.

§ 1618. Payment of liens, etc. "The probate court shall order the payment of all incumbrances and liens upon any of

[40] § 11118 G. C. (§ 1610).

the property sold, or rights and credits collected, out of the proceeds thereof, according to priority." [R. S. § 6351.][41]

§ 1618a. **Question of title.** "When the real estate to be sold, or which has been contracted to be sold by the assignor prior to the assignment, is encumbered with liens, or when questions in regard to the title, or the dower estate of the wife or widow of the assignor, require a decree to settle them, the assignee may commence a civil action therefor in the common pleas or probate court of the proper county, making all persons in interest, including the wife or widow of the assignor, parties." [R. S. § 6351.][41*]

§ 1618b. **Sale of premises.** "Upon the hearing, the court shall order a sale of the premises, or the completion of such contracts of sale, the payment of incumbrances and the contingent dower interest of the wife or widow, subject to the provision hereinafter contained, and determine the questions involved as to title to the property." [R. S. § 6351.][41**]

§ 1618c. **Disposition of proceeds of sale.** "The proceeds of all the real estate so sold, after payment of liens and incumbrances, and the contingent dower rights and interest of such wife or widow, as ordered as aforesaid, must be reported to the probate court by the assignee, and disposed of as provided in this chapter." [R. S. § 6351.][41†]

§ 1618d. **Application of preceding sections.** "The provisions of the preceding sections in relation to the wife of the assignor as a party to the proceedings thereunder and her rights by virtue thereof, and also the provisions as to ordering property sold at private sale, and upon terms of credit, shall apply to proceedings under the next three preceding sections." [R. S. § 6351.][41‡]

§ 1618e. **Homestead exemptions.** "Nothing relating to sales of the assignor's property in the preceding sections shall in any way impair the right of homestead exemptions, or the right to an allowance in lieu thereof or the mode provided by law for enforcing such rights." [R. S. § 6351.][41||]

§ 1618f. **Jurisdiction of court in action to foreclose mortgage, quiet title, etc.** "This chapter shall not take away or limit the jurisdiction of any court of record in which an action to foreclose a mortgage, to quiet title or in any way affecting the title to or possession of all or part of the real estate assigned is pending, at date of the assignment. In such action the assignee

[41] § 11126 G. C.
[41*] § 11127 G. C.
[41**] § 11128 G. C.
[41†] § 11129 G. C.
[41‡] § 11130 G. C.
[41||] § 11131 G. C.

may be made a party, with right to defend, and have such decrees, orders or judgments, as are necessary for the proper administration of his trust, in any surplus after paying liens thereon, asserted in the action." [R. S. § 6351.][41°]

§ 1619. Nature of action.

The statute itself designates the action to be a civil action, and it therefore follows that the rights and power conferred by law upon Courts in the trial of civil actions would be applicable to a proceeding commenced under the above section; and it is certainly the object of the statute that every possible right in or to any part of the real estate should be worked out in such a proceeding with at least no less power than is exercised in an action brought by an administrator to sell real estate. This matter has been fully discussed in treating of the subject of sales by administrators.[42] The suit is brought by filing a petition and having the service of summons, the same as any civil action. It seems that in addition to providing for a sale of real estate, the action might be brought to have a contract of sale completed, made by the assignor. The dower rights of the widow are to be adjusted, and if she has signed mortgages which prevent the same being set apart in the real estate, then the Court may order it sold, although she files no answer consenting thereto. Otherwise the real estate could not be sold free of her dower without such answer or consent.[43]

§ 1620. Where action brought.

The action is to be brought in the Common Pleas Court or Probate Court of the proper county, is the language of the statute.[43a] Beyond question the Probate Court of the county in which the assignment is made is the only Probate Court in which the action can be brought. The proceeding being a proceeding *in rem*, it would seem that the Court of Common Pleas would only have jurisdiction provided the land was situate in the county of such Court. Whether an action could

41° § 11132 G. C.

42 See §§ 812 and 815.

43 §§ 11123 and 11124 G. C. (§§ 1610, 1611).

43a § 1544, Jurisdiction of court.

be brought in the Court of Common Pleas of the county in which the assignment was made, when there is no real estate located therein, is not clear, the *probability,* however, is that such Common Pleas Court would have jurisdiction. If for any reason the Probate Court is not clothed with full power to adjudicate the rights of all, then the action should be brought in the Court of Common Pleas.[44] As a general rule, however, the action should be brought in the Probate Court having control of the other matters of the assignment.

§ 1621. Parties defendant.

All parties in interest, including the wife or widow of the assignor, should be made parties to such an action. While a failure to follow this provision of the statute strictly would not affect the jurisdiction of the Court, yet a neglect to do so would result in a failure in that for which the statute was enacted, to-wit, a determination and adjudication of the rights of all in or to the property. The assignee, before filing a petition, should make strict examination of the records, and err on the side of making too many persons parties, rather than too few.[45]

§ 1622. Form of petition.

A. B., as assignee for benefit of the creditors of C. D., plaintiff, vs. C. D., E. D., G. H. and I. J., defendants. Probate Court,..... County, Ohio.

Plaintiff states that on the.....day of....., 190.., the defendant, C. D., made an assignment to him of all his property for the benefit of his creditors, which assignment was on the.....day of..... .....190.., at.....o'clock, ...M., duly filed in the Probate Court of said county as assignment No.....on the assignment docket of said Court, and thereupon plaintiff duly qualified and entered upon his duties as such assignee. That among the property so assigned was the following real estate. (Here describe real estate.) Plaintiff further states that it is necessary to sell said premises to pay the costs of said assignment, the liens on said premises, the exemption in lieu of homestead allowed to said assignor and the general creditors of said assignor, and that there are not sufficient assets to pay said charges and the claims against said estate

[44] § 1545.

[45] It is evidently not intended that general creditors should be made parties, yet if a distribution be ordered before eight months from the assignee's appointment, it seems general creditors should be notified. Mooney vs. Lindley Fogg, 19 C. C. 327; 10 C. D. 551.

See *contra* Reed vs. Terhune, 22 C. C. 544.

The assignor should be made a party. Mannix vs. Elder, 1 C. C. 59; 1 C. D. 36.

without the sale of said premises. That said E. D. is the wife of said C. D., and as such has a contingent right of dower in said premises. That said C. D. is interested in the sale of said premises for the exemption due him in lieu of a homestead, and also for the surplus if any which may remain from the sale of said premises after the payment of all his debts, and that G. H. and I. J. each claim a lien on said premises by way of mortgage. Wherefore your petitioner prays that said premises may be ordered sold free and clear of all claims of all parties to this suit and that he may have such other and further relief as the nature of his case entitles him to.

....., Attorney for plaintiff.

(Verification.)[46]

§ 1623. Procedure, etc.

When the petition is filed, the same method of procedure can be followed as in the sale of real estate by administrators. On its filing an entry should be put on,[47] and service should be made as in other civil actions.[48]

The fact that property has been assigned is sufficient to authorize an order of sale, and the journal entry in an administrator's sale of real estate might be adopted.[49]

The question as to the manner of distribution of the proceeds might be deferred until the confirmation of the sale. If the real estate has not been appraised, or if for any reason the former appraisement will not answer, then it might be ordered appraised.[50]

There is now a special statute which provides it may be divided, subdivided and platted.[51] If there is any one entitled to homestead, the same must be set off.[52] Likewise dower must be assigned.[53] The following is the section relating to the platting of assigned property:

§ 1624. Proceedings to lay out lands into town lots. "When an assignee or trustee commences an action, in the common pleas or probate court of the proper county, to sell real estate, making all persons in interest parties thereto, and at the time fixed for hearing his petition the court is satisfied that all parties in

[46] Whitt. Prob. Code.

[47] § 837.

[48] § 839 as to actual service, and § 840 as to constructive service. § 841 how publication made, § 842 copy of newspaper mailed, § 843, Waiver, § 845 as to guardian *ad litem*, and § 846 as to pleadings of widow.

[49] § 852.

[50] See § 858.

[51] § 11133 G. C. (§ 1621).

[52] § 11125 G. C. (§ 1602). § 868.

[53] § 869.

interest have been duly notified of its pendency, and that such land ought to be sold, if the petition seeks to have it or any part thereof laid out in town lots, and the court finds it will be to the advantage of all parties in interest to have this done, it also shall authorize the survey and platting of the land, if it approves the survey and plat made for that purpose. The court shall authorize the assignee or trustee, on behalf of all the parties in interest, to sign, seal and acknowledge the plat in that behalf for record according to law." [R. S. § 6351a.][54]

§ 1625. Notice of sale of real estate.

If the Court has ordered the real estate to be sold at private sale, there need be no advertisement, and it could be sold for two-thirds of its appraised value. If sold at public sale, the notice must be given as provided for in the following section of the General Code:

"Notice of the time and place of the sale of the real estate assigned, shall be given by advertisement in some newspaper of general circulation, in the county where it is situated, for four consecutive weeks. The real estate shall not be sold for less than two-thirds of the appraised value thereof, but shall be subject to reappraisement, as upon execution at law." [R. S. § 6350a.][55]

The notice is very much similar to the notice required in a sale by administrator, and the sections relating thereto should be considered. The recent law requiring the street number, etc., to be given is applicable.[56] But it seems that it is not required to be published in a German newspaper, but may be.[57] The terms of the sale are cash unless the Court otherwise ordered.[58]

[54] § 11133 G. C.
I have no doubt the court would have had such power in the absence of statute.

[55] § 11116 G. C.

[56] § 884.

[57] § 885. Not now to be published in German paper.

[58] See § 886. Points to be observed, § 887, Form of notice, § 888, Conduct of sale, § 889, Who may become purchaser, and § 891 as to return of sale.
When court may fix price. Bell vs. Dudreit, 40 O. S. 330.

§ 1626. Return of sale, confirmation, etc.

If there are no bidders, the property should be again offered, and then it should be reappraised, and twice again offered, and then, if it remains unsold, the Court may fix the amount for which it may be sold.[59] The statute nowhere indicates at what place the sale should take place. It is no doubt intended to apply the section relating to execution, which requires it must be sold at the court house, or at such other place as the Court may order.[60]

§ 1627. Form of deed, assignee or trustee. Public or private sale.

Know All Men by these Presents:

.....'s deed.

That, whereas,.....as.....of..... on the.....day of.....A. D. 190.., filed h....petition in the Probate Court within and for the county of....., and State of Ohio, praying said Court for an order to sell the following described real estate of said.....

Situate in the.....of....., county of..... ....., and State of Ohio, and known as.....

And whereas, on the.....day of.....A. D. 190.., such proceedings were had by and before said Court, that the said..... as aforesaid was ordered by said Court to sell said premises, at..... sale, according to law, for not less than.....the appraised value thereof,.....the dower estate therein of..... of said.....

And whereas, the said.....as aforesaid, sold said premises, on the.....day of.....A. D. 190.., to..... for the sum of.....dollars ($.....), said sum being..... The appraised value of said premises, and the highest and best price offered therefor, and the said.....having complied with the terms of said sale, and said sale having been made in all respects according to law, the same was afterwards, to-wit: on the.....day of..... ....., A. D. 190..., approved and confirmed by said Court, and the said.....as aforesaid, was ordered to execute and deliver to said purchaser a proper deed for said premises, according to the statute in such case made and provided; all of which will more fully appear by the records of said Court, to which reference is here made.

Now, therefore, I, the said....., as aforesaid, in consideration of the premises, and by virtue of the powers in me vested by law, and under the order of said Court, do hereby give, grant, bargain, sell and convey unto the said.....the real estate aforesaid,..... .....the said dower estate, with all and singular the appurtenances thereunto belonging.

To have and to hold the same unto the said.....and unto .....heirs and assigns forever.

[59] § 11710 G. C.

[60] § 11696 G. C.

See § 895, Entry confirmation.

See § 896, Resale.

See § 897, Securing payments.

See §§ 877-906 as to sale generally.

In testimony whereof, I, as.....as aforesaid, hereunto set my hand, at.....this.....day of.....A. D. 190...

Signed and acknowledged in presence of

.....

.....

.....

.....

as.....of.....

The State of Ohio,.....County, ss.

Before me, a.....in and for said county, personally appeared the above named....., who acknowledged that..he did sign the foregoing deed as.....aforesaid, and that the same is h....free act and deed, for the uses and purposes therein mentioned.

In testimony whereof, I hereunto set my hand and official seal, at..... .....in said county, Ohio, this.....day of.....A. D. 190...

.....

.....

CHAPTER XC.

PRESENTATION OF CLAIMS.

§ 1628 Presentation of claims. Their allowance or rejection.
§ 1628a Report of claims.
§ 1629 When to be presented.
§ 1630 What to be presented.
§ 1631 Claims secured by mortgage.
§ 1632 How presented. Affidavit, etc.
§ 1633 Form of affidavit, etc.
§ 1634 How to be allowed or rejected.
§ 1635 When claim shall be disallowed on application of assignor or creditor and proceedings in such case.
§ 1636 Procedure under Section 11136 G. C.
§ 1637 When suit must be entered on rejected claim.
§ 1638 In what Court action to be brought.
§ 1639 Report of claims filed.

§ 1628. Presentation of claims. Their allowance or rejection, etc. "Creditors must present their claims within six months after publication of the notice hereinbefore provided for, unless further time be given by the court for their allowance. The assignee or trustee shall indorse his allowance or rejection thereon. Persons whose claims are rejected are required to bring suit against such assignee or trustee to enforce such claims within thirty days after they were rejected. If a claimant recovers, the judgment shall be against the assignee or trustee, that he allow the claim in settlement of his trusts, with or without the costs, as the court deems right." [R. S. § 6352.][1]

§ 1628a. Report of claims. "Immediately after the expiration of such six months, the assignee or trustee must file in court a report of all claims presented to him for allowance, their several amounts, the date from which, and the rate at which they are entitled to interest, specifying claims allowed and those rejected, with the date of allowance or rejection, what claims, if any, are held under advisement, and the postoffice address of each creditor whose claim is allowed or rejected." [R. S. § 6352.][1*]

[1] § 11134 G. C.
See § 552 for presentation of claims in administrations of estates.

[1*] § 11135 G. C.

§ 1629. When to be presented.

Creditors are to present their claims within six months after the publication of the notice of appointment, unless further time is allowed by the Court. The object of this requirement is that the assignee may know to whom the fund is to be distributed. If a creditor chooses, he may hold his claim and sue the assignor thereon,[2] and the failure to present the claim will not prevent or defeat a recovery against a surety on such claim.[3]

The mere fact that the creditor does not present his claim within six months will not bar him from thereafter presenting the same, and having it allowed any time before the trust is settled.[4] But he will only be entitled to share, however, in the funds that are undisposed of at the time of its presentation,[5] and if there are sufficient funds remaining at the time of its presentation, the creditor is entitled to the same per cent. that was paid to former creditors.[6]

As an order of distribution cannot be made until after eight months have elapsed, it seems that a creditor would be in time if his claim were presented before the order of distribution was made.[7] If a creditor delay beyond the six months, causing the assignee additional work in the way of making out an order of distribution, etc., he should be made to bear the costs.

§ 1630. What to be presented.

Every claim which exists against the assignor is a proper one to present to the assignee for payment. Claims which arise in the administration of the estate are not claims which must be presented. Such claims are primarily against the assignee, and he is personally responsible therefor.[8] Claims of a con-

[2] Haskins vs. Alcott & Horton, 13 O. S. 210.

[3] Dye vs. Dye, 21 O. S. 86.

[4] Owen vs. Ramsdell, 33 O. S. 439; Bettman vs. Hunt, 12 Bull. 286.

[5] Id.

[6] Carpenter vs. Dick, 41 O. S. 295.

[7] Whatever a creditor may lose by not presenting his claim for allowance within the statutory period by reason of a partial settlement of the trust, he may come in at any time for at least his equitable share in the assets unadministered, and not properly disposed of, at the time he presents or prosecutes his claim for allowance, in the mode prescribed by the statute. Owen vs. Ramsdell, 33 O. S. 443.

[8] Kittredge vs. Miller, 12 C. C. 129; 5 C. D. 391.

tingent character should be allowed. The order of their priority being worked out in the Probate Court.[9]

Where a suit was commenced against the assignor for debauching L.'s wife and alienating her affections, after the beginning of the suit, the assignor made his assignment; then L. proceeded with his suit and recovered a judgment, it was held that this was a claim that should be presented to the assignor, and the Probate Court might have made an order to defer distribution until judgment was recovered.[10]

A person contingently liable as surety, may present his claim.[11] But in such cases the dividend thereon shall be paid to the party holding the claim.[12]

If a chattel mortgage is void as against creditors, the holder may still present the claim secured thereby and share as a general creditor.[13]

§ 1631. Claims secured by mortgage.

Whether a claim which is secured by mortgage should be presented for its full amount and be entitled to dividends on the full amount, the same as if it was not secured by mortgage, etc., presents a question upon which the Courts are not in accord. Of course, if the security is sufficient to pay the claim in full, then it is conceded that the holder is not entitled to any dividends with general creditors, and the weight of authority seems to be that notwithstanding the fact that the claim may be reduced by application of the property held as security, the holder is entitled to dividends on the entire amount. A reported case so holding is that of Jelke vs. Stallo.[14] Here it is

See §§ 553 and 554 as to claims against deceased estate.

[9] Jones vs. Ludlow, 6 C. C. 57; 3 C. D. 348.

[10] Lally vs. Farr, 6 N. P. 73; 9 Dec. 119.

[11] See Connor vs. Stewart, 7 N. P. 167; 2 Dec. 466.

[12] § 6354 R. S. (§ 1632).

[13] Besuden vs. Besuden, 57 O. S. 508; 7 C. D. 459; 13 C. C. 183.

[14] 1 N. P. 29; 1 Dec. 43.

I am informed that in the unreported case of Lloyd vs. Western Natl. Bank, 54 O. S. 681, the Superior Court has affirmed such a ruling.

held, "A creditor is entitled to an allowance of his claim as it stood at the date of the assignment of the debtor, and to receive dividends on the whole claim, notwithstanding the fact that subsequent to the assignment, and prior to the presentation of the claim for allowance, the creditor had subjected collaterals held by him, and applied the proceeds on account of the claim; provided only that he shall not receive, altogether, more than the amount of his claim."

Another case holding the same way is that of Cromwell vs. Herron.[15] In this case it is said, "When the question was first presented to us, I believe all of the members of the Court were of the opinion that the latter was the true and equitable rule, and in the absence of any decision by the Supreme Court of this State, we felt disposed to so hold, and Judge Cox is still of the same opinion. A more careful consideration of the many authorities cited to us has led Judge Swing and myself to the conclusion that the great weight of authority is to the contrary. So far as I am concerned, I come to this conclusion with reluctance, for I feel that it is not the most equitable rule."

The view taken by these eminent Courts has never appeared to the author to be the correct and just rule.[15a] What he considers to be a just rule was laid down in a decision by him *In re Spence*,[16] and which was as follows: "A preferred creditor cannot participate in a dividend among general creditors until the security for his claim has been exhausted. All such creditor is entitled to is that the assignee retain sufficient assets to enable him to share *pro rata* with the general creditors on the amount of his claim remaining unpaid after the proceeds of his security has been applied thereon." [17]

In addition to the reasen set out in this opinion, to which the author still adheres, are those which may be found in sec. 11137, G. C., where it is required that the claimant must set forth the fact whether he holds any collateral or personal security. The object of this statutory provision would seem to be that the

[15] 11 C. C. 448; 5 C. D. 196.

[15a] See article in Ill. Law Review, Oct., 1920; coinciding by R. E. Clark, author of Clark on Receivers.

[16] 4 N. P. 439; 7 Dec. 3.6.

[17] See Searle vs. Brumback, 4 W. L. M. 330.

See Barrett vs. Reed, W. 700.

See Lloyd vs. Western Natl. Bank, 30 Bull. 165.

See § 1659, Exceptions.

general creditors have a right to have such security applied to the indebtedness before the claimant could participate in a general distribution.* Besides the Supreme Court has indicated the rule to be[18] *that there should be an equitable division of the funds of an assignor;* and therefore it is held that if a person neglects or fails to present his claim until after a dividend has been made and declared, that he is entitled to the same per cent. as those who were paid in a distribution before made, provided there be sufficient funds in his hands; and the entire policy of the assignment act seems to be opposed to the doctrine announced by the eminent authorities first above cited.[19]

§ 1632. How presented. Affidavit, etc.

Every claim must be presented in writing, and it must have an affidavit attached thereto. It differs in this respect from the presentation of claims in the administration of estates. There the administrator *may* require an affidavit in assignments, the statute says that an affidavit *shall be filed.* The following is the statutory provision relating thereto:

"Each person presenting and filing a claim against the estate of the debtor, before it is allowed or any payments made thereon, must make and file an affidavit setting forth that the claim is just and lawful, the consideration thereof, and what, if any, set-offs or counter-claims exist thereto; what collateral or personal security, if any, the claimant holds for the claim, or that he has no security. The assignee, or trustee, or a creditor may examine the claimant under oath touching such collateral or other security, or any other matter relating to his claim, within such time and under such regulations as are prescribed by the probate judge. A surety of, or person jointly liable with, the assignor, may be allowed to present and prove the claim on which he is so bound; but the dividend thereon shall be payable to the party holding it. If the latter proves such claim, then the allowance and dividend must be on it as proved by him." [R. S. § 6354.][20]

* This statement is quoted in State vs. Esterly, 69 O. S. 15, as showing an intention as claimed by the author.

[18] Owen vs. Ramsdell, 33 O. S. 443.

[19] See § 974, Where same question is discussed.

In State Bank vs. Esterly, 18 Bull. 909, 69 O. S. 15, the Supreme Court has finally settled this matter in accord with the views of the author, and the court so holds that there should be an equitable distribution.

[20] § 11137 G. C.

§ 1633. Form of affidavit, etc.

There is little ambiguity in the above section, and it should be strictly followed. If the claimant holds collateral, the affidavit must so state, or if he is security, it should so state. Proceedings to examine the claimant in reference to the validity of such claim might be had similar to those provided under sec. 11113, G. C.[21] The following is a form generally used:

The State of Ohio,.....County, ss.

Before me personally appeared A. B., who being duly sworn, says he is one of the firm of A. B. & Co., the owners of the claim hereto attached; that said claim is just and lawful; that the consideration therefor is goods sold and delivered to C. D.; that there is now due and unpaid on said claim the sum of.....dollars with interest thereon at the rate of six per cent. per annum from.....day of....., 190..; that there are no set-offs, nor counterclaims whatever against the same; that said owners have (here state what collateral or personal security the claimants hold, or if none say) no security whatever for the same to the best of affiant's knowledge and belief.

.....

Sworn to before me and subscribed in my presence this.....day of ....., 190...[22]

§ 1634. How to be allowed or rejected.

The statute makes it the duty of the assignee to endorse his allowance or rejection on the claim. But this is not the only way in which a claim might be allowed or rejected. It is merely a conclusive method of establishing such a fact. If there is no endorsement made on the claim, the question whether the same has been allowed or rejected must be determined from all the surrounding circumstances, and the same rule might be applied to the determination of this fact as in the administration of deceased persons' estates.[23] The assignee may be required to reject the claim as provided in the following section:

§ 1635. When claim shall be disallowed on application of assignor or creditor and proceedings in such case. "If the assignor or a creditor files in the court a written requisition on the assignee or trustee to disallow any claim or claims pre-

[21] § 1585.

[22] Whittaker's Pro. Code.

[23] See § 559, Allowance of claim; § 560, Rejection of claim, where this matter is fully considered.

sented which he has not reported as disallowed, and enters into bond to the assignee or trustee in such amount and with such sureties as the court approves, conditioned to pay all the costs and expenses of contesting them by the order of the court, they shall be disallowed, although theretofore allowed by the assignee or trustee. The assignee or trustee must forthwith give written notice thereof to the creditor or creditors, or his or their attorneys; whose claim or claims are so disallowed. Thereupon the same proceedings shall be had as required in other cases of disallowance in the two preceding sections." [R. S. § 6353.][24]

§ 1636. Procedure under § 11136 G. C.

The above section is very much similar to sec. 10724, G. C., in the administration of deceased persons' estates,[25] and the comments and forms suggested therein can easily be adopted to a procedure under the above section.[26] This section does not apply to the determination of the priority of the claim. Such a question must be made in the Probate Court.[27]

§ 1637. When suit must be entered on rejected claim.

If the claim is rejected, suit must be brought within thirty days after the same has been rejected, is the language of the statute,[28] and the Court, in the settlement of the trust, may determine the matter of fixing the costs provided the claimant recovered. It has been held that thirty days is not a period of limitation, but fixes a time after which distribution of the estate may properly be made without regard to such rejected claim, if suit is not brought within the thirty days after its rejection.[29] It will therefore be seen that the rule is different from the six months' limitation required in case a claim is rejected by an administrator of an estate. The law there being that if suit is not brought within such time the claim is forever barred.[30] But the only effect of not suing the claim within the

[24] § 11136 G. C.

[25] See § 561.

[26] § 562, Comments; § 563, Requisition to reject claim; § 564, Bond; § 565, Entry ordering notice; § 566, Form of notice.

[27] Graham Lumber Co. vs. Julien. 7 N. P. 391; 5 Dec. 167; Pettibone Manuf. Co. Assgmt. 3 N. P. 42; 4 Dec. 123.

[28] § 6352 R. S. (§ 1628).

[29] Kittredge vs. Miller, 12 C. C. 128; 5 C. D. 390.

[30] See § 609 *et seq.*

required time here is that the creditor may lose his right to participate in a dividend. An action may be brought any time that there are assets unadministered.[31]

§ 1638. In what Court action to be brought.

The language of the statute is that the person "shall be required to bring suit against the assignee or trustee, etc." If this statutory provision had been made with the present idea prevailing, as to the power of the Probate Courts, it might very well be contended that a suit might be brought in the Probate Court compelling an assignee to allow a claim, but the probabilities are that the Legislature intended that such action should only be brought in a Court of general jurisdiction, and such has been the holding of at least one Circuit Court, in Meader vs. Root,[32] and has been the general accepted idea of the bar for a number of years. Power to hear such an action could have been very properly conferred on the Probate Court, as the action is purely equitable,[33] and is not triable by jury.[34]

Suit is synonymous with action, and the proceeding is a civil action and not a special proceeding.[35] The only question that can be determined in such a proceeding is whether or not the assignee should *allow* the claim.[36] The Probate Court has full and complete jurisdiction to settle the question as to priority of different claims. A suit to prevent the allowance of a chattel mortgage must be brought in the Probate Court.[37]

[31] Kelley & Son vs. Mills, 1 N. P. 382; 2 Dec. 265.

Failure to sue within thirty days from the rejection of claim by a trustee, or to present the claim for allowance within six months from publication of notice of the appointment of the trustee, does not bar the creditor from contesting his claim and having it allowed after these periods have elapsed. Irwin vs. Lloyd, 20 C. C. 339; 11 C. D. 212.

[32] 11 C. C. 81; 5 C. D. 61.

[33] Gordon vs. Walton, 3 C. C. 433; 2 C. D. 246.

[34] Kennedy vs. Thompson, 3 C. C. 446; 2 C. D. 254.

[35] Id. 448.

[36] Clapp vs. Banking Co., 50 O. S. 534.

See also Wrightson vs. Bettinger, Assignee, 2 C. C. 381; 1 C. D. 543.

[37] Graham Lumber Co. vs. Julien, 7 N. P. 391; 5 Dec. 167.

§ 1639. Report of claims filed.

The statute requires that immediately after the expiration of six months, the assignee shall file a report of all claims presented.[38] It seems that the assignee is allowed two months for the purpose of paying preferred claims and filing his account upon which a general distribution is to be allowed. Although if a claim were presented before the order of distribution was made, even though the six months had expired, the holder would be entitled to participate in the general dividend. The following form suggests what it should contain:

STATEMENT OF CLAIMS PRESENTED.

In the Probate Court of.....County, Ohio.
In the Matter of the Assignment
for the benefit of the creditors of
.....Assignor.
.....Assignee.
Statement of claims presented to....., assignee of.....
....., assignor for the benefit of creditors, in the Probate Court of
.....county, Ohio, within six months from the time of the publication of the notice of appointment of said assignor, to-wit: from the.....day of.....A. D. 190.., to the.....day of
.....A. D. 190...

Claimants		
Postoffice address		
Amount of claim		$.....
Interest from		$.....
Rate of interest		$.....

Allowed—rejected—held under advisement. (State which.)
Date of allowance or rejection.....

RECAPITULATION.

Total amount of claims presented		$.....
Total amount of claims allowed	$.....	
Total amount of claims rejected	$.....	
Total amount under advisement	$.....	$.....

.....
Assignee of.....

[38] § 11134 G. C., § 1628.

CHAPTER XCI.

PAYMENT OF PREFERRED CLAIMS.

§ 1640 Introductory.
§ 1641 Costs of administration.
§ 1642 Commission of assignee.
§ 1642a Further allowance; counsel fees.
§ 1643 Ordinary services.
§ 1644 Extraordinary services. Attorney fees.
§ 1645 Itemized bill. Affidavit, etc.
§ 1646 Lien existing at time of assignment.
§ 1647 Claims preferred by statute.
§ 1647a Lien and security.
§ 1648 Taxes.
§ 1649 Labor claim under § 11138 G. C.
§ 1650 Liens on § 8339 G. C.
§ 1651 Miscellaneous matters, relating to labor claims.

§ 1640. Introductory.

While the statute does not require an accounting to be made until eight months after the appointment and qualification of the assignee,[1] yet it is evidently contemplated that prior to such accounting certain claims against the estate should be paid, for upon the confirmation of the report or account a distribution is to be made to general creditors. These claims that ought to be paid, before an account is filed, may be designated as preferred claims, and may be classified under three heads. First, costs of administration, which would include the costs of the Court, the care and management of the estate, etc.,[2] commission of assignee, etc.; second, liens either in the form of mortgage or judgment existing at the time of the assignment; third, those given a preference by statute.[3] These will be considered in their order.

§ 1641. Costs of administration.

The costs of administering the estate ought always to be paid in preference to any other claim, but some difficulty has been

[1] § 11140 G. C., § 1653.

[2] See § 506 *et seq.*, as to administration of estates.

[3] § 11138 G. C., § 1647.

See § 646, as to order and payment of debts in administration of estates.

experienced by the Courts in adjusting costs between various creditors of an estate whose claims are entitled to a different order of priority. The fund receiving the benefit of an administration should be charged with the costs which were necessary for its preservation, or reducing it into money for the benefit of the owner. As a general rule, it may be said that the assignor is entitled to his exemptions free from the costs of the assignment, the theory of the law being that exempt property does not pass to the assignee.[4] A mortgage lien holder is not to be charged with the general costs of administration. He is only to be charged with the costs that are incident to his particular fund.[5]

Where the property is covered by liens, and is not sufficient to pay all of them, where the liens have different priorities, a doubt has been expressed as to whether those which come first in order are entitled to be first paid without deduction for the costs of the sale and assignee's commission, and the burden of these be placed on those who are last in priority; or whether the lienholders shall contribute thereto ratably without respect to priority.[6] The Court is inclined to the opinion that the burden must be sustained by those last in priority.[6*]

It has recently been held that " the fees and allowances of an assignee for the benefit of creditors, for services rendered to the general estate, and for the benefit of the general creditors, are not to be paid from funds or property subject to specific liens which rest upon the property at the time the assignment is made. In an assignment for the benefit of creditors, where

[4] *In re* Marcy, 32 Bull. 6.

In this case it was said " That the costs of administration shall be paid as a second lien out of said fund, and to the extent any costs may remain unpaid after the application of such surplus of such fund, such balance of costs shall be paid *pro rata* out of the funds covered by the several mortgages including this Crane mortgage, in proportion to the amount realized on said mortgage liens, charging, however, to each fund any expense specially incident to such funds. McLain vs. Simington, 37 O. S. 660.

[5] Moore vs. Feldwisch, 3 Bull. 427.

[6] See Alms vs. Fitton, 9 C. C. 255; 6 C. D. 415.

[6*] McLain vs. Simington, 37 O. S. 660; Harrison vs. Chatfield, 12 C. C. 294; 5 C. D. 553.

In Strong vs. Strong, 42 O. S. 53, it is said, whatever deficiency there is, must fall on the junior lien holder.

the assignee has sold property encumbered by mortgage, it would be reasonable and perhaps lawful, to allow to the assignee fair compensation for such services as he might perform of benefit to the mortgagee in bringing the property to sale and in bringing the proceeds applicable to the mortgage debt unto Court.[7]

§ 1642. **Commissions of assignee. Further allowance. Counsel fees, etc.** "Before a dividend is declared, the assignee or trustee may be allowed the following commission upon the amount of the personal estate collected and accounted for by him, and of the proceeds of the real estate sold under an order of court for the payment of debts, which must be received in full compensation of all his ordinary services; for the first thousand dollars, at the rate of six per cent; for all above that sum, and not exceeding five thousand dollars, at the rate of four per cent; for all above five thousand dollars, at the rate of two per cent." [R. S. § 6357.][8]

§ 1642a. **Further allowances; counsel fees.** "Allowance also shall be made as the court considers just for necessary expenses, and extraordinary expenses, and extraordinary services not required of an assignee in the common course of his duty, and such reasonable counsel fees as were necessary for the proper administration of the assignment, whether performed by the assignee or trustee as attorney, or such other as he employs. No such further allowance, extraordinary expenses or services, or attorney fees, shall be made unless a bill of items is filed, showing such actual and necessary or extraordinary expenses and services, or attorney fees, together with the affidavit of the person incurring such expenses or performing such services, that they were done for, and were necessary to, the assignment; that the amount charged therefor is reasonable, and not more than is usually paid for such services. When such services have been performed by persons other than the assignee or trustee, the latter also must file an affidavit, stating that such services were necessary for the proper administration of the assignment, that they were performed under his direction, that the charges therefor are fair and reasonable, and that the full amount thereof has been paid to the party performing such services." [R. S. § 6357.][8*]

[7] Reed vs. Terhune, 22 C. C. 544.

[8] § 11143 G. C.

[8*] § 11144 G. C.

Rents becoming due after assignment are preferred claims, and if the assignee continues business he accepts the terms of the lease made previously by the assignor. *In re* Assign. of Frank W. Hopkins, 5 O. L. R. 178; 52 Bull. 403.

§ 1643. Ordinary services.

The statute divides the compensation of an assignee into two kinds, ordinary and extraordinary. The ordinary services are fixed upon the same basis as an administrator in the administration of estates.[9] Under either designation, they are properly costs of administration. The percentage is calculated upon the money that is collected and accounted for and proceeds of real estate sold under an order of Court. But it must be money that has been actually received and accounted for, and if the real estate is bid off by a mortgage creditor, whose mortgage lien covers the entire amount of the sale, the assignee is not entitled to percentage, although he might be entitled to extraordinary services in having the property sold.[10] Money not belonging to a trust fund cannot be considered in determining the commission,[11] nor can commission be charged on the same amounts by the assignee and his successor. If there is a maladministration of the estate, no compensation in any form will be allowed.[12]

§ 1644. Extraordinary services. Attorney fees.

The Court may make such allowance as is just and reasonable for necessary expenses and extraordinary expenses, and such reasonable attorney fees as may be necessary for the proper administration of the assignment, whether performed by the

[9] See § 654 *et seq.*

[10] Andrews vs. Johns, 59 O. S. 65; Shaw vs. 5th Ward Bldg. Ass'n, 6 C. C. 41; 3 C. D. 340; Owsley vs. Murphy, 37 Bull. 246.

[11] Commercial Bank Assignment, 3 N. P. 193; 4 Dec. 440.

[12] *In re* Purcell, 15 Bull. 311; S. C. Goebel, 40.

The Circuit Court must have laid down a different rule. For in *In re* Reefer, Ferris, J., says, "an assignee is entitled to six per cent., four per cent. and two per cent.—six per cent. upon the first thousand, four per cent. upon the next four thousand and two per cent. upon the balance, and it is not within the province of this Court to increase or diminish it even in the case of maladministration. The expression by the Circuit Court in the Purcell matter has been determined to be mandatory so far as this court is concerned. Reefer Assign, 6 N. P. 340; 9 Dec. 326.

This accords with the law in reference to an executor. § 655.

See § 659, Extra compensation to administrator.

assignee himself or by some person employed by him. But the nature of such services shall be set out in an affidavit.[13]

What is meant by extraordinary services are such that it is not presumed that an assignee of ordinary capability is able to perform, and are not within the common duties of an assignee. Thus it was held that the employment of an auctioneer was not extraordinary services.[14]

In reference to such allowance it has recently been said "complaints are common of objectionable practice in this respect in some localities, where it is charged. The effect seems to be to conduct assignments as though they had been provided primarily for the benefit of assignees and their attorneys. The faith of the people in the impartial administration of the law by the Courts would be enhanced by a correction of the abuse, if it exists, and by the adoption of methods of administration by which the rights of creditors may be fully protected and enforced, and the trust estates, not depleted by extravagant charges and costs; and no injustice to any would result." [15]

Where the nature of the services are such as are beneficial to the lienholders, the allowance should be made.[16] If an attorney has been employed and his fees are reasonable, the mere fact that a succeeding trustee refuses to make payment, will not justify the Probate Court in rejecting the claim.[17] A co-trustee may legally employ an attorney, who will be entitled to compensation.[18] As to what are proper allowances, the same rule would apply as in the administration of deceased persons' estates.[19]

[13] § 11143 G. C., § 1642.

The law applicable to administrators as to extra compensation might be followed. § 659.

[14] Ingham vs. Lindemann, 37 O. S. 218.

It seems to the author, that the Court rather stretched the ordinary duties of an assignee, when it held that the duty of an auctioneer comes within such duties.

[15] Reed vs. Terhune, 22 C. C. 544.

[16] Schaw vs. 5th Ward Bldg. Ass'n, 6 C. C. 41; 3 C. D. 540; *In re* Baker, 47 Bull. 557; Richter vs. Schoenfeldt, 1 Bull. 133; Claflin vs. Goebel, 7 C. C. 384; 4 C. D. 645.

[17] Kittredge vs. Miller, 12 C. C. 128; 5 C. D. 391.

[18] Commercial Bank Assignment, 3 N. P. 193; 4 Dec. 440.

[19] See §§ 508, 509 and 510.

A fee of $1.250 for ten days' of almost exclusive service by an attorney to an assignee of a bank with large assets and liabilities is not

§ 1645. Itemized bill. Affidavit, etc.

Before an assignee can be allowed compensation for extraordinary services, whether the same be rendered by himself or another, the statute is mandatory that it shall not be allowed by the Court, unless a bill of items be filed showing such expenditures to be actual and necessary. The statute is likewise express that the Court shall not allow such claims unless a special affidavit is made thereto, and that the amount charged is reasonable and not more than is usually paid for such services.[20]

It must also show where the services were rendered by a person other than the assignee, that the bill had actually been paid, but such services are deemed paid where the attorney holds a check of the assignee for the sum, even though the check has not been presented.[21] The following may be used as a form of affidavit:

Affidavits as to attorney fees.

Probate Court,.....County, Ohio.
In the Matter of the assignment of
.....
No.....
Counsel Fees.
The State of Ohio,
.....County, ss.
Affidavit of Attorney.
....., being duly sworn, says that he is an attorney at law of.....County, O.; that he rendered valuable legal services to.....as assignee of.....as set forth in the bill of items hereto attached and marked Exhibit "A." That said services were performed for and were necessary to the proper administration of said assignment, and that the amount charged therefor is reasonable, and not more than is usually paid for such services.

.....

Sworn to before me and signed in my presence, this.....day of.....A. D. 190..

.....

excessive. Nor is $3,750 excessive for three months' further service. Commercial Bank Assignment, 4 Dec. 440; 3 N. P. 193.

Three per cent. is a proper allowance for extraordinary services irrespective of the number of trustees. e. g., $2,700 for collecting $90,000, and if the ascertainment of who the creditors are is erroneous, expenses of clerk, office and attorney will be allowed. (The Common Pleas increased this.) Purcell's Assignment . . . Goebel, 169.

[20] Chaflin vs. Goebel, 7 C. C. 385; 4 C. D. 645.

§ 11143 G. C., § 1642.

[21] Commercial Bank Assignment, 3 N. P. 193; 4 Dec. 440.

See § 659, Extra compensation to administrators.

The State of Ohio,
.....County, ss.
Affidavit of Assignee.
..... assignee of....., being duly sworn, says the services described in the bill of items attached to the foregoing affidavit, were necessary for the proper administration of the said assignment; that said services were performed under the direction of affiant; that the charges for the same are fair and reasonable, and that the full amount thereof has been paid to said....., who performed said services.
....., assignee.
Sworn to before me and signed in my presence, this.....day of.....
.....A. D. 190...
.....

§ 1646. Lien existing at time of assignment.

The assignor can by no act of his, change the status of his property or liens thereon existing at the time of his assignment. Therefore valid liens existing at the time of such assignment must be paid before there can be a distribution to general creditors; and in this sense such claims are preferred. There seems to be no doubt where an assignee brings an action to sell the real estate and makes all lien holders parties defendant, that the Court may distribute the fund arising from the sale of such real estate before the time has elapsed in which a report must be filed in the Probate Court. The statute requires that the incumbrances and liens shall be paid out of the proceeds according to their priority and therefore general creditors have no right in the part required to be applied on the liens.[22]

It might likewise be said, that if the Court ordered a distribution to be made upon a chattel mortgage or judgment lien, that the general creditors had no interest therein. But upon this question there is a difference of opinion. One Circuit Court having held that no distribution can be made until the eight months have elapsed, even on chattel mortgages, unless notice has been given to all parties having an interest, including general creditors.[23]

It seems, therefore, that the only safe way for an assignee to do, is to file an application in the Probate Court asking for an order determining the liens and in some manner make the

22 Reed vs. Terhume, 22 C. C. 547.

23 Mooney vs. Lindley Fogg, 19 C. C. 327; 10 C. D. 551; Sylvester vs. Hesslein, 5 C. C. 256; 3 C. D. 128.

See Klaustermeyer vs. Trust Co., 89 O. S. 142, as to what will constitute an equitable lien.

general creditors parties and give them proper notice. The assignee might pay the claim and make a report thereof in his account and when making payment, require the person to whom payment is made to indemnify him, in case the Court in passing upon his report might find that the same was unlawfully paid.[24]

§ 1647. Claims preferred by statute. "Taxes of every description assessed against the assignor upon personal property held by him before his assignment must be paid by the assignee or trustee out of the proceeds of the property assigned in preference to any other claims against the assignor. Each person who has performed labor as an operative in the service of the assignor, within twelve months preceding the assignment, shall be entitled to receive out of the trust funds, before the paying of other creditors, the full amount of wages due for such labor, not exceeding three hundred dollars." [R. S. § 6355.][25]

§ 1647a. Liens and securities. "The foregoing provisions shall not prejudice or affect securities given, or liens obtained in good faith, for value, but judgments by confession on warrants of attorney rendered within two months prior to such assignment, or securities given within such time to create a preference among creditors, or to secure a pre-existing debt other than upon real estate for the purchase money thereof, shall be of no force or validity as against such claims for labor, in case of assignment, to the extent above provided." [R. S. § 6355.][25*]

§ 1648. Taxes.

The statute prescribes that all taxes shall be paid in preference to any other claims against the assignor,[26] and it has been held that taxes on personalty, charged at the time of the assignment is a claim superior to chattel mortgages made within two months before the assignment to secure a past debt or create a preference and that labor claims are superior to such mortgages and taxes are superior to labor claims.[27]

Whether taxes would be superior to the claim of costs of the assignment may be questionable. But it is a question that

[24] See § 1592, Property taken possession under lien, etc.

[25] § 11138 G. C.

[25*] § 11139 G. C.

[26] § 11138 G. C., § 1647.

[27] Adair vs. Blackburn, 60 O. S. 575.

See § 643, taxes. § 511, taxation.

rarely occurs, as the taxes are usually comparatively a small sum; an assignee is not required to list personal property in his hands for taxation while the estate is being settled in the Probate Court, whether such property be in the form of moneys, bills receivable, bonds, certificate of stock or otherwise,[28] but if the assignee was conducting a business for the benefit of the creditors, then the property used in such business would be subject to taxation and should be listed.[29]

Real estate in the hands of an assignee may be sold by the treasurer for unpaid taxes or assessments, and the treasurer may include the ten per cent. penalty.[30] But an assignee is not liable for taxes where he has demanded of a county treasurer the tax bills against his assignor and pays all taxes required of him where such bills are not presented until after the estate is settled.[31]

§ 1649. Labor claims under § 11138 G. C.

Two sections of the General Code, give preference to labor claims, to-wit, secs. 11138 G. C., 8339 G. C. Under the first, in order to be entitled to a preference, the labor must be performed by one as an "operative" in the service of the assignor. As to what will constitute a person an operative, has been the subject of numerous decisions in our State. A secretary of a manufacturing company, though he acts as an overseer and performs manual labor is not an operative.[32] And where a president was also vice-president, having control of a department, with power to hire and discharge, his claim was not entitled to preference.[33]

But where a person superintends, oversees and manages a contract to build a private street, it was held he was entitled to

[28] McNeill vs. Hagerty, 51 O. S. 259.

[29] *In re* Assignment of Jackson Brewing Co., 5 N. P. 438; 6 Dec. 396.

[30] Baker vs. French, 18 C. C. 420; 10 C. D. 222.

[31] *In re* Assign. of Ehler, 4 N. P. 246; 6 Dec. 309.

[32] Green vs. Weller, 6 C. C. 351; 3 C. D. 438.

[33] Hanner vs. The Maumee Brewing Co., 6 N. P. 305; 8 Dec. 399.

Operator does not include a director in a corporation acting as bookkeeper and sometimes as shipping clerk. *In re* Fairview Glass Co., 21 Dec. 822.

a preference.[34] Likewise a director of a corporation, though he perform certain manual labor is not an operative.[35] But a bookkeeper who was also a traveling salesman could claim his priority.[36] A salesman in a jewelry store, whose duty it is to take customers about the store, etc., is an operative; the statute is to be liberally construed.[37] The Supreme Court has held that a traveling agent to obtain subscriptions and selling a legal directory and collecting accounts, is not an operative.[38]

"Operative" is not to be confined to skilled labor nor labor in manufacturing, but a common laborer may be entitled to protection under the statute.[39] In one case it was said that where a relation of master and servant does not exist between employer and employed, the employe cannot be an operative.[40]

Thus a blacksmith following an independent calling, cannot have a preference. Likewise an electrician who did repair work, and furnished material by special contract, was held not to be an operative, but could be protected to a certain extent under sec. 8339, G. C.[41]

It has also been held, that a subcontractor, who furnishes labor to a principal contractor is an operative and entitled to preference where the principal contractor makes an assignment.[42] A person who is performing labor as an operative, is entitled to his claim not exceeding three hundred dollars, where the labor is performed within twelve months preceding the date of assignment.

[34] *In re* Engle, 1 N. P. 110; 1 Dec. 101.

[35] Williams vs. Southard, 40 Bull. 287.

[36] Hanner vs. Maumee Brew. Co., 6 N. P. 305; 8 Dec. 399.

[37] *In re* Duhme Assignment, 4 N. P. 294; 6 Dec. 448.

[38] Sloan's Assignment, 60 O. S. 472; S. C. 13 C. C. 229; 7 C. D. 111; 10 C. D. 811.

[39] Akron Iron Co. vs. William N. Whitley, 25 Bull. 203; Lowry Assignment, 4 N. P. 395; 7 Dec. 282.

[40] Lowry Assignment, 4 N. P. 395; 7 Dec. 282.

[41] Duhme Assignment, 6 Dec. 526; 4 N. P. 294.

[42] Whitney vs. Gill, 15 C. C. 648; 8 C. D. 450.

§ 1650. Liens on under (3206a, R. S.) 8339 G. C.

It is provided in sec. 8339, "that in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed, shall be first paid out of the trust funds in preference to such other claims of the assignor except claims of taxes and costs of administering the trust." This section also provides, that the person performing the labor, may have a lien upon the real property. But in case of assignments, they are entitled to preference, although no lien has been perfected.[43]

Secs. 8339, G. C., and 11138, G. C., are not antagonistic,[44] and a person may assert his claim under either section.[45] While failure to perfect the lien may affect the claim as a lien on real estate, yet preference under the statute would not be interfered with.[46] It will be observed that there is no limit to the amount under 8339, G. C., except that it must be for labor performed within three months from the time of the assignment.

§ 1651. Miscellaneous matters, relating to labor claim.

There is some difference between the wording of secs. 11138, G. C., and 8339, G. C., as to the priority of labor claims in reference to liens, mortgages, etc. They are practically, however, the same, and should be construed together. If a lien is perfected as provided in sec. 8339, G. C., then such lien would be superior to all claims for homestead, but if no lien was perfected, then the laborer could only look for payment of his claim out of the personal property where other liens might absorb the fund arising from the sale of the real estate. A

[43] Trust vs. Miami Oil Co., 19 C. C. 727; 10 C. D. 372.

[44] Engle's Assignment, 1 N. P. 110; 1 Dec. 101.

[45] Whitney vs. Gill, 15 C. C. 655; 8 C. D. 450.

[46] Evans & Co., Assignment, 2 N. P. 77; 3 Dec. 166.

chattel mortgage given in good faith is prior to the claim under sec. 8339, G. C.[47]

In a recent case it has been held, that a chattel mortgage is subject to labor claims under sec. 8339, G. C.[48] No doubt if a chattel mortgage is made within two months of an assignment in order to be superior to labor claims, it must be shown to have been *bona fide* and not to create a preference nor for a past debt.[49] Where property of an assignor is subject to a prior levy, the labor claims do not attach,[50] and so it has been held, that where property was left on contract and a chattel mortgage was given for the unpaid purchase money, a labor claim would not be superior to the chattel mortgage.[51]

While it is held, that an operative's rights to a lien is not assignable,[52] yet where a superintendent of a concern which was unable to pay its hands advanced money, it was held that he was subrogated to the rights of such persons whom he paid,[53] and that a merchant who fills orders for operatives given them on him in lieu of wages, is entitled to be subrogated to the rights of such operatives.[54]

Leaving an employment in the middle of the month on being informed that the employer cannot pay, does not forfeit the lien,[55] nor will taking the employer's notes, waive the right to priority.[56]

[47] Hobelman, Assignment, Goebel, 90.

[48] Trust Co. vs. Miami Oil Co., 19 C. C. 727; 10 C. D. 372.

It rather occurs to the writer that it was not the intention of the legislature to allow even labor claims to affect a prior chattel mortgage in good faith. In fact such is the express words of §§ 11138 and 11139 G. C.

[49] Morey vs. Pierce, 11 C. C. 563; 5 C. D. 276.

[50] Hughes vs. City Hall Bank, 61 O. S. 386; S. C. Hughes vs. Dale, 16 C. C. 645; 9 C. D. 270; *In re* Evans, Assign, 2 N. P. 77; 3 Dec. 166.

[51] Reefer's Assignment, 6 N. P. 338; 9 Dec. 326.

[52] Engle's Assignment, 1 N. P. 110; 1 Dec. 101.

[53] Standard Wagon Co., 3 N. P. 168; 4 Dec. 188.

[54] *In re* Minor Fire Clay Co., 7 N. P. 557; 9 Dec. 627.

[55] Trust vs. Miami Oil Co., 19 C. C. 727; 10 C. D. 372.

[56] Minor Fire Clay Co., Assignment, 7 N. P. 557; 9 Dec. 627; Kunkle vs. Reeser, 5 N. P. 401; 5 Dec. 442.

CHAPTER XCII.

ASSIGNEE, ACCOUNT AND DISTRIBUTION.

§ 1652 Introductory.
§ 1653 Report and settlement of assignee. The declaring and payment of dividends.
§ 1653a Dividends.
§ 1653b Dividends reserved.
§ 1654 When it must be filed.
§ 1655 What it should contain.
§ 1656 Assignee's account.
§ 1657 Filing and entry ordering notice.
§ 1658 Hearing account.
§ 1659 Exceptions.
§ 1660 Notice to creditors of dividends.
§ 1661 Report of payment.

§ 1652. Introductory.

Within the period of eight months, from the qualification of the assignee, it is his duty to report to the Court a detailed statement of his doings. Within this time, if possible, he should have converted all the property into money. But if this has not been within his power, exercising ordinary prudence, he should, notwithstanding, file his report and make a dividend to general creditors of whatever there may be on hand. He should have paid and taken vouchers for all costs incurred in the administration of the estate; he should likewise have paid all preferred claims where the same are entitled to preference beyond doubt or have been adjudicated upon, by the Court. If there are any claims of a preferred character which are doubtful and have not been adjudicated upon, they should be reported in the account as entitled to preference; and then if the account is approved, should be paid before a general order of distribution is made. The statute relating to such reports, etc., is as follows:[1]

[1] The Probate Court has power to compel an assignee to account for money in his hands and on his failure so to do suit may be brought on the bond, when there is an order of the Probate Court fixing his liability. Voss vs. Loomis, 1 C. C. 20; 1 C. D. 12.

§ 1653. Reports and settlements of assignee. The declaring and payment of dividends. "At the expiration of eight months from his appointment and qualification, and as often thereafter as the court orders, an account must be filed with it by such assignee or trustee, containing a full exhibit of all his doings as such, up to the time of filing, together with the amount of all claims remaining uncollected, and the amount thereof which in his opinion may thereafter be collected. Exceptions may be filed to the accounts by parties interested, in the manner provided in cases of accounts of administrators, or executors. Such accounts shall be examined, and the exceptions thereto heard by the court, in the manner provided by law for the settlement of the estates of deceased persons. Upon the filing of such accounts, the court shall fix a time for the hearing, and publish notice thereof as in the case of the filing of the account of an executor or administrator." [R. S. § 6356.][2]

§ 1653a. Dividends. When, on settlement, a balance is shown in the hands of the assignee or trustee, subject to distribution among the general creditors, a dividend shall be declared by the probate judge, payable therefrom equally among all the creditors entitled, in proportion to the amount of their respective claims against the assignor, including those disallowed, which the claimant has begun suit to establish as hereinbefore required, and claims held under advisement. Notice of the making of such dividend, and the time and place of its payment, shall be given by advertisement once, in a newspaper published and of general circulation in the county in which such trust is administered, and in such other way as the court orders. A report must be made within sixty days after the date fixed of the dividends paid and of those uncalled for and unpaid at that time. The court then shall cause a new notice to be given to the owners of unpaid dividends, in such way as it directs. If not demanded within twelve months thereafter, they must be divided *pro rata* among the other creditors, until they are paid in full, and any remainder to the assignor or his legal representatives." [R. S. § 6356.][2*]

§ 1653b. Dividends reserved. "Dividends reserved for claims disallowed, or held under advisement, when actions to enforce their allowance have been commenced, shall be held until the actions terminate, when they shall be paid on claims the

[2] § 11140 G. C. [2*] § 11141 G. C.

allowance of which has been ordered. Otherwise, they must be distributed *pro rata* among other creditors not paid in full, or refunded to the assignor." [R. S. § 6356.][2]†

§ 1654. When it must be filed.

The statute is positive in its provision, that the report must be filed at the expiration of eight months from the qualification of the assignee and this duty should be enforced by the Court. Of course if a delay of a short time will permit the assignment to be closed in full, such a delay might be tolerated. But if it is evident that such cannot be the case, it is the duty of the assignee to file his report and make distribution of what he has in his hands. If he delays such matter, he ought to be charged with interest on the fund. After the first report is filed, then another report may be filed at any time that the Court may require. The action of the Court will depend upon the circumstances attending each case. In no case should assignees be permitted to continue a trust for an indefinite time. Courts should require vigilance and activity on the part of the assignee without sacrificing the rights of creditors, in order that the estate may be distributed at the earliest possible time. Prolonged settlements do not usually result to the benefit of those interested. Possibly, sometimes, it may result to the interest of the assignee.[3]

§ 1655. What it should contain.

The statute provides that the report shall contain a full exhibit of all his doings as such assignee up to the time of the filing thereof, together with the amount of all claims remaining uncollected and the amount thereof which in his opinion may thereafter be collected. This means that the assignee shall set out in detail all moneys collected and disbursements made, in this respect it is very much similar to the account of an administrator and the discussion made in the chapter relating

[2] 1112 G. C.

[3] Distribution must be made according to domicile. Johnson vs. Sharp, 31 O. S. 611.

thereto can be read with profit in reference to an assignee's account.[4]

The following form will suggest many of the requisites required by the statute:

§ 1656. Assignee's account.

In the matter of the assignment of.....in trust for the benefit of creditors,.....and final account current.... ...., assignee..of.....assignor... In account with said trust before the Probate Court of.....Co., O.

Charge.....self.....as follows:

To amount received from..... $.....

To amount received from collection of notes and accounts (not above stated) as per schedule hereto attached, and made part hereof, marked No. 1..... $.....

Balance on former acc't filed.....190..,..... $.....

Total amount charged..... $.....

Said accountant claims credits on account of payments and disbursements made on behalf of said trust, as follows, to-wit:

1. On account of costs of assignment, as follows:

Paid to Probate Judge.....as per vouchers 1-2 $.....

Assignee's commission—

6 per cent. on first thousand.... $.....

4 per cent. on next four thousand $.....

2 per cent. on all above $5,000.00 $.....

$.....

Assignee's further allowance, made by Court on account of actual and necessary expenses and extraordinary expenses and services..... $.....

And attorney's fees..... $.....

2. As per bill of items, duly sworn to and filed herewith as follows: ..... $.....

SCHEDULE A.

Statement of claims upon which a dividend of.....per cent. can be declared, as stated in said assignee's foregoing account, out of a balance of $.....remaining in his hands subject to distribution among general creditors. Interest computed to.....190...

Claimants ..... $.....

Original claim ..... $.....

Interest from.....per cent..... $.....

Held under advisement..... $.....

Rejected—Proceedings commenced ..... $.....

Allowed ..... $.....

RECAPITULATION.

Total amount chargeable..... $.....

Total amount credited..... $.....

Balance remaining in hands of assignee—subject to distribution among general creditors..... $.....

[4] See § 725 in reference to preparation of account.

—A dividend of.....% can be declared, payable out of such balance, equally among all the creditors entitled, in proportion to the amount of their respective claims against the assignor of which claims—

Those allowed as valid, amount to..... $.....
Those disallowed, as to which the claimant has begun proceedings to establish, amount to..... $.....
And those held under advisement, to..... $.....

Total..... $.....

—As per schedule marked "A," hereto attached and made a part of this account.
—Said dividend of.....% will be the sum of..... $.....
Leaving $.....a balance to be hereafter accounted for.

—The claims remaining uncollected, owing to the estate of the said assignor—amount to $....., and the amount thereof, which in the opinion of the assignee..may hereafter be collected, will be the sum of $.....

AFFIDAVIT.

The State of Ohio,.....County, ss.
....., assignee..above named, being duly sworn, say..that the foregoing account, and the vouchers and schedules therein referred to, present a full and correct statement and exhibit of..h....administration of said trust to the time of the filing hereof (except as shown by former accounts) as..h....verily believe...

.....
.....

Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

....., Probate Judge.
....., Deputy Clerk.

§ 1657. Filing and entry ordering notice.

Upon the filing of an account it is the duty of the Court to fix a time for hearing and publishing notice thereof, the same as in the case of filing an executor's or administrator's account.[5]

The form of such notice can readily be adopted from that required in the accounting of an administrator.[6] The entry therefore may be in the following form:

(*Title.*)

This day came A. B., assignee of C. D., and filed in this Court for settlement his first (second or final) account. It is thereupon ordered by the Court, that said account be set for hearing on the.....day of..... .....A. D. 190.., and that due notice thereof be published, as required by law.[7]

[5] See § 11201 G. C. (§ 729).

[6] § 730. See also § 731 as to regard of publication; § 732 as to importance of notice.

[7] This notice must be not less than three weeks and ought to be in a newspaper of general circulation in the county. § 11201 G. C. (§ 729).

§ 1658. Hearing account.

The same rule applies, as to the hearing of accounts, as to administrators,[8] and what was there said is applicable.

§ 1659. Exceptions.

Exceptions are to be taken and made in the same manner as exceptions are taken and made in the accounts of administrators.[9] Reference is therefore made to the discussion of that matter under the head of administrator's account.[10]

When the account is approved and there is a balance remaining on hand, then there shall be made an order of distribution. The form of an entry in such a case may be as follows:

Probate Court,.....County, Ohio.

In the matter of the assignment
of A. B. to C. D.
Account approved, dividend ordered, etc.

It appearing to the Court that notice of the filing of the account of C. D., assignee in said matter for partial (or final settlement) was duly given by publication in....., a newspaper of general circulation in said county, and said account coming on this day to be heard, and no exceptions having been filed, the Court upon examination of the same, find it to be in all respects true and correct.

The Court further finds that the said assignee has received the sum of $....., that he is entitled to credit in the sum of $....., and that there remains a balance in his hands of the sum of..... dollars, for distribution among the general creditors. The Court do further find that the claims that have been presented to said assignee, including those disallowed and in litigation, and those under advisement, amount in all to the sum of $.....

It is therefore ordered that said account be and the same is hereby confirmed. And it is further ordered by the Court that said assignee pay upon the claims that have been presented and allowed, and those that may hereafter be allowed, a dividend of.....per cent. on and after the..... day of.....A. D. 190.., at.....and that of the time and place of said payment said assignee give notice by (here state how notice to be given).

..... Probate Judge[11]

[8] § 11202 G. C., § 733.

[9] § 11140 G. C., § 1653.

[10] § 734. When no exceptions are filed.
§ 736, Exceptions.
§ 737, Form of exception.
§ 738, Court may refer account.
§ 739, Trial.
§ 740, Evidence.

[11] It should be remembered here, that only such persons are entitled to participate in the dividends whose claims have been presented and allowed. If there are claims in litigation or held under advisement, sufficient funds should be retained to

§ 1660. Notice to creditors of dividends.

When a dividend is ordered, a notice must be given of the time and place of payment of such dividend, which notice must be by advertisement once in a newspaper published and of general circulation in the county; and notice must be given in such other way as the Court may order. Where all persons entitled to dividends have consented, this newspaper notice might be dispensed with. But the safer rule would be to always give it, and a proper way would be to order the assignee to send a postal card to each person entitled to a dividend. The form of such notice may be as follows:

NOTICE.

In pursuance of an order of the Probate Court of....., county, the undersigned, assignee for the benefit of creditors of A. B., will on the.....day of....., at.....pay upon the valid claims presented against said assignor, a dividend of..... per cent.

....., 190..

C. D., Assignee.

pay the same dividend on them as is ordered to be paid to the general creditors. A question may arise as to a person holding a claim secured by mortgage or as to whether a dividend should be paid on the entire amount or only on the amount that exists after the security has been exhausted and likewise whether a dividend should be paid at all until the security is applied. These matters have been previously discussed.

§ 1631.

Where there are joint and separate assets and joint and separate debts, the joint assets must first be applied to the payment of joint debts, and the individual assets to the payment of the individual debts. If there be any surplus assets in either of the funds, after the payment of that fund, the creditors of the other will share equally in the distribution of the surplus. Rogers vs. Meranda, 7 O. S. 179. See Central Law Journal, 204.

But if one partner has sold out to another or the firm is dissolved, then the individual creditors of the person to whom the property is sold, have the first preference and the firm creditors afterwards. Miller vs. Estill, 5 O. S. 508.

But it has been held where there are no co-partnership and no solvent partner, that the joint creditors may come upon the separate estate of the partner *pro rata* with the separate creditors. 17 Bull. 171.

Where two assignments have been made, one by the firm and the other by the partners individually to the same assignee, the Court may treat it as one trust after the adjustment of conflicting claims. Clapp vs. Baking Co., 30 Bull. 359; 50 O. S. 528.

§ 1661. Report of payment.

Within sixty days after the time fixed for the payment of dividends, the assignee shall report to the Court, and if there are any unpaid dividends, a new notice shall be given to the creditors unpaid in such a way as the Court may direct and if these unclaimed dividends are not demanded within twelve months, then the same shall be divided *pro rata* among the other creditors. If there are any claims held under advisement or secured so that a dividend cannot be paid, as soon as the question as to their validity is settled and the amount upon which a dividend is to be declared is determined, then the creditors holding such claim shall be paid their *pro rata* share. The idea of the law is to make an equitable and just division of the assets of the assignor, and if a person presents his claim while there are funds in the hands of the assignee, the Court should make such order as will do justice to all parties. If all the creditors are paid in full and any assets remain on hands, they should be returned to the assignor. If any real estate is undisposed of, it should be reconveyed.[12]

The Court should require additional accounts to be filed whenever there are assets in the hands of the assignee sufficient to justify the same and reports filed of dividends paid until all the assets are accounted for. The report of payment of dividends may be in the following form:

ASSIGNEE'S REPORT AS TO PAYMENT OF DIVIDENDS.

of.....%

In the matter of the assignment in trust, etc., of....., assignor to....., assignee.

In the Probate Court of.....County, Ohio.

To the judge of Said Court:

Out of a balance of $....., a dividend of.....% having been by you, heretofore, to-wit: on the.....day of.....A. D. 190.., declared payable equally among all the creditors entitled, in proportion to the amount of their respective claims against the assignor "of the payment of which dividends and those remaining uncalled for and unpaid," report is made as follows, to-wit:

[12] See § 577, Raising an assignment.

TO WHOM ORDERED PAID.	PAID. WHEN.	PAID. AMOUNT.	VOUCH. NO.	UNCALLED FOR AND UNPAID.
Total		$		$.....

—"of the making of which dividend, and of the time and place of payment thereof," notice was given by advertisement once in the..... ....., a newspaper published and of general circulation in said county of .....and by....., as required by law and the order of the Court—a copy of which advertisement and notice marked "B" are herewith returned and made a part of this report.

.....
Assignee of.....

AFFIDAVIT.

The State of Ohio,.....County, ss.
....., assignee..aforesaid, being duly sworn, say..that the foregoing report is true and correct, as..h....verily believes.

.....
Sworn to before me and subscribed in my presence this.....day of .....A. D. 190...

....., Probate Judge.

When such report is filed, the Court should approve the same by a journal entry, and if it be a final report, discharge the assignee. The entry may be in the following form:

(*Title.*)
This day came A. B., assignee of C. D., and filed in this Court his report of payment of dividends as heretofore ordered by the Court. On examination, the same appearing regular and correct, is approved and confirmed; and it further appearing to the Court that all the assets of said assignor have been distributed and accounted for, it is ordered that said A. B. be discharged as assignee of said C. D., and that said trust be and is hereby terminated.[13]

[13] This entry should be changed to suit the condition, if it is not a final report, it should simply be approved and confirmed and if there is any property on hand it should be ordered returned to the assignor.

CHAPTER XCIII.

APPROPRIATION OF PRIVATE PROPERTY.

§ 1662 Introductory.
§ 1663 Power of eminent domain.
§ 1664 Constitutional provisions.
§ 1665 Who may exercise power.
§ 1666 How grant to exercise, construed.
§ 1667 When may be exercised.
§ 1668 What and how much may be taken.
§ 1669 Taking property without right.
§ 1670 Additional servitudes.
§ 1671 Compensation.
§ 1672 Benefits.
§ 1673 Evidence, etc.

§ 1662. Introductory.

It seems singular, that while a large portion of the members of the constitutional convention of 1851, as well as a considerable part of the judiciary of Ohio, considered the Probate Court to be incapable of dealing with difficult and intricate questions of law, that the important proceedings of condemnation of private property should soon thereafter be conferred almost exclusively on the Probate Court. Yet such is the fact, and now in some stage of such proceedings the Probate Court entertains jurisdiction in every instance, except in proceedings brought by municipal corporations. In such cases the proceeding *may* be brought in either the Probate or Common Pleas Court.[1] In cases of appropriation by private corporations, the action must originally be commenced in the Probate Court.[2] In other cases, such as roads,[3] ditches, etc.,[4] the jurisdiction of the Probate Court is appellate. The constitutionality of the right to have a jury pass upon the value of the

1 § 3681 G. C., § 1750.
2 § 11039 G. C., § 1674.
3 §§ 7078, 12236 G. C., § 1812.
4 § 6469 G. C., § 1833; § 6625 G. C., § 1852.

property condemned, being preserved by the right to appeal to the Probate Court, and there having a jury pass upon the question of compensation, etc. From the above it will be seen that no work on probate practice in Ohio would be complete with this very important subject omitted. However, in a work of this character it will not be possible to treat the subject in a very extensive manner. In this chapter some general principles will be discussed, and subsequent chapters will take up more particularly matters pertaining to practice.[5]

The power is not like that of taxation, for taxation operates upon the community, or a class of persons in a community, and by some rule of proportionment.[6] Neither is it like special assessments, which is but another form of taxation; neither is it to be confounded with the police power of the State.[7] A police power is usually exercised as a method of regulating and restricting the use of property and not its taking or confiscation, and so it has been held not to include cases where property is taken to avert a public calamity, such as demolition of buildings to prevent a conflagration.[8] Somewhat similar to the last mentioned is that of the destruction of property in the time of war.[9] The power of appropriation attaches to every kind of property.[10]

§ 1663. Power of Eminent Domain.

The power of eminent domain may be defined to be the right of the sovereign, without the consent of the owner, when necessary, to make private property subservient to the public welfare.[11] The same definition is given in Lewis on "Eminent Domain," [12] and Mills on "Eminent Domain." [13]

[5] Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 308.

[6] Lewis on Em. Dom., § 4.

[7] See discussion of the same, Lewis Em. Dom., § 6, § 156.

[8] Lewis on Em. Dom., § 7.

[9] Discussion of same, Lewis on Em. Dom., § 8.

[10] O. S. Ry. vs. Hinkle, 1 N. P. 65; 1 Dec. 682.

See § 1811.

[11] Ranney J., Giesy vs. C. W. & Z. R. C. Co., 4 O. S. 324; Emig vs. Clark Co., etc., 5 N. P. 471; 5 Dec. 459.

[12] § 1.

[13] § 2.

Some Courts treat it as a reserved right or estate and others as one existing in all civilized governments.[14]

Our own Supreme Court has said: "It rests upon the public necessity — subordinates the rights of one to the welfare of all — and is just as broad as that necessity, and no broader. If the wants of the public are attained by the acquisition of an easement, nothing more can be taken; if the whole interest is required, the whole may be appropriated. Whether this power is derived from an implied condition in every grant by which property is held under the government, and whether, where no constitutional restraint exists, it may be exercised without making compensation, are rather questions for ingenious speculation than of practical importance. It is enough that its existence is everywhere acknowledged, and that its exercise for many important purposes, both in peace and war, in the direct form of appropriation and the indirect method of taxation, is absolutely necessary to enable any government to attain the great ends for which it is instituted; while no enlightened government, at this day, attempts to appropriate without compensation, and in this country it is everywhere enforced by Constitution provisions."

§ 1664. Constitutional provisions.

Two separate provisions of our Constitution relate to the taking of property for a public use. The first is sec. 19, in Art. 1, of the Bill of Rights, which is as follows:

Of the inviolability of private property. "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduc-

14 Lewis on Eminent Domain, § 3. The right of eminent domain involves an attribute of sovereignty, and is strictly construed. A foreign telephone company has no right to exercise such power, especially where it is not a part of an interstate system. Cen. Union Tel. vs. Columbus Grove, 8 C. C. C. (N.S.) 81; 28 O. C. C. 131.

tion for benefits to any property of the owner." [See Const. 1802, Art. 8, § 4.][15]

The second provision is sec. 5 of Art. 13, which relates more particularly to appropriation of rights of way by corporations, and is as follows:

Right of way. "No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a Court of record, as shall be prescribed by law." [16]

These provisions, while worded differently, substantially in many respects cover the same ground. This results from the fact that the above provisions were reported by separate and distinct committees of the constitutional convention.[17]

[15] Art. I, § 19.

[16] Art. XIII, § 5.

[17] It will be remembered by those who are curious to trace its history, that each article of the Constitution came from a separate committee, and redundant provisions were therefore almost unavoidable. In this instance, however, the section as originally introduced served a distinct purpose, and differed from that in the bill of rights, in requiring the money, in all cases, to be paid before the property was taken. It was afterward made to conform in this particular by amendment, and then retained by a direct note upon a motion to strike it out. It was quite impossible to arrive at the motives of all those who voted to retain it, but it is certain that many considered it expedient to do so, for the purpose of foreclosing, by the implication it afforded, any question as to the power to appropriate property to the uses of a corporation authorized to construct a public improvement. We do not now say that it may not, in some possible particulars, differ from the section in the bill of rights; but upon the question now under consideration, the intention of the convention to make them alike is placed beyond all doubt, from the fact that it went to the committee of revision with positive instructions "to make the rule of compensation therein provided, correspond with that established" in the section of the bill of rights referred to. 2 Const. Debates 850. Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 331.

See §§ 1671, 1748.

§ 1665. Who may exercise power.

"In this State the power is lodged with the General Assembly to be used when necessary to the attainment of its lawful purposes, and in my judgment can neither be surrendered, impaired, nor abridged by that body." [18]

The power of eminent domain is rather a political than judicial power, and by our Constitution its exercise is intrusted to the General Assembly so far as determining the necessity and propriety of the appropriation is concerned, while the Courts are only invested with authority to determine the amount of compensation to be paid. The power may be exercised directly by that body, or through subordinate agencies.[19] It might be exercised by an individual as well as a corporation if the Legislature so provided.[20] Existence of the right to exercise the power of eminent domain can only be derived from legislative enactment.[21]

§ 1666. How grant to exercise, construed.[21a]

Grants of this nature, being in derogation of a private right, must be strictly construed. If, therefore, there is reasonable ground of doubt as to whether the Legislature intended to grant the continuing power claimed to be exercised here, the doubt should be resolved against the corporation seeking to exercise the same.[22] While such authority is strictly construed, it must

[18] Raney, J., Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 324.

[19] Id. 326.

[20] Coe vs. C. P. & I. R. R. Co., 10 O. S. 372.

Accordingly it has been held that the right may be conferred upon corporations, upon individuals, upon foreign corporations, or a consolidated company composed in part of a foreign corporation, and upon the federal government. Such has been the common practice since the Revolution, and the right to do so has never been a matter of serious question; and it may be regarded as settled law that it is solely for the legislature to judge what persons, corporations or other agencies may properly be clothed with this power. Lewis on Em. Dom., § 242.

See Emig vs. Com., 5 N. P. 471; 5 Dec. 459.

[21] Atkinson vs. M. & C. R. R. Co., 15 O. S. 21; A. & O. R. Co. vs. Sullivan, 5 O. S. 276.

See §§ 1748, 1749.

[21a] Cited Cleveland & Pittsburg R. R. vs. Dewine, 58 Bull. 438.

[22] T. & W. R. W. Co. vs. Daniels, 16 O. S. 390.

Bartley, J., in Kramer vs. Cleve.,

not be technically construed.[23] It should be held to include such matters as are reasonably exercised for the purpose for which the grant was made, and therefore a grant to a railroad company to condemn land would include new side tracks, leading from the main road to its depot, whenever they become necessary in the proper management and operation of the road;[24] and it may condemn land after the right of way has been condemned for the purpose of throwing waste dirt.[25]

In one case it was held that the railroad company could not condemn a wharf for its exclusive use.[26] Nor could a turnpike company condemn land for a toll gate.[27] But a railroad company might condemn for terminal facilities.[28] As an incidental power a railroad company may divert a stream permanently,[29] and a canal company might condemn land on its margin for a towpath.[30] But a power to construct branch roads, appropriate for side tracks, would not give the company a right to condemn away from its permanent location.[31]

etc., R. R. Co. (5 O. S. 140), said: "I insist, that if there be any manner of truth or value in the settled rules of judicial interpretation, the constitutional grant of this power must be strictly construed; and that such exercise of it by private corporations, which always is upon occasion, not of public emergency, but simply of public convenience, should be well guarded against infringements of the rights of private property. See Platt vs. Penn. Co., 43 O. S. 228, and cases cited.

The General Assembly possesses the power to confer upon a corporation the power to erect dams in non navigable streams for purposes of power. Little Miami Co. vs. White, 5 N. P. (N.S.) 201; 52 Bull. 354; affirmed 77 O. S. 633; and the judiciary will not interfere unless there is a manifest abuse of authority by the legislature. *Id.*

As to what will constitute a public use, see Trumbull vs. Shilling, 53 Bull. 167.

[23] C. & C. vs. Bridge Co., 63 O. S. 455.

[24] T. & W. R. W. Co. vs. Daniels, 16 O. S. 390.

[25] O. S. R. R. vs. Hinkle, 1 N. P. 63; 1 Dec. 682.

Cited approvingly, Cleveland & Pittsburg R. R. vs. Dewine, 58 Bull. 441.

A traction railroad may, in order to shorten its line or avoid dangerous curves, condemn land and relocate its track. Reush vs. Traction Co., 24 O. C. C. 540; affirmed, 89 O. S. —.

[26] Iron Ry. Co. vs. City of Ironton, 19 O. S. 299.

[27] Kemper vs. C. C. & Wooster Turnpike Co., 11 O. 392.

[28] Cin. Southern Ry. Co. vs. Handy, 9 Bull. 32.

[29] Railway Co. vs. Bohm, 34 O. S. 114.

[30] Carpenter vs. State of Ohio, 12 O. S. 457.

[31] Currier vs. Marrietta & C. Ry.

§ 1667. When may be exercised.

While the power to exercise the right of condemning property exists in the Legislature, or to such person or corporation as the Legislature may delegate it, yet it can only be exercised where it is for a public use,[32] or, as elsewhere expressed, public welfare.[33] The question whether or not a contemplated use is a public use, or one for the public welfare, within the meaning of the Constitution, is a question for the Courts.[34]

As to what will constitute a public use, it is said that no question has ever been submitted to the Courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use," as found in the different State Constitutions regulating the right of eminent domain." [35] In such cases the inquiry must necessarily be, what are the objects to be accomplished? not, who are the instruments for attaining them? [36]

The use that will justify the taking of private property by the power of eminent domain is used by or for the government, or some portion of it, and not used by or for a particular individual, or for the benefit of certain estates. The draining of marshes and ponds may be for the promotion of the public

Co., 11 O. S. 228; Mills on Em. Dom., § 11; Lewis on Em. Dom., §§ 238, 239 and 240.

It has recently been held that Interurban Railroads under § 9000 G. C. can not condemn, and that under § 9119 G. C., power is given only, when necessary to deviate from the highway. Law is now amended so as to include Traction companies. 95 vs. 539. C. D. & N. Tr. Co. vs. Marriott, 47 Bull. 357.

See §§ 1668, 1749.

When the statute grants to railroads a right to condemn land for the purpose of directing a stream, the power can only be exercised in the original construction of the road. Railway vs. South, 78 O. S. 10.

Land may be condemned for approach to a railroad bridge. Railway vs. Taylor, 50 Bull. 20. Also terminal facilities.

[32] See § 1724.

Cooper vs. Williams, 5 Ohio 391; Le Clerq vs. Town of Gallipolis, 7 O. pt. 1, 217.

[33] Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 308.

[34] McQuillen vs. Hatten, 42 O. S. 202.

Drainage is a public purpose. Thomas vs. Clark Co., 5 Dec. 503; 55 N. P. 449.

[35] Lewis on Em. Dom., § 159; Cooley Const. Lim. § 532.

[36] Willyard vs. Hamilton, 7 Ohio pt. 2, 111.

health and so become a public object; but the draining of farms to render them more productive, is not such an object.[37]

However, in such cases it was held that if a ditch would be conducive to the public health, convenience and welfare of the neighborhood, a more general public necessity is not required.[38]

In our State it has been held that property may be condemned for a township road,[39] for depot purposes,[40] for a canal,[41] for a toll bridge,[42] for ditch drains, etc.,[43] and one corporation may condemn the right to use the tracks of another.[44] Railroads,[45] and side tracks.[46] It would also include transportation of natural gas, oil or water, and such like matter.[47]

§ 1668. What and how much may be taken.

As a general rule it may be said that all kinds of property and every variety and degree of interest in property may be taken under the power of eminent domain.[48] Little difficulty is experienced in the application of this rule except where it is sought to appropriate property which has already been appropriated for a certain purpose. In such cases Lewis[49] lays

[37] McQuillen vs. Hatton, 42 O. S. 202.

[38] Ry. Co. vs. Commissioner, 63 O. S. 23.

Lewis on Em. Dom., § 165, after giving various definitions for the term "public use" is inclined to the opinion that the matter is not one for the Courts, but for the legislature.

The mere fact that a railroad has both of its termini in the same municipality will not prevent its exercise of the power to condemn. Cin. Termini Co. vs. Murray, 1 N. P. (N.S.) 301; 48 B. 877.

The leasing of its road will not destroy its power. *Id.*

[39] Shaver vs. Starrett, 4 O. S. 594.

[40] Giesy vs. C. W. & Z. R. R. Co, 4 O. S. 308.

[41] Willyard vs. Hamilton, 7 Ohio pt. 2, 111.

[42] Young vs. Buckingham, 5 Ohio, 485.

[43] Thomas vs. Bd. of County Commissioners, 5 N. P. 449; 5 Dec. 503; Sessions vs. Crunkilton, 20 O. S. 349.

[44] Toledo Elec. St. Ry. Co. vs. Toledo Con. St. Ry. Co., 26 Bull. 172; 6 C. C. 362; 3 C. D. 493.

[45] Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 308.

[46] T. & W. R. W. Co. vs. Daniels, 16 O. S. 390.

[47] Mills on Em. Dom., § 12.

See § 1726.

[48] Lewis on Em. Dom., § 262; 10 Am. & Eng. Ency. of Law, 2 ed. 1088.

[49] Lewis on Em. Dom., § 276.

down the following rules. *First,* all property held for public use is still subject to the eminent domain power of the State, with this exception, that it cannot be taken to be used for the same purpose in the same manner; *second,* the right to take property already devoted to public use must be given in express terms or by necessary implication; *third,* whether such authority has been given in any case, either in express terms or by implication, is necessarily a question for the Courts; *fourth,* whether the power exists in any given case is a question of legislative intent, to be ascertained in the first place from the terms of the statute, and in the second place by the application of the statute to the subject matter.[50]

One public ditch may be constructed over another, as the two easements are not inconsistent.[51]

In an early case in this State it was held[52] that only such interest as will answer the public wants can be taken, and it can be held only so long as it is used by the public, and cannot be diverted to any other purpose. As a general rule, it may be said, that the extent of what may be taken rests with the Legislature,[53] and this grant of legislative power, as before stated, is to be strictly construed,[54] and it has been held that under authority to take land for a highway, railroad or other

[50] See Mills on Em. Dom., § 45 *et seq.*

There is no taking within the meaning of the Constitution when there is no direct or special invasion of property rights, and the only damages complained of are remote and not different in kind, or hardly more appreciable in degree, than what is suffered by the public generally. Herzog vs. P. C. & St. L. R. R., 6 C. C. (N.S.) 527; 15 Cir. D. 702; affirming 2 N. P. (N.S.) 17; 14 Low D. 529; affirmed, no report, 74 O. S. 440; .25 O. C. C. 702; affirmed 74 O. S. 440.

Access to a lot is property. East End Banking Co. vs. Cleveland, 1 N. P. (N.S.) 493; 14 Dec. 33.

It is not necessary to show that the demands of trade require a railroad before the power to condemn can be exercised. Steubenville Ry. vs. Cleveland Ry., 2 N. P. (N.S.) 45; 49 Bull. 240.

Catholic school property may be taken. Cin. Inter. R. R. vs. Murray, 1 N. P. (N.S.) 301; 48 Bull. 877.

See 10 Am. & Eng. Ency. of Law, 2 ed. 1088-1100.

[51] Miller vs. Logan, 3 C. C. 617; 2 C. D. 358; Marsh vs. Clark Co., 26 Bull. 3.

[52] Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 309.

[53] Lewis on Em. Dom., § 277.

[54] Previous section, § 1666.

use, only an easement can be acquired.[55] But if the statute so provided, a fee simple may be appropriated.[56]

It has also been held that a railroad cannot appropriate land for a limited period while its main track is being rebuilt.[57] So it was held that a turnpike company could not take beyond the one hundred feet prescribed by law, even for a tollhouse.[58] But where the law prohibited the taking of more than sixty feet, a donation of more might be accepted.[59]

The term land, in statutes conferring power to condemn, include both soil and buildings and other structures thereon and all interests therein. Land under water may be taken as well as any other land.[60]

Where land is condemned for a right of way, the owner of the fee retains the exclusive right of the trees, shrubs or herbage for all purposes not interfering with the right of way.[61] Trees may be cut down and used for constructing a highway.[62] If there is a spring on the highway, this belongs to the owner of the fee.[63]

If the public ceases to use the property appropriated, the right acquired ceases and reverts to the owner.[64] Selling to another railroad the right to lay its tracts along with the other on part of the width of the right of way acquired by appropriation is an abandonment.[65] A railroad cannot acquire by agree-

[55] McCombs vs. Stewart, 40 O. S. 647; Corwin vs. Cowan, 12 O. S. 629.

[56] Malone vs. City of Toledo, 28 O. S. 643; S. C. 34 O. S. 541.

[57] Currier vs. M. & C. R. R. Co., 11 O. S. 228.

[58] Lessee of Kemper vs. C. C. & Wooster Turnpike Co., 11 Ohio 392.

[59] Hays vs. Lewis, 28 O. S. 326; Lewis on Em. Dom., § 280.

[60] Lewis on Em. Dom., § 285; Valley Ry. Co. vs. Pouchot, 4 C. C. 187; 2 C. D. 492.

See § 1700 in next chapter, Necessity for condemnation.

[61] Phifer vs. Cox, 21 O. S. 248; Vought vs. Railroad Co., 58 O. S. 123; Aff. Walsh vs. Ry. Co., 176 U. S. 469. Mills on Em. Dom., § 53.

Park property may be condemned for a railroad. Ry. vs. Cincinnati, 53 Bull. 224. So may an unused street. *Id.*

[62] Prather vs. Ellison, 10 Ohio, 396.

[63] Mills on Em. Dom., § 56.

[64] McComb vs. Stewart, 40 O. S. 647.

[65] Platt vs. Penn. Co., 43 O. S. 228; Penn Co. vs. Platt, 47 O. S. 366.

ment or condemnation, exclusive right to occupy a part of a street.[66]

The consents of owners of lots abutting on a street to the construction and operation of a street railroad on such street, are not property rights that can be appropriated under the power of eminent domain. Such consents are not property rights, but rights in their nature personal to each owner of an abutting lot.[66*]

§ 1669. Taking property without right.

Whenever a person's right to his property — that is, the right to possess, use and dispose of the same in any manner not inconsistent with the law of the land — is interfered with, then to the extent of such interference an appropriation has been made for which the owner is entitled to compensation. If such appropriation has been made by a person or body for a use that is not of a public character, the owner must seek his remedy by an action in damages. If the body or person appropriating the same is authorized to take the property under the power of eminent domain, then the owner has his choice of remedies. He may either bring an ordinary action of damages or he may bring an action to compel the offending person or corporation to appropriate the property. It may be laid down as a general proposition, says Lewis,[67] based upon the nature of the property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is *pro tanto*, taken and he is entitled to compensation.

A difficulty is sometimes experienced in determining whether a certain matter has been included within the appropriation proceedings and the owner has received compensatory damages. For this reason it becomes highly necessary that in such proceedings the petition should fully set forth just what is to be

[66] C., C., C. & St. L. R. R. Co. vs. City of Cin., Goebel 269.
See § 1749.

[66*] H. G. & C. T. Co. vs. Parish, 47 Bull. 831.

[67] Lewis on Em. Dom., § 56.

taken. Then it might properly be held that all results that reasonably follow from such appropriation would be held to be included, and compensation rendered in such proceedings. Whether or not a certain matter would be included is largely one of fact, depending upon the conditions surrounding each case. If the person has no property right or has surrendered the same, then there is no taking. Thus an abutting land owner has no such interest in the public market in the street as to be entitled to enjoin a street railway that will interfere with the market.[68]

It has recently been held that the making of a tile ditch through a farm is a taking without right, although there is but nominal damage.[69]

A city running its sewage in a natural watercourse, may, if it cause a nuisance and injuriously affect the riparian proprietor, be a wrongful taking under the Constitution.[70]

§ 1670. Additional servitudes.

Questions frequently arise as to a party's rights when the property appropriated has been applied to a new and additional use. In such cases, generally the person owning the fee is entitled to remuneration. Thus where a railroad appropriated a strip 100 feet wide, built its track on one-half the width, and sold to another railroad the right to lay its tracks on the other half, to the injury of the original owner's land, it was held the original owner had a right to recover.[71] Poles for telephone or telegraph wires in a sidewalk are additional servitudes.[72] So poles for an electric light company.[73] But poles for wires for an electric street railway are not.[74] Pipes for

[68] Sells vs. Col. St. Ry. Co., 28 Bull. 172.

See Cincinnati & I. R. R. Co. vs. Zinn, 18 O. S. 417; C. & P. Ry. Co. vs. Stackhouse, 10 O. S. 567; Cooper vs. Williams, 4 Ohio, 253, 286.

[69] Railroad vs. Commissioners, 63 O. S. 29.

[70] Mansfield vs. Balliet, 65 O. S. 451.

As to discussion of extent of public easement in highway, see 49 Bull. 14.

[71] Platt vs. Penn. Co., 43 O. S. 228; Penn Co. vs. Platt, 47 O. S. 366.

[72] Smith vs. Cent. Dist. Printing & Tel. Co., 2 C. C. 259; 1 C. D. 473.

[73] McLean vs. Brush Elect. Light Co., 9 Bull. 65.

See note 78 below.

[74] Simmons vs. City of Toledo, 8 C. C. 535; 4 C. D. 69; Mt. Adams & E. P. Incl. Ry. vs. Winslow, 3 C. C. 425; 2 C. D. 240.

natural gas are an additional servitude,[75] but the making of sewers in a street is not.[76] The occupation of a highway by a railroad is unlawful.[77]

It has recently been held that telephone poles in a city are not,[78] but a different rule is applied in a highway in the country,[79] and an electric railway in the city is not an additional servitude,[80] unless it is on a different grade.[81]

Where the grade of a street is changed recovery can only be had, *first,* where one builds to an established grade, and it is changed; *second,* where he builds before a grade is established and afterwards a grade was established, and the grade after being so established is changed; *third,* where one builds before

[75] Webb vs. Ohio Gas Fuel Co., 16 Bull. 121.

[76] City of Cinn. vs. Penny, 21 O. S. 499.

[77] Little Miami Ry. Co. vs. Naylor, 2 O. S. 235; Parrot vs. C. H. & D. R. R. Co., 10 O. S. 624; Ry. Co. vs. Gardner, 45 O. S. 309; C. I. St. L. & C. Ry. Co. vs. Pfitzer, Goebel, 248.

[78] Auerach vs. Cuyahoga Tel. Co. & Cleve. Elec., etc., Co., 7 N. P. 633; 9 Dec. 389.

The case of Callen vs. The Columbus Ed. Elec. Light Co., 47 Bull. 448; 66 O. S. 166, limits the doctrine to poles put down for public service. If for private gain, the owner is entitled to compensation.

[79] Denver vs. U. S. Tel. Co., 10 Dec. 273.

[80] Sanfleet vs. City of Toledo, 10 C. C. 460; 8 C. D. 711.

It has recently been held that an Interurban R. R laid on the side of a public highway is an additional burden and the owner is entitled to compensation. Schaff vs. C. M. & S. P., 47 Bull. 455; 66 O. S. 215.

The right of an owner of a lot abutting upon a street to access thereto is "property" but is subordinate to the right and duty of the municipality to grade and otherwise improve and maintain the street in a suitable condition to answer the purposes of its acquisition. East End Banking Trust vs. Cleveland, 1 N. P. (N.S.) 493; 14 Dec. 33; 49 Bull. 33.

The land held by a railway company which is not needed or used for the proper exercise of its franchise may be taken and subjected to an additional use. C. C. C. & St. L. R. R. vs. U. B. & N. U., 5 C. C. (N.S.) 583; 16 Cir. D. 180; affirmed, no report, 73 O. S. 364; 26 O. C. C. 180; affirmed 73 O. S. 364.

Land for a sidetrack may be taken. State *ex rel.* vs. Toledo, 1 C. C. (N.S.) 513; 14 Cir. D. 321; affirmed 69 O. S. 550; 24 O. C. C. 321.

An electric road in a street or highway is not an additional servitude, when? Ry. vs. Kesk, 23 O. C. C. 57.

The use of a street by a railway company is not inconsistent with its use by the city for street purposes. Cin. vs. Kirchner & Co., 1 N. P. (N.S.) 93; 13 Dec. 327.

A new and inconsistent use of a street is not necessarily a taking of private property within the constitution. It must be such use as palpably and injuriously affects the adjacent property, and to plead or prove merely the invasion of a private right does not stir the conscience in a Court of Equity. Burns vs. Telephone Co., 3 N. P. (N.S.) 257; 17 Low. D. 731; affirmed 10 C. C. (N.S.) 307; 20 Cir. D. 74; affirmed, no report, 76 O. S. 589; 30 O. C. C. 74.

[81] Oviatt vs. Akron St. Ry. Co., 2 N. P. 84; 3 Dec. 252.

a grade is established and afterwards an unreasonable grade is established.[82]

The Ohio cases on this question are all reviewed in Lewis on "Eminent Domain."[83]

§ 1671. Compensation.

The Constitution provides[84] that full compensation shall be first made in money irrespective of any benefit proposed by the corporation. This means that when property is taken, the owner is entitled to its fair marketable value.[85]

In order to be fully compensated, it is said: "It must be a remuneration or recompense for that detriment or loss to the owner in the value of his property arising from the taking of his property in connection with the use for which it is taken. The compensation must be broad enough to cover the full loss in value which the owner suffers in his property by means of the appropriation."[86]

In appropriation proceedings the terms "compensation" and "damages" have different and distinct meanings; "compensation" means the sum of money which will compensate the owner for the land actually taken, irrespective of any benefits to remaining lands. "Damages" is an allowance made for any injury that may result to the remaining lands by reason of the construction of the proposed improvement, after making all due allowance for special benefits resulting thereto.[87]

[82] City of Akron vs. Chamberlain Co., 34 O. S. 328.

[83] § 98.

See Mills on Em. Dom., §§ 32, 33, 34 and 35.

It has recently been held by a Superior Court of Cincinnati that where a Telephone Co. had a permit from the city to plant poles in the sidewalk there was no additional servitude, unless special injury be shown.

[84] Art. 13, § 5, previous § 1664.

[85] Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 309.

[86] C. & P. R. R. Co. vs. Ball, 5 O. S. 568.

[87] Ohio Southern R. R. vs. Rawlins, 29 Bull. 260.

See O. S. R. R. vs. Snyder, 5 N. P. 461; 5 Dec. 480.

The definition, or rather the division of the question of compensation as above indicated, results from the nature of the oath administered to the jurors, and only becomes material when considering the question of benefits.

See C. D. & M. E. Ry. vs. Knauss, 47 Bull. 807.

See § 1706.

The damages must be confined to the present use of the lands. C. C. C. & St. L. R. R. vs. Cordray, 10 C. C. (N.S.) 81; 30 O. C. C. 630.

§ 1672. Benefits.

Both sections of the Constitution provide that such compensation shall be made without deduction for benefits, etc. The question then arises, does this constitutional provision forbid a consideration of all questions of benefits in appropriation of property? There is no doubt but that benefits of a general nature, which are those that are common to the community at large, can have no effect upon the question of what should be allowed the owner as compensation or damages. But whether special benefits, which are defined to be such as appreciably enhance the value of the particular tract of land alleged to be benefited,[88] can be shown to affect the amount to be allowed the owner as damages, is a matter about which there is a difference of opinion. Unquestionably under our Constitution they cannot be shown to affect the amount to which the owner is entitled for the land actually taken. But when it comes to considering the damages to the residue, it has always been the opinion of the author that the same could be shown.[89] The reasons for such a holding are fully set forth in the opinion of the O. S. R. R. vs. Rawlins.[90] The same view has been taken by a District Court in C. & A. Ry. Co. vs. Williams.[92]

In a recent case it was said, in reference to the case of Cleve. & Pitts. R. R. Co. vs. Ball,[93] that local incidental peculiar benefits, which will accrue to the land owner, cannot be deducted from the land taken, but may be deducted from the incidental damages to other lands which the land owner will suffer by reason of the appropriation.[94] Admitting that special benefits

[88] 10 Am. & Eng. Ency. of Law, 2 ed. 1176.

[89] See O. S. R. R. Co. vs. Rawlins, 29 Bull. 260; O. S. R. R. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480.

[90] 29 Bull. 260.

[92] 9 Bull. 253.

In this case it was held that the Probate Court erred when it refused to charge as follows: "Special benefits such as accrue solely to the owner of the lands from which the right of way is taken, as when the excavation of the railroad track has the effect to better drain and reclaim wet and swamp lands, and to render them more valuable, should be taken into consideration by the jury in determining how much less valuable if any the lands not appropriated are by reason of the appropriation. Id. 256.

[93] 5 O. S. 575.

[94] Lorain St. Ry. Co. vs. Sinning, 17 C. C. 658; 6 C. D. 752.

may be offset against special injuries, the question yet remains as to what will constitute special benefits.[95]

In the case of O. S. R. R. Co. vs. Snyder, the Court charged the jury as follows: "You should not consider remote or speculative benefits that may be conferred on said lands by the building of said proposed railroad. Such as that some parts of said land may, at some time, be needed for stock yards, elevators, etc.; neither are you to consider benefits of a general nature, such as a supposed enhancement of the value of the remaining lands by increased facilities for travel or transportation, or the growth of towns. But if a new use is conferred upon the remaining lands by the building and operation of the proposed railroad, specially applicable to such lands alone, be it for the purpose of stock yards, elevators, manufacturing establishments, a mill or a stone quarry, and such new use adds to or increases the market value of such remaining lands, such is a special beneficial use, and should be considered by you in determining how much less valuable such remaining lands are worth by reason of such appropriation." [96]

[95] In Cleve. & Pitts R. R. Co. vs. Ball. 5 O. S. 575, it was said that where a local benefit or advantage is blended with, or has a direct or immediate connection with, or bearing upon, the local incidental injury, such as appears in this case in the instance of the obstruction of the free and convenient communication between the coal-banks and river, which loss may be either totally or partially removed by the facilities for the transportation of coal or market afforded by the railroad, then, the local advantage or benefit may have to be taken into consideration, in order to estimate the extent of the loss, if any, in the value of the property, caused by the injury or disadvantage. For if the river transportation for getting the coal to market had ceased to be of any great value, by means of the facilities supplied by the railroad for the transportation of the coal, the owner ought not to be compensated for the disadvantage beyond its actual value to him in the enjoyment of his property. Where, in the construction of a railroad, a ditch or excavation is made, which drains a swamp and renders a part of the owner's land valuable, which had been previously of little or no value, but the same ditch in draining the swamp, destroys a valuable spring of water, the injury and benefit may be so blended that they must necessarily be taken into consideration in estimating the compensation to be made. Id. 579.

[96] 5 N. P. 464.

The following is given in 10 Am. & Eng. Ency. of Law, 2 ed, 1176, as instances of special benefits. Providing access to land by making a

§ 1673. Evidence, etc.

Our statute provides that the land owner shall have the right to open and close the case. From this would follow that upon the landholder rests the burden of proof.[97] The ordinary rules of evidence apply in condemnation proceedings. The question at issue in all cases is the amount of money to which the land owner is entitled by reason of the appropriation. The determination of this question being one of value, is one upon which the witness may give his opinion.[98]

In an early case, A. & G. W. R. R. Co. vs. Campbell,[99] the Supreme Court laid down the rule that a witness could not answer the direct question as to the amount of damages incurred by the land owner by reason of the appropriation, taking into consideration the injuries resulting thereto, but held that a witness might testify as to the value of the land before and after the location of the railroad. This decision was the foundation in Ohio of what always appeared to the author as an illogical rule. Under this decision, the proper question to be

public road, Hire vs. Kniseley, 130 Ind. 295; Allen vs. Charlestown, 109 Mass. 243; the widening of a street, thus rendering the remainder more valuable. Cross vs. Plymouth County, 125 Mass. 557; improving the land by filling in a canal, Whitman vs. Boston, etc., R. Co., 3 Allen (Mass.) 133; providing sewerage, Lipes vs. Hand, 104 Ind. 503; French vs. Lowell, 117 Mass. 363; the construction of a railway station near by, so as to render shipping convenient to the remainder, Shattuck vs. Stoneham Branch R. Co., 6 Allen (Mass.) 115; Bookman vs. New York El. R. Co., 137 N. Y. 302; *contra*, Washburn vs. Milwaukee, etc., R. Co., 59 Wis. 364; the advantage of being able to connect an industrial work with a railroad, Colorado Cent. R. Co. vs. Humphrey, 16 Colo. 34; Russell vs. St. Paul, etc., R. Co., 33 Minn. 210; Pittsburg, etc., R. Co. vs. Robinson, 95 Pa. St. 426; 1 Am. & Eng. R. Cas. 468; draining of marsh lands, Roberts vs. Brown Co., 21 Kan. 247; Washburn vs. Milwaukee, etc., R. Co., 59 Wis. 364; 20 Am. & Eng. R. Cas. 225; the formation and maintaining of a millpond by the construction of a necessary embankment, Sullivan vs. North Hudson Co. R. Co., 51 N. J. L. 518; 40 Am. & Eng. R. Cas. 324; Washburn vs. Milwaukee, etc., R. Co., 59 Wis. 364; 20 Am. & Eng. R. Cas. 225.

See §§ 1706, 1713, 1748, 1851.

97 See § 1710, as to whether the view is evidence.

O. S. Ry. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480; Lewis on Em. Dom. § 426.

In a recent case it is held that in an action to condemn private property by municipal corporations there are no formal pleadings, and the doctrine of burden of proof has no application. The jury merely acts as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted. Martin vs. Columbus, 101 O. S. —.

Query: Would the same rule apply to where a private corporation seeks to condemn?

98 Lewis on Em. Dom. 435.

99 4 O. S. 585.

propounded upon examination in chief, seems to be, how much less valuable will the remaining lands of the land owner be worth, with the proposed appropriation, than the owner's lands are now worth without such appropriation? And then, on cross-examination, the witness may be tested as to his reasons for the conclusion given. In order for the witness to answer the question propounded, he must in his own mind grasp together the various matters and form a conclusion just as much as if he were allowed to answer the question directly, what amount of damages do you think would be sustained by reason of the location and construction of the railroad, etc.?

In reference to the Ohio method, Lewis very justly says: "Why a witness should not be allowed to state at once and directly his opinion of the amount of damages or benefits in answer to a single question, instead of stating it indirectly in answer to two questions, we are unable to perceive. The distinction attempted to be maintained between the two methods is without any substantial difference and must eventually be abandoned." [100]

Before a witness is allowed to testify, he must in some manner show that he is competent to give an opinion; this matter is largely left to the trial judge.[101] Generally, in such matters, the testimony of witnesses offered is received and the weight to be attached thereto is left with the jury.

In Powers vs. Ry. Co.,[102] where it was said that the difference in the value of the owner's property with the appropriation and that without it, is the rule of compensation. That this

[100] Lewis on Em. Dom. § 436.

Lewis quotes extensively in a note from the opinion of R. & S. R. R. Co. v. Budlong, 10 How. Pr. 289.

During the author's experience as Probate Judge, of Clark County, he presided over a number of condemnation cases for railroads, ditches, etc., and the rule adopted by our Supreme Court was found to be one which it was almost impossible to follow with any degree of satisfaction; and while the attorneys in the case in its beginning would confine themselves to the rule adopted by the Supreme Court, before the case was ended, it generally happened by common consent, that the witness was allowed to answer the direct question; yet generally the rule of the Supreme Court was followed. O. S. R. R. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480.

[101] Lewis on Em. Dom., § 437.

[102] 33 O. S. 429.

difference must be ascertained with reference to the value of the property in view of its present character, situation and surroundings, and that it cannot be enhanced by proving facts of a contingent and prospective character, such as the probable rents that may be derived from the property, or its special value as a prospective monopoly to the adjoining lands of other persons." It has also been held that, in condemning land for water works purposes, the fact that said lands are specially adapted for reservoir purposes is not admissible in evidence and cannot be considered by the jury in determining its market value.[103]

In finding the value of land, the jury should consider its abstract value and also its relative value in connection with the rest of the tract, etc.[104]

The owner may show that before any expectation of appropriation he had platted the land, the jury are to decide whether the value in bulk or as subdivided shall be taken, though there has been no binding dedication.[105]

[103] Gibson vs. City of Norwalk, 13 C. C. 428; 7 C. D. 6.

In the case of O. S. R. R. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480, a number of questions arose in reference to the method of proving the value of the lands appropriated. Such as its value and the damages to be considered by several tracts of land by their connection, etc.

[104] Lorain St. Ry. Co. vs. Sinning, 17 C. C. 649; 6 C. D. 753; C. & P. R. Co. vs. Ball, 5 O. S. 568; C. & S. Ry. Co. vs. Longworth, 30 O. S. 108.

[105] Id. 108.

In the case of Cincinnati vs. Neff, 20 Bull. 8, the following general rules were laid down. The owner is entitled to the fair and reasonable but full value ascertained by the evidence of experts. Rental derived with such regularity as to make a continuance probable is a valuable test, taking into account the probable life of buildings and depreciation affecting rent and considering the rent of all, so as to eliminate inequality by variance in rent charges. Enhancement in values by the prospect of the improvements must be allowed to the owner. Buildings are not to be valued as old materal, but as if they were to remain in use on the lot. Lessees are entitled so far as the value or rent for the term exceeds the ground rent, keeping in mind the covenants to repair, etc. Movable fixtures are to be valued by the difference in value where they are and elsewhere. Probabilities are not to be considered except as affecting present values. The burden to establish values is on the owners.

And in Toledo & O. Cen. Ry. vs. Fostoria, 7 C. C. 293; 4 C. D. 602, the following was laid down: The damages for appropriating a street across railway lands are:

1. The land actually taken.

The propriety of allowing proof of the sales of similar property to that in question, says Lewis,[106] made at or about the time of the taking, is left very much in doubt by the authorities. The better rule seems to be in favor of admitting such testimony provided the land taken is of similar quality, etc., as that which has been recently sold. It is not competent to give testimony as to what the corporation had offered, etc.,[107] and what the owner paid for the land is generally held to be incompetent. Likewise it is not competent to offer evidence as to the price for which adjoining lands may be bought.[108]

Tax returns of property have been held, are competent, and may be allowed to go to the jury and be considered by them.[109]

A witness may be asked how much a well situate on the premises costs. Likewise the value of trees, etc.[110]

Expert testimony is not necessary. Persons living in the neighborhood who have bought and sold property and know the land are competent.[111]

2. The burden imposed on the railway by statute, as for sidewalks, flooring, cattle guards, repair of crossings, etc., not, however, including delay of trains.

3. The damages to the remainder of the railroad yards by the opening of each street, without reference to the other streets opened at the same time.

[106] Lewis on Em. Dom., § 443.

[107] C. & W. Turnpike Co. vs. City of Cincinnati, 19 C. C. 607; 10 C. D. 288.

[108] See O. S. R. R. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480.

[109] T. C. St. R. R. Co. vs. Toledo Elect. St. R. R. Co., 12 C. C. 367; 5 C. D. 643.

[110] Foote vs. The L. & C. R. R. Co., 21 C. C. 319.

[111] 17 Bull. 328; 31, 260 Cin., etc., vs. Neff, 20 Bull. 8.

See §§ 1713, 1748.

It is error to exclude testimony as to the general selling price of land in the neighborhood, or price the defendant paid a little more than a year before trial. It is proper to show the value of the land separate from the buildings thereon, and also the value of the buildings. The aggregate of the two is the value of the parcel taken. Cleveland Terminal & Valley Ry. Co. vs. Gorsuch *et al.*, 8 C. C. (N.S.) 297; 28 O. C. C. 468; 76 O. S. 609.

In considering the fair market value of property sought to be condemned, the jury may resort not only to the evidence before them, but may consider also in connection therewith their own good sound judgment as to the value. Union Grain, etc. vs. Cincinnati, 33 O. C. C. 509.

In determining the value of real estate a property owner may offer evidence as to the value of improvements separate from the land and show the value of the land separate from the improvements. Linesh vs. Board of Ed., 13 O. App. —.

CHAPTER XCIV.

CONDEMNATION PROCEEDINGS BY PRIVATE CORPORATIONS.

§ 1674 To what chapter applies.
§ 1675 To what does not apply.
§ 1676 When appropriations can be made.
§ 1677 Appropriation of property of minors, idiots, imbecile or insane person.
§ 1677a Notice to ward.
§ 1678 Proceedings under § 11040 G. C.
§ 1679 Petition for appropriation filed in Probate Court.
§ 1680 Where to be filed.
§ 1681 Petition may include one or more parcels. In what county to be filed.
§ 1682 When probate judge interested, proceedings to be commenced in Common Pleas. Special term of.
§ 1682a Procedure in common pleas.
§ 1682b When corporation entitled to possession.
§ 1683 Nature of proceedings.
§ 1684 Amendments allowed.
§ 1685 Time of trials. Adjournment. Discharge of juries.
§ 1686 Essentials of petition.
§ 1687 Parties, etc.
§ 1688 Form of petition.
§ 1689 Filing the petition, entry, etc.
§ 1690 Summons, its command and service thereof. Alias summons.
§ 1691 Notice.
§ 1692 Service by publication, how proved.
§ 1693 Affidavit and form of notice.
§ 1694 Court to appoint attorney for party absent or under disability.
§ 1695 Jurisdictional questions. When to be heard and determined. Burden of proof.
§ 1696 When to be heard.
§ 1697 Existence of corporation.
§ 1698 Right to make appropriation.
§ 1699 Inability to agree.
§ 1700 Necessity for appropriation.
§ 1701 Jurors to be drawn from box and venire issued.
§ 1702 Finding and order to draw jury.
§ 1703 How panel to be filled; jurors to be interrogated by Court.
§ 1704 Challenge to jurors and how vacancies filled.
§ 1705 Challenge of jury.
§ 1706 Oath to be administered to jury.
§ 1707 View of premises.
§ 1708 Judge must deliver to sheriff description of property. May appoint persons to be present at view, etc.
§ 1709 Entry impaneling a jury.
§ 1710 Is the view evidence?
§ 1711 Separate owners entitled to separate trial. They hold the affirmative on trial.
§ 1712 Motion for separate trial, entry, etc.
§ 1713 Witnesses may be examined before jury.
§ 1714 Trial, etc.
§ 1714a Burden of proof.
§ 1715 When a structure is partly on land sought to be appropriated.
§ 1715a Verdict. Motion for new trial, etc. Confirmation of verdict.
§ 1716 Form of entry and verdict, etc.
§ 1717 Motion for new trial, etc.
§ 1718 New trial. Proceedings thereon. Costs.
§ 1719 Entry confirming verdict, etc.
§ 1720 Petition in error may be filed by either party in Common Pleas, when. Bill of exceptions.
§ 1720a Petition in error.
§ 1720b Corporation may pay judgment and enter on property.

§ 1721 When error may be prosecuted.
§ 1722 Proceedings in Common Pleas on error. Costs.
§ 1723 When corporation may have possession.
§ 1724 Entry when deposit made.
§ 1725 When and how corporation may abandon proceedings.
§ 1726 What is an abandonment.
§ 1726a When action may be brought for costs, etc.
§ 1727 Entry of distribution where there are no conflicting claims.
§ 1728 When Probate Court can not order distribution.
§ 1729 Conflicting claims adjudicated in Common Pleas. Petition therefor. Disposition of fund.
§ 1729a Custody of the funds.
§ 1730 Such proceedings a civil action.
§ 1731 When unfinished roadbed of railray company may be condemned.
§ 1731a Construction of terms.
§ 1732 Judgment and costs in such case. When jury to determine amount of compensation.
§ 1733 In what Courts such proceedings may be commenced and how conducted.
§ 1733a Error.
§ 1733b Statement of intention.
§ 1733c Failure to occupy roadbed one year.
§ 1733d Interpretation of word "roadbed."
§ 1734 When land owner may compel appropriation.
§ 1735 When landowners or school officers may notify corporation to institute proceedings; petition on failure of corporation to act.
§ 1735a Demand of written statement describing the land occupied without appropriation.
§ 1736 Who may bring action.
§ 1737 When and where action brought.
§ 1738 Notice to corporation.
§ 1739 Demand of description of property.
§ 1740 Essentials of petition.
§ 1741 Form of petition.
§ 1742 Summons in such case.
§ 1742a Summons in such case.
§ 1743 Procedure, etc.
§ 1744 When corporation may be enjoined from occupying the land.
§ 1745 Motion for injunction, etc.
§ 1746 Tender made by corporation.
§ 1747 School lands, how appropriated.

§ 1674. To what chapter applies.

The proceedings in Court to appropriate private property for a public purpose under the power of eminent domain are known as condemnation proceedings. The entire proceedings in Ohio is regulated by statute, and a party seeking to enforce a condemnation of property must strictly comply with these statutory provisions.[1] The law under the present Constitution was passed on April 30, 1852.[2]

The following is the statutory provision in reference to matters coming within this chapter:

"Appropriation of private property by corporations must be made according to the provisions of this chapter." [R. S. § 6414.][3]

[1] 7 Ency. of Pleadings and Prac. 468; Garvin vs. City of Columbus, 5 N. P. 236; 5 Dec. 333.

[2] 50 Ohio Laws, 201.

[3] § 11038 G. C.

The final judgment of the Probate Court under this section and those following, is *res adjudicata* as to all questions involved. Dayton & M. Tr. Co. vs. Dayton & U. Ry. Co., 72 O. S. 429; affirming without report, 4 C. C. (N.S.) 329; 16 Cir. D. 1. See 72 O. S. 429.

Does not deprive Federal Court

§ 1675. To what does not apply. "The provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches. In all such cases it shall be optional with such authorities to pay the judgment rendered against them, or to pay the costs and decline to take the property sought to be appropriated." [R. S. § 6453.][4]

§ 1676. When appropriations can be made. "Appropriations can be made only when the corporation is unable to agree with the owner, or his guardian or trustee, as to the compensation to be paid for the property, or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown." [R. S. § 6415.][5]

of jurisdiction in proper case. Postal Tel. Co. vs. Railway, 10 O. F. D. 94; 94 Fed. 234.

The following corporations may avail themselves of the provisions of this chapter, by special enactment: Railroad companies (§§ 8759, 8754, 8780 G. C.); Traction railroads, (§ 9119 G. C., amended 1902); Telegraph companies (§§ 9172, 9177, 9187, 9188 G. C.); Turnpike or plankroad companies (§ 9232 G. C.); Bridge companies (§§ 9305, 9306 G. C.); Ohio River Bridge Company (§ 9311 G. C.); Hydraulic companies (§ 10121 G. C.); Avenue companies (executed); Pipe line companies (§§ 3995-3998 G. C.); Owner of mine, for outlet (§§ 10120-10132 G. C.); Cemetery Association (§§ 914-917 G. C.); County Commissioners for turnpike (§§ 10095-10097 G. C.).

See §§ 1748, 1811.

[4] § 11091 G. C.

See § 1748 *et seq.*, as to condemnation by municipal corporation.

§ 9119 G. C., granting power to street railways, including interurban railways—it has been held that it must be strictly construed and it must be shown that it is *necessary* to deviate from a highway before a power to condemn is conferred. C. D. & N. Ry. vs. Marriott, 47 Bull. 357; Cemetery Assn. vs. Traction Co., 93 O. S. 164.

Act now (1902) amended to include tractions.

It has recently been held that an interurban electric line is a railway and that it is not necessary for such company to go through the ordinary course pursued by city lines to secure a franchise for a loop over city streets. Like a steam railway, all that is necessary to appropriate the right of way and pay the owners what a jury may allow. 47 Bull. 755.

[5] § 11039 G. C.

This section of the General Code seems only to relate to one particular matter which must exist before an appropriation can be made, to-wit: the fact that the corporation is unable to agree with the owner, etc. The fact, however, is, that an appropriation can only be had when all the facts exist which are to be heard on preliminary hear-

§ 1677. Appropriation of property of minor, idiot, imbecile, or insane person. "Under this chapter, when the property of a minor, idiot, imbecile, or insane person, or any easement or interest therein, is sought to be appropriated by a corporation and there is a legally appointed guardian of the person and estate or of the estates, or trustee of such minor, idiot, imbecile, or insane person, and the guardian has agreed with the corporation upon the amount of compensation to be paid for such property, easement, or interest therein, he may file with the probate court of the county wherein the property is situated, a written application for authority to convey the property or interest to such corporation. The application must fully describe the property, right, easement or interest therein, sought to be conveyed, and set out the price agreed to be paid for it." [R. S. § 6415a.][6]

§ 1677a. Notice to ward. "The probate judge shall order the guardian to give such notice as he deems reasonable, to the ward, of the filing of the application, and of the time set for its hearing. At the time for the hearing, if the judge finds that notice was given as ordered of the time set therefor, that the price to be paid is just, and that such conveyance will be to the best interest of his ward, he shall order the guardian to make and execute a deed to the corporation for the property or interests upon the payment of the price agreed upon by them." [R. S. § 6415a.][6*]

§ 1678. Proceedings under § 11040.

The above section provides a very simple mode for the transfer of property of a minor to a corporation, yet, as it only exists by virtue of statute, the statute must be strictly followed in order to carry a good title; and the same rule in that respect would prevail as applies to the sale of a minor's real estate generally.[7] In the succeeding section forms for execution the provisions of secs. 11040, 11041, G. C., will be given.

ing, that is, the existence of the corporation, the right to make the appropriation, the inability to agree and the necessity for the appropriation.

The Probate Court has no jurisdiction in condemnation proceedings whether a railroad should be built above or below grade. Toledo vs. Toledo, 9 C. C. (N.S.) 399; 29 O. C. C. 656; affirmed 78 O. S. 429.

As to abutter's consents, see Hume vs. Hamilton, G. & C. Traction Co., 13 Dec. 70.

[6] § 11040 G. C.

[6*] § 11041 G. C.

[7] § 1404 *et seq.*

FORM OF APPLICATION.

In the Matter of L. H. L., Guardian of J. W. | Probate Court, ... County, Ohio. APPLICATION TO SELL REAL ESTATE TO CORPORATION.

Now comes L. H. L. and represents that on.....day of....., 190..., he was appointed and duly qualified by the Probate Court of .....county, as guardian of J. W., an alleged habitual drunkard and imbecile, and is still acting as such guardian.

He further represents that the said J. W. is the owner in fee simple of a tract of land situate .....

He further represents to the Court that the C., L. & S. Ry. Co., a corporation, is about to construct an electric railway along said National Road, and desires to purchase sufficient land adjoining said National Road from the lands of the said Joseph Wallingsford upon which to construct their said railway.

He further represents that the following is a description of the tract of land said corporation wishes to purchase for railway purposes, to-wit:..... ..... Said guardian further represents that it has been agreed by the said guardian and the said corporation that the sum of four hundred dollars would be a reasonable price for said lands to be used for the purpose of said corporation. And in addition to the payment of said price agreed upon, the said corporation has agreed to build and maintain a good woven-wire fence between the lands purchased by it and the remaining lands of his said ward, and to provide and maintain a suitable crossing for each field or lot upon said farm adjoining the lands of the said corporation. And to provide and maintain gates at each one of said crossings.

Wherefore he asks that an order may be made by this Court, authorizing and directing the said L. H. L., as guardian of said J. W., to make and execute a deed in fee simple to said corporation for said property. And that a time be fixed for the hearing of this application and that notice thereof be issued for said J. W., directed to.....to be served upon said J. W. without delay.

.....

Sworn to before me and subscribed in my presence this.....day of ....., 190...

.....

Entry ORDERING NOTICE.

In the Matter of L. H. L., Guardian of J. W. | Probate Court, ...County, Ohio. Entry.

This day came L. H. L., guardian of J. W., and filed in this Court his application for an order authorizing and directing him to convey a certain tract of land therein described, belonging to the said J. W., to the C., L. & S. Ry. Co.

Whereupon it is ordered that said application be set for hearing on the .....day of....., at.....o'clock, and that.....days' notice thereof be given to said J. W. of the time of hearing of said application, and that said notice contain the price to be received for said tract of land, and a description of the tract to be conveyed. Which notice shall be directed to.....to be by him served.

FORM OF NOTICE.

To.....

You are hereby directed to notify J. W. that an application has been filed in this Court, by L. H. L., guardian of said J. W., praying for author-

ity to convey to the C., L. & S. Ry. Co., for the consideration of..... dollars, and the erection and maintaining of a woven-wire fence along the lands to be conveyed, the following described real estate, situate in the township of....., county of....., State of Ohio, bounded and described as follows:.....
Said application has been set for hearing on the.....day of..... at.....o'clock. The said J. W. will take notice of the prayer of said application and the time of hearing the same.

....., Probate Judge.

State of Ohio,.....County, ss.

R. W., being first duly sworn, says that on the 8th day of July he served upon the said J. W. personally, a true copy of the above notice.

.....

Sworn to before me and subscribed in my presence this.....day of ....., 190..

.....

ENTRY ORDERING CONVEYANCE.

In the Matter of L. H. L., Guardian of J. W. } Probate Court, ...County, Ohio. ENTRY.

This day this cause came on to be heard upon the application and the return of service of notice, and testimony, and was submitted to the Court. Whereupon the Court finds that said J. W. has had due and legal notice of the time set for hearing of this application, and that the price to be paid by the C., L. & S. Ry. Co., is reasonable and just; and that a conveyance made of the property described in said application would be to the best interest of said ward.

Wherefore it is ordered that said guardian shall make, execute and deliver to the said C., L. & S. Ry. Co., upon the payment to him of the said price agreed upon, a proper deed for the premises in the application described.

FORM OF DEED.

Know all Men by these Presents:

That whereas, on the 7th day of October, 1896, L. H. L. was duly appointed and qualified as guardian of J. W. And whereas, on the 8th day of July, 1901, he filed a certain application in the Probate Court of..... county, Ohio, praying that such proceedings may be had that he may be authorized by the said Probate Court to convey the premises in said petition described to the C., L. & S. Ry. Co., a corporation. For the purpose of said corporation to construct an electric railway thereon.

And whereas, on the 11th day of July, said J. W. having had notice thereof, and the Court finding that the price to be paid is reasonable and just, and that said conveyance would be to the best interest of said ward, ordered that the said L. H. L., as guardian aforesaid, should make, execute and deliver to the said corporation for said property a proper deed upon the payment of said price agreed upon, to-wit: the sum of four hundred dollars ($400), all of which will more fully appear by the records of said Court, to which reference is here made.

Now, therefore, I, the said L. H. L., guardian of the said J. W., by virtue of said order of Court and of the statute in such cases made and provided and of the powers vested in me, and for and in the consideration of the premises and sum of four hundred dollars ($400) to me paid by the C., L. & S. Ry. Co., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said C., L. & S. Ry. Co., its successors and assigns forever, the following real estate, situate in the county of....., township of....., State of Ohio, and bounded and described as follows:.....

To have and to hold said premises, with all the privileges and appurtenances thereto belonging, to the said C., L. & S. Ry. Co., its successors and assigns forever, as fully and completely as he the said L. H. L. as such guardian by virtue of said order of Court and of the statute made and provided for such cases, might or should sell and convey the same.

The said C., L. & S. Ry. Co. agreeing as a part of the consideration of this deed to build and maintain a good woven wire fence on its south line between its lands and the remaining lands of said J. W., and provide and maintain a suitable crossing for each field or lot upon said remaining lands adjoining the lands of the said corporation herein conveyed. * * * The above provisions are covenants running with the land and shall be binding on the C., L. & S. Ry. Co., its successors and assigns forever.

In witness whereof, the said....., as.....ha... hereunto set..h....hand.., this.....day of....., A. D. 190...

Signed and acknowledged in presence of } .....
.....
.....
..... } of.....

State of Ohio,.....County, ss.

Be it remembered, that on the.....day of....., 190.., before me the subscriber, a.....in and for said county, personally came the above named....., as.....of.....the grantor..in the foregoing deed, and acknowledged the signing of the same to be..h....voluntary act and deed as such....., for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last aforesaid.

.....

§ 1679. Petition for appropriation filed in Probate Court. "In such a case the corporation may file a petition with the probate judge, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which the property is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as they can be ascertained, and a prayer for its appropriation." [R. S. § 6416.][8]

§ 1680. Where to be filed.

The petition must be filed in the Probate Court of the county where the land is situate which it is proposed to appropriate.[9]

[8] § 11042 G. C.

In the ordinary sense of the term, pleadings are not required in condemnation proceedings. C. I. St. L. & C. Ry. Co. vs. Pfitzer, Goebel, 248.

[9] Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 308; Lewis on Em. Dom., §§ 313, 316; 7 Ency. Plead. & Prac. 478.

If it is for the original right of way the terminal need not be stated. 18 C. C. (N.S.) 86.

In cases coming within the next section, a petition might be filed in either of one of two counties where the land is located in both counties.[10]

§ 1681. **Petition may include one or more parcels. In what county to be filed.** "The petition may include one or more of the parcels of property, rights, or interests in the county in which it is filed. When any such parcel, right or interest, is situated in two or more counties, the petition may be filed in either of the counties in which an owner is resident, and if no owner resides therein, it may be filed in either." [R. S. § 6417.][11]

§ 1682. **When probate judge interested, proceedings to be commenced in common pleas. Special term of.** "When the probate judge is interested, either as stockholder, director or otherwise, in a corporation seeking to appropriate private property to its use, or if before filing the petition, it is made to appear to the satisfaction of a judge of the common pleas court of the county wherein the action is to be brought, that such probate judge is interested either as owner or otherwise in the property sought to be appropriated, or by reason of sickness, absence or other incapacity is and will be unable to preside at the trial, the proceedings authorized by this chapter may be commenced in the common pleas court of the county." [R. S. § 6440.][12]

§ 1682a. **Procedure in common pleas court.** "In such case, so far as applicable, the proceedings shall conform to the provisions of this chapter, and the powers conferred and duties imposed thereby upon the probate court devolve upon the common pleas, which court may make such orders and direct such proceedings to be had as are necessary to do justice between the parties according to the spirit and intent of this chapter." [R. S. § 6440.][12*]

[10] Only limited and special jurisdiction is conferred on the Probate Court. Dayton & W. Ry. vs. Marshall, 11 O. S. 497.

See §§ 1737, 1749.

The jurisdiction of the Probate Court is complete, and where a petition is filed therein to appropriate, the proceedings cannot be restrained by injunction in Court of Common Pleas. Kinkade, J., in unreported case Toledo Com. Pleas.

[11] § 11043 G. C.

See Consolidated St. Ry. Co. vs. Toledo Elect. St. Ry. Co., 6 N. P. 537; 8 Dec. 268; 26 Bull. 172; 3 C. D. 493; 6 C. C. 362; 50 O. S. 603.

[12] § 11068 G. C.

[12*] § 11069 G. C.

§ 1682b. When corporations entitled to possession. "After final judgment, on depositing the amount of the judgment and costs assessed in such court with the clerk thereof, the corporation may be entitled to enter into possession of the property sought to be appropriated. In case such court is not in session when the proceedings are begun therein, nor on the day fixed for the inquiry and assessment of compensation, a special term thereof must be held as provided by law." [R. S. § 6440.][12†]

§ 1683. Nature of proceedings.

The entire proceedings is substantially a proceeding *in rem*, and jurisdiction over the person of the parties is not absolutely essential.[13] The jury, provided for in the Constitution, means a tribunal of twelve men, presided over by a Court, and under its direction hearing the allegations, evidence and argument of the counsel and declaring the truth upon the evidence submitted, and the law given them by the Court.[14]

The petition is not an ordinary petition under the Code, but a petition provided for by a special section of the statute.[15] The action is not a common law one,[16] but a special proceeding.[17]

§ 1684. Amendments allowed. "The court may amend any defect or informality in the proceedings authorized or required by this chapter or cause new parties to be added, and direct such further notice to be given to a party in interest as it deems proper." [R. S. § 6423.][18]

§ 1685. Time of trials. Adjournments, discharge of juries. "The court may direct the order and fix the time of the several trials, and adjourn or continue a trial for the purpose of obtaining proper service upon a property owner; or, when deemed necessary for the proper and convenient trial of the several cases, it may discharge a jury, and cause other juries to be impaneled, as provided in this chapter." [R. S. § 6424.][19]

[12†] § 11070 G. C.

See §§ 9, 10, for procedure where judge is interested.

[13] Cupp vs. Commissioners, 19 O. S. 173.

[14] Smith vs. Atlantic & G. W. R. R. Co., 25 O. S. 91.

[15] *In re* George, 5 C. C. 207; 3 C. D. 104.

[16] O. S. R. R. Co. vs. Kloeb, 5 N. P. 4; 5 Dec. 217.

[17] 7 Ency. of Plead. and Prac. 467.

See Lewis on Em. Dom., §§ 314, 316.

See § 1749.

[18] § 11049 G. C.

This section but follows the ordinary provisions applicable to code proceedings.

See 7 Ency. of Pl. & Prac., 541, as to allowable amendments.

[19] § 11050 G. C.

§ 1686. Essentials of petition.

The proceeding is a special proceeding, and while the rules applicable to Code pleading should be generally applied, and a petition should be sustained if it shows a substantial compliance with the law.[20] The essential thing to be maintained is a substantial compliance with all the requisites of the statute.[21] Formal defects in a petition may be waived, but jurisdictional defects cannot, and may be taken advantage of at any stage of the proceeding.[22]

The subsequent parts of this section will be devoted to the essentials of a petition, the *first* of which is that it must be verified as a petition in other civil actions.[23] The *second* essential is that the petition must contain a specific description of each parcel of property, interest or right therein which is sought to be appropriated.[24] It may become very important in after years to have this essential requirement definitely and completely complied with. Upon this description may devolve the question whether a future injury or taking has been determined in the original proceedings or provides a new cause for a separate remedy; and this is also essential in enabling the Court to determine whether the property sought to be appropriated is necessary, etc.[25]

If neither party appear on the day a cause is set for hearing, the Court may, of its own motion, continue such cause indefinitely. Kiefer vs. Board of Commissioners, 4 N. P. 282; 7 Dec. 31.

The names of the townships through which the proposed road is to extend, are not required to be set forth in the articles of incorporation. Counties are only required. Hayes, Trustee, *et al.*, vs. Toledo Ry. & Ter. Co., 6 C. C. (N.S.) 281; 16 Cir. D. 395; affirmed, no report, 70 O. S. 425.

Two distinct railways cannot at the same time in the same proceedings maintain an action to condemn. Traction Co. vs. Guthrie, 48 Bull. 11.

But the mere fact that it has leased its lines will not prevent exercise of the power. Cincinnati Interterminal Co. vs. Murray, 1 N. P. (N.S.) 301; 48 Bull. 877.

[20] The Toledo Consol. St. Ry. Co. vs. The Toledo Elec. St. Ry. Co., 6 C. C. 362; 3 C. D. 493.

[21] *In re* George, 5 C. C. 207; 3 C. D. 104; Lewis on Em. Dom.,, §§ 348, 343.

[22] Lewis on Em. Dom., § 632.

[23] § 11351 G. C.
See § 831.

[24] The object is to compel the R. R. to appropriate whatever the court may determine necessary. Ry. vs. Perkins, 22 C. C. 630; 49 O. S. 326.
See § 1669.

[25] Cemetery Assn. vs. Traction Co., 93 O. S. 164; Railway Co. vs.

It would be proper to attach to the petition a plat of the land proposed to be taken, and an ordinance of the city granting the right in certain cases might also be attached.[26]

The *third* essential is that the petition should contain a statement of the work that was intended to be constructed thereon. This means that the petition should contain an allegation as to what is to be placed on the right of way; for instance, whether it is to make a public road, place a railroad, or dig a trench for gas pipe, erect a building for depot purposes, or a bridge, and matter of that character.

The *fourth* essential is the use to which the land appropriated is to be applied. This allegation is required for two purposes. First, that the land owner may know the nature and character of the use for which the appropriation is to be made, and second, that it be shown that the use is of such character that the power of eminent domain will apply.[27]

It is not necessary for the petition to state the length of time the use of the property sought to be appropriated will be required by the appropriating company.[28]

If land adjoining is sought for the purpose of obtaining material, such use must be disclosed in the petition.[29]

The *fifth* essential is the necessity for the appropriation. By this is meant that it must be shown in the petition that it is necessary for the use of the corporation that this particular tract of land be appropriated for its use. If not necessary, then it could not be appropriated. The question of its necessity will come up on the preliminary hearing, but this does not dispense

Bohm, 34 O. S. 122; C. H. & D. Ry. Co. vs. Persons, 7 W. L. J. 265; Schaible vs. L. S. & M. S. Ry. Co., 10 C. C. 334; 6 C. D. 505.

See C. T. Ry. vs. Prentice, for sufficient description. 13 O. S. 373

See A. & O. Ry. Co. vs. Sullivant, 5 O. S. 279.

See Lewis on Em. Dom., §§ 350, 351, 352, 307.

[26] The Toledo Consol. St. Ry. Co. vs. The Toledo Elec. St. Ry. Co., 6 C. C. 362; 5 C. D. 643.

[27] Railway Co. vs. Bohm, 34 O. S. 114; Lewis on Em. Dom., § 353.

The particular manner in which the land is to be used, is to appear from the plans and specifications. 7 Ency. of Pleadings & Prac., §§ 325, 326 and 327.

[28] Toledo Consol. St. R R. Co. vs. Toledo Elec. St. R. R. Co., 12 C. C. 367; 5 C. D. 643.

[29] Railway Co. vs. Bohm, 34 O. S. 114.

with the allegation of the petition that it is necessary. The appropriation could only be necessary when it comes within a right granted to the corporation. Where the corporation has power to appropriate, it usually determines what lands are necessary for the exercise of the given power.[30]

The *sixth* essential of the petition is that it contain the name of the owner of each tract, and if not known, a statement of that fact; and also must contain the names of all persons having or claiming an interest in the property legal or equitable, so far as the same can be ascertained. In this respect it is sufficient to say that the statute contemplates that each and every person, no matter what his interest may be, should be made a party and his name stated.[31]

The *seventh* essential of the petition is that it contain a prayer for the appropriation of the property. *Another* essential that is not laid down by the previous section is the existence of the corporation. This should be averred in the petition, for if the corporation has no existence, the action cannot be maintained.[32]

The petition must also contain a statement that the parties are unable to agree. This likewise being an essential.[33]

§ 1687. Parties, etc.

It has been observed in the previous section that the petition should state names of the owers, etc., and it may be further stated that every person having any interest whatever in the land sought to be appropriated should be made a party. A mortgagee whose mortgage is duly recorded is an owner.[34] All the cotenants should be made parties. The acceptance of one of the money paid into the Court will not bind the other.[35] The

[30] See subsequent section. § 1700. C. L. & S. Ry. vs. Cole, 47 Bull. 547; C. D. & N. Ry. vs. Marriott, 47 Bull. 357.

[31] See Parties, § 1687.

[32] A. & O. R. Co. vs. Sullivant, 5 O. S. 276; Powers vs. H. & L. Ry. Co., 33 O. S. 429; *In re* George, 5 C. C. 214; 3 C. D. 104; Cemetery Assn. vs. Traction Co., 93 O. S. 161.

[33] § 6415 previous section, §§ 7676, 1740, 1751.

When it is sought to condemn land to change or relocate a railroad, the petition should contain the averments required by the statute authorizing the same, and the court should, in its finding, pass upon such questions and place them in the journal entry; a general finding, however, that the allegations of the petition are true is sufficient. Renssh vs. Traction Co., 24 O. C. C. 541; affirmed no op., 89 O. S. —.

[34] Harrison vs. Incorp. Vill. of Sabina, 1 C. C. 49; 1 C. D. 30; Big Four B. & L. Assn. vs. Cincinnati, 12 Dec. 218.

[35] Garvin vs. City of Columbus, 5 N. P. 236; 5 Dec. 333; Mack vs. Degraff, 57 O. S. 463.

This is proper, but it is said not to be necessary. Pitts. C. & T. Ry. vs. Todd, 72 O. S. 166.

As to what is sufficient petition, see Toledo Consolidated Ry. vs. Toledo Electric Ry., 3 C. D. 504; 6. O. C. C. 362.

owner of the fee must be made a party.[36] And where the party has only an easement, the owners of the easement and of the fee must both be made parties.[37]

Where a party has died, his heirs should be made defendants, and not the administrator, unless such administrator holds the fee.[38]

§ 1688. Form of petition.

In the Probate Court of.....County, Ohio.

C., L. & S. Ry. Co., Pltf.
vs.
W. S. T., other names here inserted, Deft. } PETITION.

Plaintiff says it is a corporation duly incorporated and organized under and in pursuance of the laws of the State of Ohio, under the corporate name of C., L. & S. Ry. Co.; that by the terms of its charter it is authorized and empowered to locate, construct, maintain and operate a line of railway to be operated by electricity or some motive power other than steam, with a single or double track, with all necessary and convenient switches, branches, connections, side-tracks, turn-outs, stations, depots, and other appurtenances for the transportation of passengers, packages, express matter, United States mail, baggage and freight, commencing at a point in the city of C., F. county, Ohio; thence through a portion of said county, through the county of.....in said State, and the city of..... .....in said.....county, and through a portion of the county of.....in said State, to and into the city of....., ...county, Ohio, and there terminating, with the right to construct the same in and upon the public streets respectively of said cities, and upon and along the highways in each of said counties, and through and upon such private property and right of way of said corporation as it might acquire.

Plaintiff says that a portion of its said line has been completed and that it is now engaged in the construction of its said line between the cities of.....and.....

Plaintiff further says that it is necessary, in order to carry out the said objects and purposes of its incorporation, that it shall appropriate and it intends to appropriate, as a part of its rights of way, for the construction, maintenance and operation of its said line of railway, and for the purpose of constructing, maintaining and operating thereon,[39] a single or double track of railway at the option of the plaintiff, with the necessary side-tracks, switches and turnouts and for the construction of its road-bed, the laying of its rails and the erection of its poles and other necessary construction thereon, the following described real estate, situate in the State of Ohio, county of.....and township of....., and bounded and described as follows, to-wit:

A plat of said real estate, with a profile of the proposed improvement and

[36] Gorrill vs. Tol. F. & S. Ry. Co., 4 C. C. 398; 2 C. D. 617; Ohio Oil Co. vs. T. F. & S. Ry. Co., 4 C. C. 210; 2 C. D. 505.

[37] Metropolitan St. Ry. Co. vs. Toledo El. St. Ry. Co., 9 C. C. 664; 6 C. D. 733.

[38] See Lewis on Em. Dom., §§ 317 to 330; Mills on Em. Dom., § 75.

There is no inchoate dower right to property that may be condemned. Long vs. Long, 99 O. S. 350.

See §§ 1686, 1691, 1751.

[39] It has recently been held the

work thereon, is hereto attached, marked "Exhibit A," and made a part of this petition.

Plaintiff says that by the provisions of a deed of trust executed by J. T. to W. T. and C. T. and by the provisions of a written appointment executed by the said J. T. and also by the terms of the last will and testament of said J. T., now deceased, which said last will and testament has been duly admitted to probate in the Probate Court of.....county, Ohio, the said W. T. and C. T. were duly appointed trustees, in relation to the above described real estate, for the defendant, F. T., and the defendants, W. T., N. S., M. T., L. T., M. T. and C. T., and by the terms of said trust are vested as such trustees with the legal title to the above described real estate and are therefore the legal owners thereof, they having accepted said trust and being now engaged in the execution thereof; the terms of said trust are fully known to said trustees and the defendant beneficiaries. Neither said deed of trust or said declaration of trust have ever been filed for record with the recorder of.....county, Ohio, but the same are now in the possession of said trustees.

The defendants, F. B. T., L. T., M. T., and C. T., who are both minors under the age of fourteen years, and W. T., N. S. and M. T., have an interest in said real estate by virtue of the provisions of said trust.

The defendants, W. T. and C. T., are the duly appointed, qualified and acting executors of the last will and testament of J. T., deceased.

The defendants, J. D. and S. C., have or claim some interest in the above described real estate as tenants.

None of the defendants herein have guardians or trustees, except as above stated, and there are no liens except the taxes for the year 1901, subsisting against the above described real estate, and the above defendants are all the persons having any interest, legal or equitable, in the above described real estate, so far as same can be ascertained.

Plaintiff says it is unable to agree with the owners of the above described real estate as to the compensation to be paid therefor.

Wherefore the plaintiff asks that such steps may be taken as are authorized by law, whereby plaintiff will be enabled to appropriate the above described real estate for the use, objects and purposes above stated, and for such other and further relief as the nature of the case may require.

.....

State of Ohio,.....County, ss.

....., being first duly sworn, says he is the first vice-president of the C., L. & S. Ry. Co., the plaintiff herein, and that the facts stated in its foregoing petition are true as he verily believes.

Sworn to before me and subscribed in my presence this.....day of ....., 190...[40]

§ 1689. Filing the petition, entry, etc.

The petition having been properly prepared, should be filed in the Probate Court of the county in which the land is located,[41] and an entry should be made of such fact. Several things may be included in this entry according to information

petition must allege the facts which show that it is necessary to condemn private property for a traction company. C. L. & S. vs. Cole, 47 Bull. 547.

[40] See Whit. on forms, 586, for form for additional lands for material, etc.

See O. S. R. vs. Hinkle, 1 N. P. 63; 1 Dec. 682.

[41] Previous section, §§ 1680, 1681.

at this time conveyed to the Court. If service is to be made by publication, as provided by statute,[42] this might also be included in this entry.[43] The entry may be in the following form:

(Title.)

This day came the plaintiff and filed its petition for the appropriation of certain property therein described and named the defendants as persons owning or having an interest in such property; and filed therewith its precipe for summons for A. B., C. D. and E. F., certain defendants. Wherefore it is ordered that summons be issued directed to the sheriff of .....county, for the said defendants, notifying said defendants to appear at this office on (not less than five or more than 15 days), returnable according to law.

And it further appearing to the Court that G. H., one of the parties defendant, is a non-resident of this State (or that his residence is unknown)[43*] it is ordered that the said G. H. be served by publication as authorized by law; and that said cause be set for hearing as to him on..... (Notice must be published at least four consecutive weeks.) And the Court fixes the.....day of.....for hearing the preliminary questions.[44]

§ 1690. Summons, its command and service thereof. Alias summons. "Upon the filing of a precipe therefor, the probate judge shall issue summons for the owners, and persons named in the petition as residents of the state, having an interest, which may be directed to the sheriff of any county, and shall command him to notify the persons it names of the filing of the petition, and to appear thereto at a time to be fixed by the judge, and therein stated, not less than five nor more than fifteen days from the date thereof. It must be served and returned as in a civil action. When returned 'not summoned,' other writs may issue until the parties are duly summoned." [R. S. § 6418.][45]

§ 1691. Notice.

As said in a previous section, every person having any interest should be made a party,[46] and if not made a party, he would not be bound by any of the proceedings unless he in some way entered his appearance. This is well illustrated where it was

[42] See subsequent section, § 1692.

[43] § 11071 G. C., § 1694, subsequent section, § 21.

[43*] See subsequent section, § 11045 G. C., § 51.

[44] See § 1696, Time to be heard.

An attorney could probably not be appointed until service has been made on persons under legal disability.

[45] § 11044 G. C.

[46] § 1687.

If a mortgagee is not notified he is not bound. Harrison vs. Sabina, 1 C. D. 301; 1 O. C. C. 49.

held that service on one co-tenant would not bind the other.[47]

It is held, however, that the whole proceeding is substantially *in rem,* and the notice will be sufficient, although it be not personally served if made as the statute directs.[48] The summons or notice must be given as the law directs. In this respect the rule of strict construction applies.[49] If the owner is not notified he may enjoin the proceedings,[50] or he may bring his action for damages.[51]

The record of the proceeding must show that the notice required by the statute has been given.[52] The summons in proceedings under this chapter must be served as in other civil actions.[53]

No provision is made for any other person making the service except the sheriff.[54] The person making the service should make a return the same as in service of summons generally.[55]

§ 1692. Service by publication, how proved. "When a person having an interest is unknown, or his residence is beyond the state or unknown, the corporation may make service against him by publishing in a newspaper of general circulation in the county where the petition is filed, for four consecutive weeks, a notice containing a summary statement of the object and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten nor more than twenty days after the last publication. The fact of publication may be proved by the affidavit of any person having knowledge thereof." [R. S. § 6419.][56]

[47] Garvin vs. City of Columbus, 5 N. P. 236; 5 Dec. 333; Mack vs. Degraff, 57 O. S. 464.

[48] Cupp vs. Board of Commissioners, 19 O. S. 173; Harrison vs. Incorporated Village of Sabina, 1 C. C. 49; 1 C. D. 30.

[49] Harback vs. City of Toledo, 11 O. S. 219.

[50] Teegarden vs. Davis, 36 O. S. 601.

[51] Badgley vs. Hamilton Co., 1 Dis. 316; Lewis on Em. Dom., § 371 *et seq.*

[52] Harbeck vs. City of Toledo, 11 O. S. 219; Fravert vs. Finfrock, 43 O. S. 335.

[53] See § 839, § 6418 R. S.

[54] 7 Ency. of Pl. and Prac., 487.

[55] See § 1755.

[56] § 11045 G. C.
See § 1689.

A bill of exceptions upon questions arising upon preliminary matters, must be taken within the time limited by § 5301 R. S., §§ 11564-5 G. C. Dayton Ry. vs. Dayton Traction Co., 26 O. C. C. 1; 72 O. S. 429; affirming, without report, 4 C. C. (N.S.) 329. And this is dated from the time that a motion for a new trial is overruled, and the motion is properly made at the time the verdict is confirmed or the action dismissed. It should not be made at the time the preliminary question is heard, but on the final judgment in the case. Railroad vs. Todd, 72 O. S. 165; Railroad vs. Traction Co., 72 O. S. 430; affirming, without report, 4 C. C. (N.S.) 329. See § 1721.

These preliminary questions are all reviewable on error. Railroad vs. Todd, 72 O. S. 165.

§ 1693. Affidavit and form of notice

The statute does not direct in what manner the Court should be informed that some person having an interest is unknown, or that if known, his residence is beyond the State. It would be proper that an affidavit be filed for this purpose setting out such facts. This could be done when the petition is filed, and the Court make an order at that time.[57]

The form of notice given in a previous section[58] can likewise easily be adopted. The statute does not require that copies be mailed, but it would be good practice to so do.[59]

§ 1694. Court to appoint attorney for party absent or under disability. "When a party in interest is unknown, or his residence is unknown, and service has been made by publication, and the party has not appeared in the proceedings by agent or attorney, or when such party in interest is under any legal disability and has no legal guardian, or trustee, within the county where the action is brought, the court shall appoint some competent attorney to attend upon the proceedings, and protect the rights and interests of such party, and also fix the fees of the attorney for such service, which shall be payable out of any money paid on the judgment rendered in such case for property appropriated." [R. S. § 6441.][60]

The above section is somewhat similar to the provision relating to the appointment of a guardian *ad litem* so far as an infant is concerned. The appointment need only be made when the conditions of the statute exist, but when they do exist, it is questionable whether a proceeding would be regular without such appointment. It may be, as the proceeding is *in rem*, that a failure to make such appointment would not invalidate the proceedings; especially so far as an indirect attack might be made. The appointment should be made on motion setting forth the facts.[61]

§ 1695. Jurisdictional questions. When to be heard and determined. Burden of proof. "On the day named in a summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its

[57] See § 840 for form of affidavit.
[58] § 841.
[59] See § 842, § 1755.
[60] § 11071 G. C.
[61] See § 845 for motion, entry, etc. See § 1756.

inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof shall be upon the corporation, and any interested person shall be heard." [R. S. § 6420.][62]

If the record fails to disclose the existence of these jurisdictional questions, then the proceedings would be irregular and void.[63] Until these questions are determined, the Probate Judge has no right or jurisdiction to order a jury. [64] Whatever is required by way of preliminaries must be strictly complied with.[65] The preliminary hearing and the trial upon the issue of compensation and damages are independent trials upon separate issues of fact. The order of the Probate Court confirming the verdict of the jury is the final order from which error is prosecuted.*

§ 1696. When to be heard.

If all the parties can be served by summons, then no difficulty is experienced as to the time that should be fixed for the hearing of preliminary questions. It must not be less than five nor more than fifteen days from the date of the summons,[66] and if all the defendants were to be served by publication, there would be no difficulty, though then it must be not less than ten, nor more than twenty, days after the last publication.[67]

Where some defendants are served by summons and others by publication, the case should be set for hearing as if all parties were served by summons, and then a continuance had until the time has expired for service by publication; and such further continuance might be had from time to time until all persons were properly served at or previous to the preliminary hearing. An attorney should be appointed for a person absent, etc.[68] The statute defines the preliminary questions

[62] § 11046 G. C. The court is to hear and determine the questions as to the existence of the corporation, its right to make the appropriation and inability to agree, before proceeding to impanel the jury. Cincinnati vs. R. R., 83 O. S. 283; Cemetery Assn. vs. Traction Co., 93 O. S. 166.

[63] Zimmerman vs. Canfield, 42 O. S. 463.

[64] *In re* George, 5 C. C. 213; 3 C. D. 104; Toledo Consol. St. Ry. Co. vs. Toledo Elec. St. Ry. Co., 6 C. C. 363; 3 C. D. 493; T. & O. Cent. Ry. Co. vs. City of Fostoria, 7 C. C. 293; 4 C. D. 602.

[65] Lewis on Em. Dom., § 310.

When proceedings are brought by a telegraph company under § 3459, the Probate Court must also pass upon, provided the same be controverted, whether the erection of the line at the place designated will interfere in any material degree with the practical uses of the railroad. C. C. C. & St. L. vs. O. Postal Tel. Co. (1903), 68 O. S. 306.

* Dayton El. U. Ry. Co. vs. Traction Co., 1 N. P. (N.S.) 218; 48 Bull. 957; 14 Dec. 22. See § 1721.

[66] § 11044 G. C., § 1690.

[67] § 11045 G. C., § 1692.

[68] § 11071 G. C., § 1694.

which are to be passed upon, and upon these questions the burden of proof rests upon the corporation. These matters will be considered in their order.[69]

§ 1697. Existence of corporation.

The first to be considered is the existence of the corporation. Before a corporation can exercise the right of eminent domain it must prove its corporate existence, and that it has complied with the law granting to it power to condemn.[70] The corporation should give evidence of a certificate or public record, and of its organization in accordance with the provisions of the statute.[71] Proof of the corporate existence of plaintiff is made out by placing in evidence its articles of incorporation, its certificate of subscription to the capital stock, and the record book of the company showing the election of the officers.[72]

§ 1698. Right to make appropriation.

The second question to be considered upon the preliminary hearing is as to the right of the corporation to make the appropriation. This means that the corporation must show that power to condemn the property sought to be condemned has been conferred upon it by some valid legislative enactment.[73] It would be incumbent upon the corporation to show that the act of the Legislature granting the power was constitutional. This is shown by establishing the fact that the appropriation is for a public and not merely a private purpose.[74]

[69] See § 1689, 1756.

[70] Powers vs. Railway Co., 33 O. S. 429; Atkinson vs. M. & C. Ry. Co., 15 O. S. 21.

[71] Atlantic & O. R. R. Co. vs. Sullivant, 5 O. S. 276; Con. St. Ry. vs. Ry., 8 Dec. 268; *In re* George, 5 C. C. 214; 3 C. D. 104.

[72] T. E. St. Ry. Co. vs. T. C. St. Ry. Co., 26 Bull. 172.

See Lewis on Em. Dom., §§ 390, 391.

The Probate Court has full power to go into this question and if the corporation is not properly organized to dismiss the action. Cemetery Assn. vs. Traction Co., 93 O. S. 183.

[73] See Powers vs. Railway Co., 33 O. S. 429; Harrison vs. Incorp. Village of Sabina, 1 C. C. 52; 1 C. D. 30.

[74] T. E. St. Ry. Co. vs. T. C. St. Ry. Co., 26 Bull. 172.

As to what will constitute a public use, see Trumbull vs. Shilling, 53 Bull. 167.

§ 1699. Inability to agree.

The third preliminary question is the establishment of the fact that the parties have been unable to agree upon a consideration, where the owner is capable of agreeing, and is not unknown or has a residence beyond the State.[75] The inability of parties to agree as to the compensation for the property taken is established by proof of *bona fide* attempts to reach a settlement, and not merely colorable formal efforts. No special or set forms of words is necessary, and acts showing a desire and effort to agree may be as convincing as speech itself.[76] The inability to agree required by statute does not mean an inability to buy at any price, but only at a price which the condemning party is willing to pay.[77]

§ 1700. Necessity for appropriation.

A fourth matter to be heard on preliminary hearing is the necessity for the appropriation. This means that it is incumbent upon the corporation to show that the property sought to be appropriated is reasonably necessary to carry into effect the purposes of the corporation. As a general rule, the amount of land to be taken,[78] or the route to be pursued,[79] will rest in the discretion of the corporation when such discretion is not abused,[80] and where the corporation resolves that it is necessary to appropriate a certain described piece of land and no abuse be shown, it will be presumed that it was a necessity; and the mere fact that it has already condemned a strip for a railway does not show absence of a necessity to take additional land to widen the strip.[81]

[75] § 6415 R. S., § 1676.

[76] T. E. St. Ry. vs. T. C. Ry. Co., 26 Bull. 172.

[77] Lewis on Em. Dom., § 302. The purpose of the provision in relation to agreement of parties is to save expense and trouble. L. & N. Ry. vs. Cin., 56 Bull. 317.

An agreement not reduced to writing will not be binding or sufficient to defeat the action. Cleveland & Pitts. R. R. vs. Dewine, 58 Bull. 438.

[78] Schiable vs. Ry., 10 C. C. 334; 6 C. D. 505; Iron R. R. Co. vs. City of Ironton, 19 O. S. 299.

[79] L. E. S. & W. Ry. Co. vs. A. & G. W. Ry. Co., 2 Bull. 188.

[80] O. S. Ry. vs. Hinkle, 1 N. P. 63; 1 Dec. 682. The discretion vested in a corporation is merely a primary discretion, the final determination rests in the court. Cincinnati vs. R. R., 88 O. S. 283.

[81] Trustees vs. O'Meara, 2 Bull. 142. In order to sustain a proceeding by a railroad to condemn an easement across a public landing for an elevated tract, the evidence must show both the necessity for the appropriation and that the taking will not destroy or seriously impede the use to which the property is already devoted. Cincinnati vs. R. R., 88 O. S. 283.

See T. E. & T. C. Ry. Co. vs. T. C. St. Ry. Co., 26 Bull. 172, where one street railway may appropriate the right to use another street railway.

There must be a definite understanding that the proposition is one upon which the parties can not agree. If there is a misunderstanding as to the terms, there is no disagreement. Steubenville R. R. vs. Cleveland, 2 N. P. (N.S.) 45; 49 Bull. 240.

An averment of inability to agree must be in the petition. Railway vs. Diamond Stone Co., 51 Bull. 421.

If there are several joint owners

If, upon hearing, the Court is satisfied that the corporation is abusing its power, it should refuse the application and dismiss the proceeding.[82] But it being presumed that self-interest will dictate that it will not abuse its powers and make an improvement where there is no demand for it, the exercise of this discretion will generally not be interfered with by the Court.[83]

§ 1701. Jurors to be drawn from box and venire issued. "If, as to any or all of the property, and persons interested therein, the judge determines such questions for the corporation, he shall issue an order to the clerk and sheriff to draw sixteen names from the jury wheel, as in other cases, and within two days after the receipt of it they must execute the order, and the clerk forthwith return it to the probate judge, with a list of the names drawn indorsed thereon, who shall issue to the sheriff a venire for the jurors so drawn to attend at his office at a time to be fixed by him, and named in the writ, not exceeding ten days from the date thereof. It shall be served and returned as in other cases." [R. S. § 6421.][84]

§ 1702. Finding and order to draw jury.

The Court having determined all the preliminary questions in favor of the plaintiff, and that all parties entitled to notice have been notified as the law requires, will then order a jury to be drawn.[85] A distinction exists between a jury drawn under the above section for appropriation by private corporations and that provided under the section relating to appropriations by

an effort ought to be made to agree with all. Cin. Inter., etc., vs. Murray, 1 N. P. (N.S.) 300; 48 Bull. 877. See Trumbull vs. Shilling, 53 Bull. 167. As to necessity where one railroad condemns land of another, see Steubenville vs. Cleveland, 2 N. P. (N.S.) 45; 49 Bull. 240.

82 Lewis on Em. Dom., § 393.

See T. C. St. Ry. Co. vs. Ry. Co., 8 Dec. 268, when Probate Court will not be reversed.

83 Mills on Em. Dom., §§ 61, 62. See § 1686.

Mere surveying does not give exclusive right. C. T. & B. Ry. vs. Ry., 32 Bull. 186; 1 Dec. 627.

Necessity does not mean indispensible. Shaver vs. Starrett, 4 O. S. 499. Necessity to authorize a railway to condemn private property is reasonable, not absolute. Reusch vs. Traction Co., 24 O. C. C. 540; affirmed no op., 89 O. S. 456.

84 § 11047 G. C.

It has recently been held that jury fees are not to be taxed against the plaintiff. Hill vs. Durr, 47 Bull. 440.

The Circuit Court of Darke County has held the opposite, and as the author thinks rightfully, taxed such costs against the plaintiff.

The whole costs are assessed against the corporation. Railroad vs. County, 71 O. S. 454.

85 Lamb vs. Lane, 4 O. S. 167, where it is held, that the word jury means a tribunal of twelve men, presided over by a Court, and hearing the allegations, evidence and arguments of the parties. Watson vs. Trustees, 21 O. S. 667; Smith vs. A. & G. W. Ry. Co., 25 O. S. 91.

The action of the Court in filling the jury panel by selecting jurors from fifty names drawn from the jury box, not error. Hosbrock vs. Traction Co., 5 C. C. (N.S.) 209; 27 O. C. C. 42; affirmed 75 O. S. 584.

municipal corporations. There the clerk must draw the names in the presence of the *Probate Judge,* and twelve instead of sixteen, men.[86]

If the Court finds against the plaintiff, a simple entry of dismissal will be sufficient. The following may be used as a general form of entry:

(*Title.*)

This cause having been continued from....., 190.., being the day heretofore fixed by the Court for the hearing of this cause, until..... ....., 190.., the date of this entry, thereupon this day came the plaintiff by its attorneys, and the defendants having been duly and legally served with process herein and appeared by their attorneys, the trustees and executors of the estate of J. A. having also filed their answer herein, whereupon this cause came on to be heard upon the questions of the existence of the corporation, its rights to make the appropriation, its inability to agree with the owners of the property, and the necessity for the appropriation, and the Court having heard the evidence and arguments of counsel, and being fully advised in the premises, do find that the plaintiff is a corporation and has a legal right to make the appropriation of the property described in the petition as prayed for; that the plaintiff is unable to agree with the owners of the property as to the amount of compensation to be paid therefor, and that there is a necessity for such appropriation as prayed for in the petition; and the Court proceeding as directed by statute orders and directs that a jury be drawn as required by law, returnable at a time to be hereafter fixed by the Court (or on the..... day of....., at.....o'clock A. M.)[87]

When the clerk and sheriff make a return to the Probate Judge showing that a jury has been drawn, it would then be proper for the Court to put an entry on, directing that such persons be summoned to appear as jurors on a day fixed. The entry may be as follows:

ENTRY ORDERING VENIRE TO BE ISSUED.

(*Title.*)

This day came the sheriff and clerk and filed a list of names drawn by them to serve as jurors in the above case, whereupon it is ordered that a venire shall be issued to the sheriff for the jurors drawn, returnable on the .....day of....., 190.., at.....o'clock, at which time the jury shall be impaneled and the trial of the cause commenced.[88]

§ 1703. How panel to be filed. Jurors to be interrogated by Court. "If, by reason of non-attendance, sickness, or other cause, any of the sixteen persons are not present and in condition

[86] § 1760, New municipal code, makes it the same as civil actions, in condemnation by municipal corporations.

[87] Whittaker's Prob. Code.

[88] See §§ 1769, 1761 1844. See § 409, for form of order to draw jury and form of venire.

to serve as jurors, the judge shall order the sheriff to fill the vacancies with talesmen. When the list of sixteen is full, the judge shall call upon each separately, beginning with the first named on the list, to take his place in the jury box, and personally inquire of each, as called, whether he is interested in any way in any of the property, rights, or interests sought to be appropriated, or in the corporation which filed the petition, either as owner, stockholder, agent, attorney, or otherwise. If such person answers in the affirmative, or if it be shown to the judge, by satisfactory evidence, that he is so interested, he shall be excused from serving on the jury, and the next person on the list be called, and interrogated in like manner. If the list of sixteen be exhausted before a proper jury of twelve men is taken and accepted therefrom, the judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of twelve with talesmen, who shall be interrogated as above provided." [R. S. § 6425.][89]

§ 1704. Challenge to jurors and how vacancies filled. When a jury box is filled with twelve disinterested jurors, the owners of the property which is the subject of the trial, jointly, and the petitioner, shall each have the right to four peremptory challenges, and to challenge for cause. Vacancies arising in the jury from challenge, or otherwise, shall be filled with talesmen having the qualifications prescribed in the next preceding section, to be ascertained as therein provided." [R. S. § 6426.][90]

§ 1705. Challenge of jury.

When the jury of twelve men becomes complete, then, as in ordinary trials, the party should proceed to challenge for cause, and any matter which is sufficient to excuse a juror in the trial of ordinary civil proceedings would be sufficient in this kind of

[89] § 11051 G. C.

It should be observed that whenever it is discovered that the full sixteen are not present, that the sheriff should fill the number of talesmen and when the list is full the duty devolves upon the Court of making the inquiry of each one in the order and as provided for in the previous section; and if a juror appears to be interested as therein provided, the judge shall excuse him; and if the sixteen are exhausted before the twelve men are taken, it should be filled by talesmen.

See § 1761.

[90] § 11052 G. C.

See § 1761.

a proceeding.[91] As to the right of peremptory challenges, it is held that it is limited to two for the plaintiff and two for the defendant, and the fact that there are a number of defendants will not change this rule.[92]

While the parties may be entitled to a separate hearing of the case where there are a number of defendants, yet as to the empanelling of the jury they act jointly, and likewise as to all proceedings prior to the hearing after the view made of the premises.[93]

§ 1706. Oath to be administered to jury. "When a jury is filled, the probate judge shall administer to them the following oath: 'You, and each of you, do solemnly swear that, according to your best judgment, you will justly and impartially assess the amount of compensation due to the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their property described in the petition, to the use of (here name the corporation) in the proceeding now pending, irrespective of any benefit from any improvement proposed by such corporation; and you do further swear that in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation, you will further ascertain how much less valuable the remaining portion of such property will be in consequence of such appropriation; this you swear as you shall answer to God.'" [R. S. § 6427.][94]

§ 1707. View of premises.

After the jury is empaneled, the law places it within the power of any of the parties to demand that they view the prem-

[91] See §§ 11437, 11438 G. C.

[92] City of Cincinnati vs. Neff, 19 Bull. 404; O. S. R. vs. Kloeb, 5 N. P. 4; 5 Dec. 217, now changed to form —.

[93] See §§ 1761, 1846.

[94] § 11053 G. C.

The wording of the oath, as set forth in § 6427, is important, as indicative of the legislative mind upon the questions which are to be determined and justifies the conclusion that two questions are for their consideration. First, the compensation to be paid for the land actually taken, and second, for damages that may occur to the remaining lands by reason of the appropriation. It might also be considered upon the question as to whether or not the matters brought to their attention in the view is to be considered as evidence. This matter will be discussed in §§ 1672, 1710.

ises. This demand is invariably made by some one of the parties, and I presume the Court might order the view without the demand. The desire for such a view may be made by a written or verbal motion. The statute providing for the form of writ to the sheriff is as follows:

"Upon motion of either party, the probate judge may issue the following writ to the sheriff, to-wit: 'To the sheriff of..... .....county: You are hereby commanded to conduct the twelve jurors named in the panel to this writ annexed, to view the property or premises sought to be appropriated by (here state the name of the corporation), and owned by (here state the name of each owner), on....., the ..... day of ....., then and there to view the premises or property aforesaid, in the presence of A. B. on the part of the corporation aforesaid and C. D. on the part of the owner, appointed by this court, and you shall make return of the manner you have executed this writ to this court, on the.....day of ....., A. D. .....' The writ shall be signed by the probate judge, and certified under his seal of office." [R. S. § 6428.][95]

§ 1708. Judge must deliver to sheriff description of property. May appoint persons to be present at view. Certificate of sheriff. Expense of view. No evidence given thereon. "The judge also shall deliver to the sheriff a copy of that part of the petition containing a separate description of each parcel of property, and rights or interests sought to be appropriated within the county, which the jury is required to view. He may appoint, to be present at the view, the two persons named in the writ. The sheriff who is to execute the writ, by a special return upon it, shall certify under his hand that the view has been made according to the command thereof. The expenses of the view must be taxed in the bill of costs. No evidence shall be given on either side at its taking." [R. S. § 6429.][96]

[95] § 11054 G. C.

Under § 11054 G. C. the Court is only authorized to appoint one person on the part of the corporation and one person on the part of the owner to be present at the view.

[96] § 11055 G. C.

Before the jury leaves to view the premises the author's experience has demonstrated to him the advisability of charging them as to their duties. A charge of this kind in a ditch proceeding will be found in Thomas vs. Commissioners, 5 N. P. 449; 5 Dec. 510. The Court should be careful in defining the duties of the jury on this view.

§ 1709. Entry empaneling a jury.

(*Title.*)

This day came the plaintiffs and....., their attorneys, and the defendants and....., their attorneys; and also came the following named persons, who were duly examined and sworn as jurors (here set out names of all jurors); and thereupon, on motion of....., plaintiff, (or one of the defendants) an order was issued to the sheriff to conduct the jury to view the premises sought to be appropriated on the .....day of....., (or forthwith) A. B., appointed on the part of the plaintiffs, and C. D., on part of the defendants, to show the jury said premises. Returnable according to law on the..... day of....., (or forthwith upon the view being completed).

The following part might be added to this entry, but it would be better to have it in the entry making a finding, etc., to draw a jury:[97]

ENTRY APPOINTING ATTORNEY.

And it appearing to the Court that the defendant,....., who has an interest in this proceeding, and who is a non-resident of this State (or is unknown, or his residence is unknown, or he is under some legal disability, and has no guardian or trustee within this county), and that service has been made by publication (or by service of summons, if he be a minor, lunatic, or idiot, living in the county and having no guardian or trustee); it is ordered, that....., a competent attorney, be and he is hereby appointed attorney, to attend upon the proceedings and protect the interest of said.....

....., Probate Judge.[98]

§ 1710. Is the view evidence?

Is the object of the view simply to enable the jury to better understand and apply the evidence, as is the rule in ordinary civil actions, or may they take into consideration all the facts which they learn upon such view as so much additional evidence upon which to found their verdict? This is a matter upon which the decisions are not in accord. Neither are the textbook writers, Lewis, on "Eminent Domain," taking the view that it is only to enable the jury better to understand and apply the evidence.[99]

Where the attorneys and parties call the attention of the jury to certain facts on the view, it is such conduct as may warrant the court in setting aside the verdict. Nypano R. R. vs. Wadsworth, 9 C. C. (N.S.) 114; 29 O. C. C. 110.

[97] See § 1702.

[98] Gilmore's Prob. Prac. 78. See §§ 1762, 1823, 1850.

[99] See Lewis on Em. Dom., § 425, citing the following cases in support that the view is evidence, Culbertson & Blair Provision Co. vs. Chicago, 111 Ills. 651, 655; other cases declare or support the same rule; Chicago & Evanston R. R. Co. vs. Jacobs, 110 Ills. 414; Peoria, etc., Ry. Co. vs. Barnum, 107 Ills. 160; Green vs. Chicago, 97 Ills. 370; Chicago, Iowa R. R. Co. vs. Hopkins, 90 Ills. 316; Mitchell vs. Illinois & St. L. R. R. & Coal Co., 85 Ills. 566; Peoria, etc., R. R. Co. vs. Sawyer, 71 Ills. 361; Evansville, etc., R. R. Co. vs. Cochran, 10 Ind. 560; Parker vs.

The Supreme Court of our State has never directly, if at all, passed upon this question. In an early case,[100] after defining the word "jury," as used in the Constitution, it is said, "It is hardly necessary to add that they may be sent to inspect the premises. That may be done in the trial of even a common law action, when it is expedient." While this is a mere dictum, it shows the bent of the judges' mind to be, that the rule was to be applied as in ordinary jury trials.[101]

In Williams vs. Lockoman,[102] in a ditch proceeding, it was held that the jury might consider in evidence facts made known to them personally from an actual view of the premises. From an examination of this case it appears that the question of compensation upon which the Constitution guarantees a right to trial by jury, was not considered, but the facts upon which the jury passed were those relating to the necessity of the proposed improvement.

In the recent case of Railroad Co. vs. Commissioners,[103] another ditch case, in which the question as to its necessity and compensation were both before the Supreme Court. On the question of necessity, etc., the Court again confirmed its former opinion that upon such a question the jury are entitled to consider as evidence facts brought to their knowledge from their actual view of the premises.

This matter was very exhaustively considered in a case in

Boston, 15 Pick. 198; City of Kansas vs. Butterfield, 89 Mo. 646; Omaha & Rep. Valley R. R. Co. vs. Walker, 17 Neb. 432; *In re* Barbadoes St., 8 Phila. 498; Lehigh Valley Coal Co. vs. Chicago, 26 Fed. R. 415, and the following to the *contra*.

Jeffersonville, etc., R. R. Co. vs. Bowen, 40 Ind. 545; Heady vs. Turnpike Co., 52 Ind. 117; overruling Evansville, etc., R. R. Co. vs. Cochran, 10 Ind. 560; Close vs. Samm, 27 Ia. 503; Harrison vs. Iowa Midland R. R. Co., 36 Ia. 323; Washburn vs. Milwaukee, etc., R. R. Co., 59 Wis. 364.

See 6 Am. & Eng. Ency. of Law, 615; 7 Ency. of Plead. and Prac., 583.

[100] Lamb vs. Lane, 4 O. S. 180.

[101] In Smith vs. A. & G. W. R. R. Co., 25 O. S. 102, in defining the word jury it is said that it has uniformly been construed to mean a tribunal of twelve men presided over by a Court, and under its direction hearing the allegations, evidence and argument of counsel, and declaring the truth upon the evidence submitted, and the law given them by the Court.

[102] 46 O. S. 416.

[103] 63 O. S. 23.

See note at end of section.

the Court of Common Pleas, and by a very able judge,[104] and there the conclusion is reached that the facts made known to the jury upon the view is evidence. In this case the statute and the decisions of our and other States are critically examined. While not free from doubt, the author, in his experience as judge, was inclined to follow this case.[105]

In Consolidated St. Ry. Co. vs. Toledo Elec. St. Ry. Co.,[106] after calling attention to the statute providing that a jury shall be drawn and the testimony may be given by witnesses,[107] and limiting their number, it is said that "this language of the statute clearly indicates the purpose of the Legislature that the examination which the jury shall make, as it is provided for in the statute, shall furnish them with evidence which may be considered together with the testimony, which it is provided, may be given by the swearing of the witnesses and their examination before the Court and in the hearing of the jury." By adopting the view that what the jurors see on their view is evidence, a difficulty is experienced in bringing the question before a reviewing Court, it being impossible to have this evidence set forth in a bill of exceptions, and therefore practically making it impossible for a reviewing Court to set aside a judgment and verdict for the reason that the same is contrary to law.[108] But it may be said that upon this question it was

[104] Sibley, J., afterwards judge of Circuit Court in Israel vs. Zanesville & R. R. Co., 19 Bull. 258.

[105] In O. S. R. R. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480, the jury were charged: You were ordered to view the land sought to be appropriated in this case. This was for the purpose of enabling you better to determine the questions before you, and to apply your own judgment in regard to them, as well as to better understand the evidence. And if any one of you knows of any fact of his own knowledge, not common to all, bearing upon the case, he ought to disclose it, and testify to it in open Court. O. S. Ry. vs. Rawlins, 29 Bull. 260.

Judge Galloway, Probate Judge of Franklin county, charged the jury that the view of the premises is to enable them to better understand and apply the testimony of witnesses and not for the purpose of ascertaining the value of the property, and they cannot take into consideration their own ideas of the value of the premises as fixed by their own view of them. C. D. & M. E. Ry. vs. Knauss, 47 Bull. 807.

[106] 6 N. P. 540; 8 Dec. 268.

[107] § 11056 G C., § 1713.

[108] This matter is very distinctly set forth in Washburn vs. Milwaukee Ry. Co., 59 Wis. 364.

See L. S. & M. S. vs. Gaffney, 9 C. C. 32; 6 C. D. 94.

the intention of the Legislature that there should be no review.[109]

While it is a question of great doubt in the author's mind, yet he is inclined to the opinion that the things which the jury saw upon their view and facts thus ascertained, constitute evidence in the case submitted.[110]

§ 1711. Separate owners entitled to separate trial. They hold the affirmative on trial. "The owners of each separate parcel, right, or interest, are entitled to a separate trial by jury, verdict, and judgment. They shall hold the affirmative on the trial, which must be conducted, evidence admitted, and bills of exception allowed as provided in civil actions." [R. S. § 6422.][111]

[109] Reviewing Courts are now inclined not to set aside any verdict on the mere ground that it is contrary to the weight of evidence.

[110] Our Supreme Court has recently held, "When upon the trial of the general issue, in an action upon a *quantum meruit* for services of a domestic character, the plaintiff offers evidence showing the facts from which the promise to pay may properly be inferred, and also showing the nature and extent of the services rendered, the case should be submitted to the jury although no witness expresses an opinion as to the value of the services." Hossler vs. Trump, 62 O. S. 139.

In the case of Marsh vs. County Commissioners, 27 Bull. 56, the Probate Court refused to set aside the verdict because it was against the weight of evidence for the reason that some parts of such evidence was not before the Court and rested within the knowledge of the jurors. The Probate Court was reversed by the Common Pleas Court, sustained by the Circuit Court and by the Supreme Court. 33 Bull. 121, 131. The Supreme Court, however, did not report their decision, and whether the view on this particular question of the Probate Court was affirmed or not is not known.

In City of Columbus vs. Bidlingmeier, 7 C. C. 136; 3 C. D. 698, under the general statute, §§ 5189i and 5191, it was held it was not evidence followed. Besuden vs. Commissioners, 7 C. C. 237; 4 C. D. 575.

A distinction is made by the Supreme Court in views ordered under the general statute and statutes in special proceedings. Machader vs. Williams, 54 O. S. 344; 35 Bull. 182.

See Bender vs. Buehrer, 8 C. C. 244; 4 C. D. 507.

See §§ 1706, 1762, 1848.

[111] § 11048 G. C.

In the case of Railroad Co. vs. Bolen, 76 O. S. 376, the Supreme Court has held that "The impressions made on the minds of the jurors in an appropriation case by a view of the premises are not of themselves evidence in the cause. Hence, a bill of exceptions which contains all the evidence given in a court at the trial is, with a record otherwise complete, sufficient to present to a reviewing court the question of the weight of the evidence." In the opinion this work is cited and a conclusion is reached that by virtue of the provisions of the Constitution giving in trial of condemnation, the right of what is known as a jury trial, that it therefore follows that only such can be considered as evidence as is produced to the jury in the presence of the court, and therefore commends the rule followed in ordinary trials, and that is that "The view by the jury of the property which is the subject of litigation . . . is solely for the purpose of enabling them to apply the evidence offered upon the trial." The court is, however, careful to except, "that in passing upon issue of fact the jurors may take account of their general knowledge of affairs, and likely to be possessed by all intelligent men or general knowledge on the subject of inquiry." Whether or not the court might charge the jury that the things that they saw

§ 1712. Motion for separate trial and entry, etc.

The above section was not in the original act.[112] Under the original act, however, it was said that it does not compel him (defendant) to proceed jointly after the jury have returned from the view, nor to encounter the jargon, confusion and uncertainty of a joint litigation. He has, then, the right to demand that his rights and interests shall engage the separate attention and examination of the jury.[113] The party desiring the separate hearing should make a motion for that purpose, and the Court should grant the same and make a journal entry of that fact, and if there are a number of defendants, set forth the order in which their cases should be tried; and when the verdict of the jury in one matter has been returned, an immediate trial should be had of another defendant's interest. After the view is taken, each defendant may proceed with his own case just the same as if they were separate actions. The following may be used as a form of entry:

(*Title.*)

This day this matter came on to be further heard upon the motion of A. B., a plaintiff in the above action, for a separate trial. Wherefore it is ordered that said motion be granted and that the Court proceed to the hearing of testimony in the above matter in reference to the lands of said A. B., sought to be appropriated herein, and that on the.....day of .....testimony will be heard in reference to the lands of C. D., defendant of the above action, etc.[114]

§ 1713. Witnesses may be examined before jury. "Witnesses may be examined before the jury after its return to the court. If more than three witnesses be examined by either party, on the same point in the same case, the judge may tax the costs of such additional witnesses to the party calling them." [R. S. § 6430.][115]

upon the view, might be taken in consideration by them, is not directly passed upon, but what is distinctly passed upon is that the mere fact that the bill of exceptions does not show (and by the nature of the case could not show) what the jurors saw, would not prevent the case from being considered on error. The fact, remains, however, that from the nature of the case, the matters that the jury gathered from observation on the view, cannot be considered as otherwise than evidence from which they will largely draw to arrive at their final conclusion. See Evidence, § 1673.

[112] 50 Ohio Laws, 201.

[113] Ranney, J., Giesy vs. C. W. & Z. R. R. Co., 4 O. S. 322.

[114] See §§ 1764, 1823, 1851, 1868.

[115] § 11056 G. C.

See § 1673, Evidence; and §§ 1760, 1672, Benefits.

As the evidence to be produced to the jury is ordinary opinion evidence, the Court should not grant a continuance by reason of an absent

§ 1714. Trial, etc.

A trial before the Court proceeds in the same manner that jury trials in civil cases are ordinarily conducted. The statute provides "that the land owners shall hold the affirmative on the trial, which shall be conducted, and evidence shall be admitted, and bills of exception may be taken, as provided in civil actions."[116] It has therefore been held that the burden of proof rests upon them.[117]

§ 1714a. Burden of proof.

Recently the Supreme Court has held: An action brought by a municipality to condemn private property under the constitution and laws of Ohio, is a proceeding *in rem*. In such proceeding, there are no formal pleadings or definite issues, which admit of affirmation upon one side and denial upon the other: hence the doctrine of burden of proof has no application. The jury acts merely as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted.[117a] While this is a case brought by a municipality, the reasoning would adopt the same rule to a case brought by a private corporation.

In the Martin case, the Court below charged the jury:

"The burden of proving the value of this property rests upon the defendants, the owners of the property, and they are

witness when such witness could only testify as to matters which could easily be supplied by others.

See C. J. & M. Ry. vs. Barcelow, 2 C. D. 413; 4 C. C. 49, as to discretion of judge.

If a property owner submits to joint trial without exception, he can not be heard in a reviewing court to complain that he did not have a separate trial. Cincinnati Iron Store Co. vs. Cincinnati Southern Ry., 9 C. C. (N.S.) 103; 19 Cir. D. 719; 29 O. C. C. 719.

116 § 11048 G. C. (§ 1711).

117 O. S. R. R. Co. vs. Snyder, 5 N. P. 461; 5 Dec. 480. See previous section.

See § 11062 G. C. (§ 1718).

See § 1764.

117a Martin vs. Columbus, 101 O. S. —.

required to prove its value by a preponderance; that is the greater weight of the evidence."

For giving this charge, the judgment of the common pleas and court of appeals was reversed. While the matter of burden of proof in its application to condemnation proceedings was always one of perplexity, I am not sure that the decision of the supreme court has materially aided the trial of such cases. There is still a burden somewhere; the evidence, by its greater weight, must still be the rock upon which the verdict must stand. Even if the charge was technically incorrect, it is not easy to conceive how the land owner was prejudiced thereby. While there is no price or value of the lands fixed or claimed in the pleadings, yet there is an issue, and that issue is the fair value of the lands. The land owner claims that it is of one value; the corporation of another.

This of course does not appear from the pleadings, but it is a fact generally known to the parties at time of trial. On this issue the land owner holds the affirmative—that is on his claim—and of course in order to sustain it, he must produce or have to support it the preponderance of evidence. It is difficult to understand why the legislature gave the affirmative to land owner if it did not mean to put him in the same position, on the trial of the issue then at hand, as the law generally places on the party that holds the affirmative.

In a former case the court held that the jury in condemnation cases, was that known to the common law, and that the impressions made on the minds of the jury, in their view was not evidence, etc.[117b]

The duties of a common law jury, are generally regarded differently from the duties of an appraising or assessing board, and some doubt might be raised as to how far a reviewing court might go into the matter of the weight of evidence necessary to support a verdict.

[117b] Railroad Co. vs. Bolin, 76 O. S. 376. See § 1710.

The result then of this decision is that the corporation has the burden of proof showing that the owner should be divested of his property, and as to what the corporation should pay, there is no burden of proof on either party.

§ 1715. When a structure is partly on land sought to be appropriated. "When a building or other structure is situated partly upon land sought to be appropriated, and partly upon adjoining land, and such structure can not be divided upon the line between such two tracts without manifest injury, in assessing the compensation to any owner of the lands, the jury shall assess its value exclusive of the structure, and make a separate estimate of the value of the structure. The owner of the structure may elect to retain its ownership, and to remove it, or accept the value estimated by the jury. If he fails to make such election within ten days from the date of the jury's report, or within ten days from the termination of the cause in a higher court to which it is taken, he shall be deemed to have elected to retain and remove the structure. If he elects to accept the value of the structure, the title thereto shall vest in the corporation making the appropriation, with the right to enter upon the land for the purpose of removing it therefrom." [R. S. § 6431.][118]

§ 1715a. Verdict. Motion for new trial. Confirmation of verdict. "The jury shall render its verdict in writing, signed by the foreman, to the judge, who shall cause it to be entered of record. Unless for good cause shown, upon motion to be filed within ten days after the verdict is rendered, a new trial be granted, the judge shall enter a judgment confirming such verdict." [R. S. § 6432.][119]

§ 1716. Form of entry and verdict, etc.

When the jury arrives at its conclusion, it should return a verdict in writing, signed as above provided, and the judge

[118] § 11057 G. C.

The question whether the structure is on the line and whether or not it can be divided is a question of fact to be submitted to the jury. C. & C. Bridge Co. vs. Devoto, 5 N. P. 330; 8 Dec. 640.

[119] § 11058 G. C.

See Central Ohio Ry. vs. Holler, 7 O. S. 220, where verdict was held not to conform to law.

should immediately enter it upon his record. The following may be used as a form for a journal entry, the latter part of which contains the form of a verdict:

(*Title.*)

This day came the parties (by their attorneys), and thereupon came again the jury, after having made a view of the premises (and thereupon A. B. demanded a separate trial by jury, verdict, and judgment, which was granted; and the jury having heard the evidence and arguments of counsel and charge of the Court in reference to the rights and interest of the said A. B., retired to their room for deliberation, and in due time returned into Court, and delivered the following verdict in writing, to-wit: (Here copy verdict entire.) Or (and thereupon A. B. and C. D. demanded separate trials by jury, verdict, and judgment, which was granted; and by consent, said A. B. and C. D. submitted the evidence on their respective claims separately, and they were separately argued, with the understanding and agreement that said jury are to hear the evidence and arguments and charge of the Court in all the cases before retiring, and render separate verdicts in the cases of said A. B. and C. D.); or, and thereupon, neither of the defendants demanding a separate trial, and the jury having heard the evidence offered by all the parties, and the arguments of counsel, retired to their room, and in due time returned into Court, and delivered the following verdict, in writing, to-wit: (Here copy verdict entire.)

FORM OF VERDICT.

.....County Probate Court.

Case stated.

VERDICT.

We, the jury, empaneled and sworn in this proceedings, do find and assess compensation and damages, to be paid by (name corporation) plaintiff, by reason of the appropriation of said property to its use, in the several cases submitted to us (or in the case of A. B., if his case is submitted separately) as follows:

To....., the owner of tract 1, as described in the petition, we assess, as compensation for land taken, $.....

As damages to residue of tract..... $.....

To,....., the owner of tract 2, as described in the petition, we assess, as compensation for lands taken, $.....

As damages to residue of tract..... $.....

(And so on with all who have not demanded separate trials). We make said assessments, irrespective of any benefit of the owner from any improvement proposed by said corporation.

Date.....

....., Foreman[120]

§ 1717. Motion for new trial, etc.

The statute allows ten days' time from the time that the verdict is *returned* for the purpose of filing a motion for a new

[120] See §§ 1766, 1823.

Where the attorney stated that the property was purchased at a certain price, and the court told the jury to disregard the statement, it was not error for which the verdict should be set aside. Devou vs. Cin. Term., etc., 4 O. L. R. 313; 29 O. C. C. 113.

While there was a diversity of opinion formerly the rule seems now well established that three-fourths of the jury may return a verdict. Smith vs. Craig, 40 O. C. A. 544.

The order of the Probate Court confirming the verdict of the jury, is a final order which may be reviewed on error. State vs. Waite, 2 C. C. (N.S.) 49; affirmed, 70 O. S. 149; 25 O. C. C. 216; affirmed, 70 O. S. 149.

trial. The statute relating to condemnation proceedings does not set forth the grounds for which a new trial may be asked. The general statute relating to that subject therefore applies.[121] While the finding of the court upon the preliminary hearing might be reviewed on error, it could not be so reviewed until after the verdict was returned and the judgment confirmed.[122]

§ 1718. New trial. Proceedings thereon. Costs. "A new trial shall be granted for cause only, shall take place in the court where the first trial was had, and be conducted in accordance with the provisions of this chapter so far as they are applicable. Upon granting the motion for a new trial, if the amount of the first verdict has been paid into court the judge shall retain it until the final termination of the second trial. On the new trial, if the verdict of the jury exceeds the amount of the first verdict, the corporation must pay the amount of the first verdict, together with the excess, to the owner of the property. When the verdict upon the second trial is less than that of the first, the judge shall repay to the corporation the difference. If a new trial be granted at the instance of the owner of the property, and the verdict of the jury be the same or less in amount than that first rendered, he must pay all the costs of the second trial. If it be more than that first rendered, the costs of the second trial must be paid by the corporation." [R. S. § 6436.][123]

§ 1719. Entry confirming verdict, etc.

(Title.)

This day came the parties by their attorneys, and the jury having assessed the total compensation to be paid by the plaintiff as appears of record herein, and the defendant,....., having elected to take the valuation fixed by the jury for the structure, to-wit: $....., thereupon this cause came on to be heard upon the motion of the defendant,....., to set aside the verdict of the jury and for a new trial herein, and was argued by counsel. On consideration whereof the Court find that said motion is not well taken and the same is hereby overruled, to which decision of the Court and overruling of said motion the said.....excepted and his exceptions are entered of record. And the Court having examined the proceedings herein and the same being in all respects regular and proper, it is ordered by the Court that judgment be entered upon said verdict as required by law. It is therefore

[121] §§ 11575-6 G. C.
See § 52.

[122] T. C. Street Ry. Co. vs. T. E. Ry. Co., 6 C. C. 362; 3 C. D. 493. See, however, recent decision of Supreme Court, P. C. & St. L. R. R. vs. Todd, 72 O. S. 156, which holds that the final order is the confirmation of the verdict of the jury, etc. See §§ 1774, 1853, 1853, and the time to present a review of all questions, on preliminary hearing or otherwise, will date from the overruling of a motion for a new trial after verdict. Reusch vs. Traction Co., 24 O. C. C. 540; affirmed 89 O. S. 283.

[123] § 11062 G. C. The courts now hold that if error is prosecuted from the Probate Court and then to the Court of Appeals and the case is there reversed, it should be remanded back to the Probate Court. Railway vs. Barger, 30 O. C. C. 66. The same from the Supreme Court. Cemetery Assn. vs. Traction Co., 93 O. S. 182.

ordered and adjudged that said proceedings and the verdict be and the same are hereby approved and confirmed and that said plaintiff corporation, upon payment within thirty days from the entry hereof of the said sum of $....., the amount of said verdict, and costs herein taxed at $....., to the owners of said property as hereinafter described, or deposit the same with the Court for the use of said owners, shall be entitled to take possession of and hold and use the property, rights and interests of the defendants and each of them so appropriated for the uses and purposes for which the appropriation was sought, as set forth in the petition, said property being described as follows, namely: (Describe it.) And upon such payment or deposit an order may issue to the sheriff of .....county to put the plaintiff in possession of said premises. And it is considered by the Court that the plaintiff pay the costs of this proceeding taxed at $.....(or, if necessary, proceed as follows: It being made to appear that.....and....., defendants herein, have each waived the issuing of summons and entered their appearance herein and filed their answer and cross-petition setting forth their mortgage lien against said premises, and the city of.....has filed its cross-petition herein setting forth its lien for the improvement of said .....street, it is ordered that this cause be continued for further hearing upon the rights of the several parties hereto upon distribution of the money paid into Court as aforesaid and if desired refer the same to Court of Common Pleas (§ 1727). To all of which findings, orders and judgment of the Court, the said.....excepts, and thereupon the said.....filed his motion to vacate and set aside the same and to set aside this entire order and judgment, which motion was submitted to the Court, upon consideration whereof the Court overrule said motion. To all of which the said.....excepts.)[124]

§ 1720. Petition in error may be filed by either party in Common Pleas, when. Bills of exceptions. "Bills of exceptions may be taken and shall be allowed, as provided by law in civil actions." [R. S. § 6437.][125]

§ 1720a. Petition in error. "Either party may file a petition in error in the court of common pleas of the proper county within thirty days after the time allowed for such signing of bills of exceptions, and the proceedings in error shall be conducted as in civil cases." [R. S. § 6437.][125*]

§ 1720b. Corporation may pay judgment and enter on property. "On the rendition of final judgment in the probate court, the corporation may pay into the court the amount of the judgment for compensation, and costs therein rendered, and proceed to enter upon and appropriate property notwithstanding the pendency of the proceedings in error." [R. S. § 6437.][125†]

[124] The entry overruling motion for a new trial and confirming the verdict is a final judgment from which error may be prosecuted. C. J. & M. R. R. Co. v. Barcalow, 4 C. C. 49; 2 C. D. 493.

[125] § 11063 G. C.

[125*] § 11064 G. C.

[125†] 11065 G. C.

In proceedings for the appropriation of property by a private corporation the determination of the preliminary questions by the probate judge, as required by § 11046 G. C.,

§ 1721. When error may be prosecuted.

Error may be prosecuted from any final order, but the petition therefor can only be filed within thirty days from the time that final judgment is rendered. This final judgment means the entry overruling the motion for a new trial and confirming the verdict of the jury.[126] Where the statute provides a method of hearing cases on error, it must be followed.

§ 1722. Proceedings in Common Pleas on error. Costs. "Upon the hearing of the cause, if the common pleas court affirms the judgment of the probate court, all the costs in the

§ 1695, may be reviewed on error.

A motion for a new trial, or rehearing, of such preliminary questions is not necessary.

The time within which a bill of exceptions on such hearing should be taken is to be computed from the day on which said questions are determined, if no motion for a new trial is filed, and if a motion for a new trial is filed from the day the motion for a new trial is overruled.

The time within which a petition in error must be filed in the Court of Common Pleas is to be computed from the final judgment of the Probate Court either dismissing the petition or confirming the verdict of the jury.

If the Court of Common Pleas reverses the judgment of the Probate Court for error in the determination of either of the preliminary questions it should retain the case and hear and determine such questions *de novo*. P. C. &. St. R. R. vs. Todd, 72 O. S. 156; Ry. vs. Traction, 430. If the Common Pleas affirms the Probate Court and the case is taken to the Court of Appeals or Supreme Court and there reversed it is remanded back to the Probate Court, not to the Court of Common Pleas. Railway vs. Barger, 30 O. C. A. 66; 10 O. App. 443; Cemetery Assn. vs. Traction Co., 93 O. S. 183.

The undertaking or bond given by the corporation under § 6718 R. S., on proceeding in error to review the verdict and order of confirmation of the Probate Court, must secure the costs and attorney fees accruing in the Probate Court in case of an abandonment of the property by the corporation. 48 Bull. 943.

An undertaking under § 6718 R. S. is not sufficient to stay execution but must also be given under § 6725 R. S. State vs. Waite, 25 C. C. 217; 70 O. S. affirming 2 C. C. (N.S.) 49; 15 Cir. D. 216.

In State vs. Waite, 70 O. S. 151, it is held that "if the corporation chooses it may prosecute error to the Common Pleas Court by giving an undertaking, and if it does not take possession, it will not be required to deposit the sum allowed as compensation, etc., and an action of mandamus will not lie to compel the Probate Judge to collect the same while such proceedings in error is pending."

Where the statute provides a method of hearing cases on error, it must be followed. Wiler v. Logan Nat. Gas & Fuel Co., 27 C. C. 257; 6 C. C. (N.S.) 206; 17 Cir. D. 257; reversing 1 N. P. (N.S.) 277; 14 Low. D. 164; affirmed, no report, 72 O. S. 628.

[126] C. & M. V. Ry. Co. vs. Wick, 35 O. S. 247; Little Miami Ry. Co. vs. Hopkins, 19 O. S. 279; Wagner vs. Ry. Co., 38 O. S. 32; Steubenville & I. Ry. Co. vs. Patrick, 7 O. S. 170. See authority under previous note 111.

common pleas court shall be paid by the plaintiff in error. If it reverses such judgment, it shall retain the cause for trial and final judgment, as in other cases. The trial shall be had at the term of reversal, unless for good cause shown by either party a continuance is granted. On the trial of the cause in the common pleas court the same inquiry shall be made as to the interest of the jurors, and the same oath administered to the jury as hereinbefore provided." [R. S. § 6438.][127]

§ 1723. When corporation may have possession.

Any time after a judgment confirming the verdict of the jury has been entered, the corporation may pay or deposit with the

If the verdict of the jury was confirmed and entry put on at the time it was rendered it would date from that date, notwithstanding the fact that a motion for a new trial had been filed.

See Dowty vs. Pepple, 58 O. S. 395; Wilder vs. McDonald, 9 C. D. 259; 18 C. C. 232; Collins vs. Mansfield, 7 C. D. 445; 13 C. C. 258.

National Union vs. Rothert, 39 Bull. 145; Selig vs. Akron, etc., 10 C. D. 535; 19 C. C. 633.

Wiler vs. Logan Nat. Gas & Fuel Co., 27 C. C. 257; 6 C. C. (N.S.) 206; 17 Cir. D. 257; reversing 1 N. P. (N.S.) 277; 14 Low. D. 164; affirmed, no report, 72 O. S. 628.

[127] § 11066 G. C.

If the Court of Common Pleas reverses the Probate Court, then it shall retain the case and proceed in the same manner as if the cause had originally been brought in such Court. C. & C. Co. vs. Magruder, 63 O. S. 455. Where the Common Pleas Court reverses the Probate Court, such order of reversal cannot be reviewed by petition in error in the Circuit Court. Railway Co. vs. Bailey, 39 O. S. 170; 9 Bull. 296.

Error could be prosecuted from any order made thereafter the same as from the Probate Court. But a reviewing Court will not reverse the Probate Court where there is no substantial errors to the prejudice of the party complaining. Consol. St. Ry. vs. Toledo Elec. St. Ry. Co., 6 N. P. 537; 8 Dec. 268; Banning vs. Trustees of Southern Ry., 3 Bull. 965.

If reversed on preliminary questions the Common Pleas Court retains it. P. C. & St. v. Todd, 72 O. S. 156.

The fact that payment has been made by the corporation will not prevent the corporation from prosecuting error. Trustees of Southern Ry. vs. Banning, 17 Bull. 319.

The provision of § 6438 R. S., relating to error proceedings in appropriation proceedings, that the Common Pleas Court "shall retain the cause for trial and final judgment, as in other cases," does not authorize a judgment for costs other or different from that prescribed by §§ 6414 to 6453 R. S. Hence, the fees of jurors, in appropriation proceedings, should be taxed as part of the costs under § 6414 R. S., *et seq.*, and not under § 5182 R. S. Hosbrook vs. L. & C. Traction Co., 27 O. C. C. 42; 5 C. C. (N.S.) 209.

The original defendant may pros-

Probate Judge the amount of the verdict, and the costs[128] that have accrued up to that time, and the corporation shall then be entitled to take possession of the property.[129] This deposit must be made in money, a certificate of indebtedness will not be sufficient.[130]

Where a corporation makes a deposit and on a new trial a lower judgment is rendered, the corporation might maintain an action to recover the excess.[131] The statute relating to such deposit is as follows:

"Upon payment to the party entitled thereto, or deposit with the probate judge of the amount of the verdict and such costs as lawfully accrued in the case up to the time against the corporation, it will be entitled to take possession of, and hold, the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition. The judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof." [R. S. § 6433.][132]

ecute error to protect officers of the Court. Hosbrock vs. Traction Co., 5 C. C. (N.S.) 209; 17 Cir. D. 42; affirmed, no report, 75 O. S. 584; 27 O. C. C. 42.

This applies to a case taken up from the Insolvency Court. Cin. vs. Lohman, 10 C. C. (N.S.) 119; 30 O. C. C. 92.

If the Court of Common Pleas affirms the judgment, it cannot render a judgment but should approve the action of the Probate Court and remand the same to that Court. C. & M. Valley Ry. Co. vs. Wick, 35 O. S. 247.

[128] Jury fees are not costs to be taxed to a party. Hill vs. Durr, 47 Bull. 440.

The Circuit Court of Darke County has decided otherwise, and likewise the Supreme Court. Detroit Southern vs. Lawrence Co., 71 O. S. 454.

[129] Wagner vs. Ry. Co., 38 O. S. 32.

[130] City of Toledo vs. Sanwald, 13 C. C. 496; 7 C. D. 116.

[131] Trustees Cin. Southern Ry. vs. Banning, 21 Bull. 9.

[132] § 11659 G. C.

After such deposit the title passes to the corporation. Hueston vs. E. & H. R. R. Co., 4 O. S. 685.

Mandamus will not lie to compel the corporation to pay in the amount of the verdict, etc. 48 Bull. 942.

If a proper undertaking is given in proceeding in error, the deposit need not be made, unless the corporation takes possession. State vs. R. Waite, etc., 70 O. S.; affirming 2 C. C. (N.S.) 49; 15 Cir. D. 216; 25 C. C. 216.

If the company pays the money into Court, under a stipulation that the money may be withdrawn, without prejudice to any other right, the Court may, in its discretion, proceed to a second trial without a refunder by the land owner. Covington vs. Magruder, 8 C. C. (N.S.) 303; 18 Cir. D. 607; 28 O. C. C. 607; affirmed, no report, 76 O. S. 616.

See City of Cleveland vs. Cuyahoga Agricultural Soc., 41 O. S. 600.

§ 1724. Entry when deposit made.

As a corporation is entitled to possession of the property, the Court should make an entry of the fact of deposit, etc., which may be in the following form:

ENTRY OF PAYMENT OF AMOUNT OF VERDICT, ETC.

(*Title.*)

This day came the plaintiff, the C., R. & B. Company, a corporation under the laws of Ohio and Kentucky, by its attorney, and pays into Court and deposits with the judge of this Court the sum of ..... dollars, the amount of the verdict of the jury herein, and pays the costs of this action, and thereupon, it is considered ordered and adjudged that the plaintiff, the C., R. & B. Company, be entitled to the possession of and to hold, use and enjoy, the real estate, property, rights and interests of the defendants and each of them in and to the real estate, property and rights appropriated herein to the uses of plaintiff as set forth in the petition and described as follows: (Describe it.) And a writ or order may issue on the application of plaintiff directed to the sheriff of ..... county, Ohio, to put the plaintiff in possession of said premises. (To all of which the defendants ....., excepts.)[133]

§ 1725. **When and how corporation may abandon proceeding.** "The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses, and attorney fees, as found by the court. If the corporation fails in any case to make payment or deposit, as provided in the next preceding section, within thirty days after confirmation of the verdict, on motion of the party entitled to such payment, to be filed within ten days after the expiration of such thirty days, the judge shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of the order. Unless such corporation, within such time makes such payment or deposit, it shall be held thereby to have abandoned the property, rights, or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect. He also shall enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent and attorney fees incurred by him in the proceeding, as, upon the evidence offered in that behalf, the court deems just, for which execution may be issued against the corporation. The directors of the corporation shall be individually liable upon such judgment, and may be made parties thereto by action." [R. S. § 6434.][134]

[133] Whittaker Prob. Code. See § 1667.

[134] See 48 Bull. 942; § 11060 G. C. In all cases the corporation may pay the judgment and costs and take the property, or pay the costs and decline to take the property.

It has been very much doubted if the Probate Court could try the question of attorneys' fees, etc., and

§ 1726. What is an abandonment.

It may be generally said that the corporation may discontinue the proceeding at any time, at least before the submission of the inquiry to the jury.[135] A corporation can legally abandon the proceeding after a verdict is rendered, although the Court makes no record or journal entry of such a fact. The land owner, however, has a right immediately after the verdict, and its confirmation by demand, to have the plaintiff corporation indicate whether it will abandon the proceedings or not.[136]

In appropriation by municipal corporations, after the abandonment has been made, an action may be brought to again appropriate the property.[137] But not if the abandonment has been made in bad faith.[138]

that judgment could be rendered for such amount as the Court might think fit. See Logan Natural Gas Co. vs. Anna L. Wiler, 1 N. P. (N.S.) 277 (1903); 14 Low. D. 164.

See, however, Wiler vs. Gas Co., 6 C. C. (N.S.) 206; 17 Cir. D. 257; reversing 1 N. P. (N.S.) 277; 14 Low. D. 164; affirmed, no report, 72 O. S. 628; 27 O. C. C. 257; 6 C. C. (N.S.) 206.

§ 11091 G. C., § 1675.

[135] D. & W. Ry. Co. vs. Marshall, 11 O. S. 497.

The Probate Court may include reasonable attorney fees, and its judgment will not be disturbed unless it appears to have abused its discretion, and may hear evidence on the value of the same. Wiler vs. Gas, etc., 27 C. C. (N.S.) 257; 6 C. C. (N.S.) 206.

The corporation may abandon part before verdict. Cin. vs. Trustees, 14 Dec. 466.

If a proceeding in error is pending, there is no abandonment even though there be no deposit made. 70 O. S.; affirming 2 C. C. (N.S.) 49; State vs. Waite, 25 C. C. 216.

If the Court orders a deposit and this is not done, this will be an abandonment even though the case be pending on error. *Id.*

If the corporation is compelled to abandon proceedings by reason of a decision of the Supreme Court, this will not excuse it from paying costs. Expenses include all reasonable and proper expenses incurred in defense of suit. What is reasonable attorney fee, see Railroad vs. Farmers Co., 53 Bull. 13; 50 L. R. 530.

[136] State of Ohio, *ex rel.* Hayes vs. C. & I. R. R. Co., 170 S. 105.

[137] Trustees of Cincinnati S. Ry. vs. Haas, 42 O. S. 239.

See City of Cincinnati vs. Hosea, 19 C. C. 744; 10 C. D. 618.

[138] Cin. vs. Hott, 5 N. P. 418; 8 Dec. 643.

A railroad failed to take advantage of a verdict for six months; it was held it might bring a new action.[139]

§ 1726a. When action may be brought for costs and expenses. "If such judgment is not satisfied within thirty days after its rendition, or if the party entitled thereto is not satisfied with its amount he shall have a right of action against the petitioner for such expenses, including time spent and attorney fees, and also for his expenses, including reasonable attorney fees, incurred in prosecuting such action. But it must be brought within six months after the rendition of the judgment in the probate court." [R. S. § 6435.] [140]

§ 1727. Entry of distribution where there are no conflicting claims.

If there are conflicting claims, then the Probate Court has no right to adjudicate upon such rights, but an action thereon must be brought in the Court of Common Pleas.[141] Even though proceedings in error are pending, the Probate Judge is not entitled to keep the fund, but must turn it over to the persons entitled thereto.[142] The entry therefor may be in the following form:

ORDER OF DISTRIBUTION.

(*Title.*)

This proceeding came on this day to be heard upon the application of ..... for distribution on deposit of $..... made by the

[139] C. P. & V. Ry. vs. Blank, 5 Dec. 569.

See §§ 1667, 1783.

[140] § 11061 G. C.

[141] §§ 11072, 11073, 11074, 11075 G. C., §§ 1728, 1729, 1730.

[142] Meily vs. Zurmehly, 23 O. S. 627; Wagner vs. Railway Co., 38 O. S. 36.

The corporation cannot be held to abandon its proceeding even if no deposit be made, if a proceeding in error has been commenced. 48 Bull. 943.

The undertaking in such a case being held, to answer that purpose. However, if the corporation takes possession the deposit must be made.

If the case is dismissed on motion of defendant, because there is no showing made of inability to agree, the defendant is not entitled to costs. Devon vs. Ry., 4 O. L. R. 319; 17 Dec. 134.

plaintiff, and the Court being fully advised in the premises, find that there is due to.....and.....upon their mortgage described in their answer and cross-petiton, including interest thereon at five per cent. per annum from....., 190.., to....., 190.., the date of the entry hereof, the sum of $....., which is the first and best lien upon said premises and said fund, after paying the assessment to the city of....., and the Court further finds that there is due to the city of....., for the unpaid assessment on all the premises fronting on.....street, the sum of $....., which is the first and best lien upon said premises and said fund, and the Court find that the residue of said fund, viz: $....., belongs to the defendant, ... It is therefore considered and ordered by the Court, that the clerk of this Court pay out of said fund of $....., 1st. To the city of....., or its solicitors, the sum of $..... 2d. To the defendants,.....and....., upon their cancelling the mortgage held by them, the sum of $....., and 3d. To ....., or his attorneys of record therein, the residue of said fund, viz: $.....[143]

§ 1728. When Probate Court cannot order distribution.

For some legislative reason which is not very apparent to the writer, the Probate Court cannot order a distribution of a fund when there are diverse or conflicting claims, legal or equitable to the real estate appropriated, or any interest therein. It seems that the Probate Court might as well, having all the parties before it, be authorized to adjust the equities existing between them, and make such distribution as the law and equity of the case might require. The action brought in the Court of Common Pleas, when neither is in possession, is one of an equitable nature, and the parties are not entitled to a jury trial. If the issue is one triable by jury, it must be so tried.[144] The three following sections provide for such actions in the Court of Common Pleas:

When there are diverse or conflicting claims, legal or equitable, to the real estate, or any interest therein, sought to be appropriated under the provisions of this chapter, the jury or court shall not pass upon them in the proceedings for appropriation. Such claims shall be reserved for adjudication as hereinafter provided. [R. S. § 6442.][145]

[143] Whittaker's Prob. Code. See § 1774.

[144] Skerrett vs. Presb. Soc., 41 O. S. 606. See § 11075 G. C.

[145] § 11072 G. C. For the purpose of proving value of attorney fees the Court may take into consideration the reasonable value of the property condemned. And the decision of the Probate Court will not be disturbed unless it appears to be an abuse of discretion or clearly against the weight of the evidence. Wiler vs. Gas Co., 6 C. C. (N.S.) 206; 27 O. C. C. 257.

§ 1729. Conflicting claims adjudicated in Common Pleas. Petition therefor. Disposition of fund. "Upon the payment of the money into court by the corporation, a party claiming a legal or equitable interest in the property, or the money arising therefrom by such appropriation, may file his petition in the common pleas court of the proper county, making the other claimants to the property or money parties thereto, setting forth the facts on which the claim is founded, the fact of the appropriation of the property, the amount of money so paid in and such other facts as are required to enable the court to hear and determine the matter between the claimants." [R. S. § 6443.] [146]

§ 1729a. Custody of the funds. "The court forthwith shall appoint some master, or other suitable person selected by the parties, to hold such fund, or invest it in the manner the court directs, after hearing the parties. Such fund thenceforth will represent the land, and the interests therein, and be subject to the control of the court having jurisdiction of the case, by orders entered in this action, according to the rights of the parties to the land or fund, as from time to time it determines." [R. S. § 6443.] [146*]

§ 1730. Such proceeding a civil action. "Such proceeding in the court of common pleas, shall be a civil action; and the conflicting claims of parties to such fund shall be determined by the court, or by a jury trial, according as the claim is equitable or legal, as if the land had not been converted into money." [R. S. § 6444.] [147]

§ 1731. When unfinished roadbed of railway company may be condemned.

The Legislature has authorized a railroad corporation to condemn an unfinished road bed of any other railroad company, as provided in the three following sections:

A railroad corporation of this state may condemn and appropriate to its own use the interest and easement in and quiet title to any unfinished road-bed, or part thereof, lying within the state, and on the line of its proposed road, owned or claimed by another railroad company or companies, person or persons, partnership or corporation, when such road-bed, or part thereof has remained in an unfinished condition, and without having

A remainderman's interest is not affected by life tenant's deed. Gorrill vs. Ry., 2 C. D. 620; 4 O. C. C. 398.

[146] § 11073 G. C.

[146*] § 11074 G. C.

[147] § 11075 G. C.

It has been held that §§ 11073 and 11074 G. C. do not apply to ordinary appropriations by railroads. Valley Ry. Co. vs. Pouchot, 2 C. D. 492; 4 O. C. C. 187; affirmed 51 O. S. 571.

§ 11071 G. C. does not give a jury trial. Skerrett vs. Presbyterian Soc., 41 O. S. 630.

the ties and iron placed and continued thereon for the period of five years or more, immediately preceding the commencement of proceedings to condemn or appropriate it as herein authorized. Every such company, or companies, person or persons, partnership or corporation shall be made a party defendant to such proceedings to condemn or appropriate it, and be required to answer therein, setting forth fully its or their title to or interest in such road-bed, or part thereof, so sought to be appropriated, if any, it or they claim, to which answer the plaintiff must plead issuably, unless it admits the validity of the defendant's claim. In such case, if a party defendant be a non-resident of this state, or a foreign corporation, service of summons may be made by publication, as in other proceedings to appropriate the property of foreign corporations, or persons not residing in Ohio. [R. S. § 6445.] [148]

§ 1731a. Construction of terms. "The terms 'company or companies' used in this chapter, also embrace 'person or persons,' 'partnership or corporation' as used in the next preceding section." [R. S. § 6445.] [148*]

§ 1732. Judgment and costs in such case. When jury to determine amount of compensation. "When it is determined by the court, upon issue of law, or by the jury upon issue of fact, or by the admission of the pleadings, or by reason of failure to plead that any company asserting such ownership or claim is not entitled thereto, judgment, including costs, must be rendered accordingly. But when in like manner it is determined that such a company has an interest in such road-bed, or part thereof, so sought to be appropriated, the jury shall determine and state the amount of compensation due to such company, according to law, on account of the appropriation of such interest. [R. S. § 6446.] [149]

§ 1733. In what Courts such proceedings may be commenced and how conducted. Case may be taken out of its order. Proceedings in error. Provisions as to viewers not to apply. Sworn statement of president of intention to complete road. 25 per cent. of cost of completion to be expended within a year. Words "road-bed" include what. "Such proceedings may be commenced in the probate court, the common pleas or the superior court of any county in which such road-bed, or part so sought to be appropriated or condemned is situated. All or part only of such road-bed within this state may be included in one proceeding, and when it is begun in the common pleas or superior court, the same proceedings shall be had as are prescribed in this chapter for its conduct in the probate court, so

[148] § 11076 G. C.
[148*] § 11077 G. C.
[149] § 11078 G. C.

far as applicable and not excepted in this section. On motion, the case shall be taken out of its order by the court or by a reviewing court, and determined without unnecessary delay. The provisions of this chapter as to viewers shall not apply to appropriations of road-beds as herein authorized. [R. S. § 6447.][150]

§ 1733a. **Error.** "Proceedings in error to such common pleas or superior courts, may be commenced directly in the supreme court." [R. S. § 6447.][150*]

§ 1733b. **Statement of intention.** "When a railroad corporation commences proceedings under section eleven thousand and seventy-six, its president shall make, subscribe and file in the court where such proceeding is had a statement under oath, declaring that it is the bona fide intentian of such corporation to complete and operate a railroad on the road-bed so sought to be appropriated." [R. S. § 6447.][150**]

§ 1733c. **Failure to occupy roadbed for one year.** "For a period of one year after it acquired right to occupy the road-bed, if such corporation fails to expend in and about the completion of a railroad thereon a sum equal to twenty-five per cent. of the total cost of completing it, to be estimated by the railroad commission of Ohio, then such road-bed will be open to appropriation and condemnation by any other railroad corporation." [R. S. § 6447.][150†]

§ 1733d. **Interpretation of word "road-bed."** "The word 'road-bed' used in any of the preceding sections includes rights of way, depot grounds, and other easements connected therewith, and it will be sufficient in the petition and proceedings under this chapter to designate the road-bed as the road-bed of the railroad corporation by which the route of the road was located and established with the terminal points within which appropriation is sought." [R. S. § 6447.][150‡]

§ 1734. **When land owner may compel appropriation.**

Where a corporation has taken the property of another without rendering compensation therefor, provided the property be taken for a use coming within the power of eminent domain, the owner may compel the corporation to pay for the same by proceedings to condemn the property already appropriated. If

[150] § 11079 G. C.
[150*] § 11080 G. C.
[150**] § 11081 G. C.
[150†] § 11082 G. C.
[150‡] § 11083 G. C.

Right of action under the statute does not begin or arise until a person is entitled to right of possession, and where the land is held by a life tenant, the right of the remainder-

the corporation has taken property which it has no right to condemn, then the owner might recover his property by an action in ejectment. He might also permit the corporation to keep the property and bring an action for damages. The provisions of our statute relating to the action brought by the land owner to condemn the land appropriated will be discussed in the following sections:

§ 1735. When land owners or school officers may notify corporation to institute proceedings; petition on failure of corporation to act. "When a corporation, authorized by law to make appropriation of private property or lands reserved for school purposes, has taken possession of and is occupying or using the land of any person, or such school lands for any purpose, and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by an agreement in writing with the owner thereof, or the trustees or school officers having possession or control of such school lands, such owner or owners, or either of them, or such trustees or school officers, may serve written notice upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands. On the failure of such corporation for ten days so to proceed, the owner or owners, or such trustees or school officers may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable, thereto, and in cases of reserved sections sixteen and twenty-nine, or any part of sections granted by congress instead of section sixteen for school purposes, no right, legal or equitable, derived from the trustees and officers named therein, that such notice has been duly served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used or occupied, as are proper to a full understanding of the case." [R. S. § 6448.] [151]

§ 1735a. Demand of written statement describing the land occupied without appropriation. "Such owner or owners, or such trustees or school officers, intending to institute such proceeding, may demand, in writing, from the president or chief officer of such corporation a specific description of each parcel of land so used or occupied without appropriation by it, of the work, if any, constructed or intended to be constructed thereon,

man does not begin until the death of the life tenant. Webster vs. R. R., 78 O. S. 87.

[151] § 11084 G. C.

and the use to which it is to be applied. Upon failure of the corporation for ten days to furnish this as fully as would be required of it in a proceeding to appropriate lands, the fact of such demand and failure may be alleged in the petition in such proceeding. On notice to the corporation and proof thereof to the probate judge having jurisdiction of such appropriation, he shall restrain it from the use and occupation of the land until such demand is complied with. Or, such owner or owners, or trustees or school officers may cause the necessary surveys to be made therefor, and the costs thereof must be taxed to the corporation in such proceeding." [R. S. § 6448.] [151*]

§ 1736. Who may bring action.

The action might be brought by any person who has an interest in the real estate [152]— that is, any person who should rightfully be made a party defendant where the action is brought by a corporation — it seems ought to be a party that would have a right to bring the action. There might be some question whether a party who is not entitled to possession could bring the action. It has been held that only the owner of the legal title could maintain such an action.[153] If an owner sells his land after the road has wrongfully taken the property, his grantee is the person who is entitled to bring the action.[154]

§ 1737. When and where action brought.

The action should be brought in the same Court, in which, if the corporation were condemning the land, it would be required to bring its action.[155] The action can only be brought when several facts exist.[156] Such an action is not barred in less than twenty-one years from the time of the company's occupation.[157] But if an action was brought for wrongful possession, it would be barred in six years.[158] A person merely standing by and

[151*] 11085 G. C.

[152] Railroad vs. O'Hara, 48 O. S. 355.

[153] Rapp vs. O. S. Ry. Co., 5 N. P. 497; 5 Dec. 453.

[154] C. P. & V. R. R. Co. vs. Davis, 19 C. C. 589; 10 C. D. 745.

[155] Previous section, § 1680.

[156] See § 11084 G. C.

See subsequent section, § 1740, Essentials of petition.

[157] Fries vs. Railway Co., 56 O. S. 135.

[158] *Id.*

Railroad Co. vs. O'Harra, 48 O. S. 343.

A railroad company cannot bring proceedings under this section, nor can any action be brought against it, unless the occupation is under an agreement in writing. Collins vs. Shipbuilding Co., 7 C. C. (N.S.) 350; 27 O. C. C. 802.

seeing the occupation of the land by a corporation will not estop him from compelling an appropriation.[158]

§ 1738. Notice to corporation.

Before the owner can maintain his action against the corporation he must notify the corporation to proceed to appropriate. This notice should be served in the same manner as a summons, and it must have been served at least ten days before the owner can bring the action. This notice ought to describe the property that has been appropriated, and may be in the following form:

To.....Corporation.

You have taken possession of and are now occupying and using the following land owned by me (here describe) without having appropriated or paid for the same and without any agreement in writing with me therefor.

You are hereby notified to proceed to appropriate said lands as provided for in §§ 11038 to 11091 General Code.

§ 1739. Demand of description of property.

Before the owner institutes a proceeding as provided for, such owner has a right to demand of the president or chief officer of the corporation, a specific description of each parcel of land so used or occupied, and, if occupied without a work constructed thereon, shall have a right to demand the kind of work that will be put thereon and the use to which the same shall be applied. This application must be made at least ten days before the filing of the petition. It is probable that this application for description could not be made until the expiration of the ten days mentioned in the previous section. Such application may be in the following form:

To.....Corporation.

The undersigned hereby makes application to you to furnish him with a specific description of the property now occupied by you, situate (here describe in a definite manner) and used by you for the following purpose (here set forth). (If said property is not in use, the following should be used.)

You will also give to me a description of the work that will be placed thereon and the use to which the same will be applied, as provided for in

158 Railroad vs. Perkins, 22 C. C. 638.

Owner standing by is not estopped. Pitt. & W. Ry. vs. Perkins, 12 C. D. 676; 22 O. C. C. 631; affirmed 49 O. S. 326.

Proceedings under this section is not to recover the value of the land. State vs. Harrison, 11 C. C. (N.S.) 503; 81 O. S. 105.

Owner has lien superior to mortgage given by railway where railway seizes land. Hatry vs. Ry., 1 C. D. 238; 1 O. C. C. 126.

Where owner dies right descends to him. Lawrence vs. O'Hara, 50 O. S. 667.

§ 6448 of the Revised Statutes. Said description, etc., to be furnished within ten days. If not so furnished, the undersigned will make application to restrain said corporation from the use of land as provided in § 6448 of the Revised Statutes.

§ 1740. Essentials of petition.

The petition ought to set forth the facts required by the statute,[160] and ought to contain the following matters:

First, that the person bringing the action is the owner of the land appropriated.[161]

Second, it should contain a description of the property in the same manner as if the corporation was seeking to condemn.

Third, it must allege that the corporation has taken possession of and is occupying or using said land.

Fourth, the same has not been appropriated or paid for by said corporation.

Fifth, that it is not held under any agreement in writing with the owner.[162]

Sixth, that a written notice was served on the defendant, notifying it to proceed under the statute to appropriate said lands.

Seventh, that more than ten days have elapsed since the service of said notice, and that said corporation has failed to proceed.

Eighth, that said corporation has no right, legal or equitable, to said lands.[163]

Ninth, that said corporation is authorized to make appropriation of private property.

Tenth, that the property appropriated is used for a public purpose.

Eleventh, petition should be verified.[164]

§ 1741. Form of petition.

(*Title.*)

Plaintiff says that he is the owner of the following described real estate (here describe as contained in description furnished by the corporation).

[160] See previous section, § 1686.

[161] Railroad vs. O'Hara, 48 O. S. 355.

[162] Railroad vs. Perkins, 22 C. C. 636.

[163] *In re* George, 5 C. C. 207; 3 C. D. 104.

[164] See § 1751.

That said defendant has taken possession of and is occupying and using said land above described. That the same has not been appropriated or paid for by said corporation, nor is the same held by any agreement in writing with plaintiff.

Plaintiff further says that on the.....day of....., he caused a written notice to be served on defendant, notifying it to proceed under the statute, to appropriate said land as required by law. A copy of said notice, showing the manner of service, is hereto attached, and made part hereof; that more than ten days have elapsed since the service of said notice and said defendant has failed to proceed, as required thereby.

(If the defendant refuses to give a description of the land, the plaintiff might state such fact and that ten days have elapsed since such demand was made, and might also state the fact, that plaintiff had the same surveyed as provided by law. A better way, however, where the defendant refused to give such description is to have the defendant enjoined from using said land.)[165]

Plaintiff further says that said corporation has no right, legal or equitable, to said land and that said corporation is authorized to make appropriation for private property, and that said property is appropriated by said corporation for a public purpose.

Wherefore plaintiff prays that such proceedings may be taken, as authorized by law, to appropriate said land to the use of said corporation and compensate the plaintiff therefor as provided by law.

(If the corporation has refused to give a description of the land the following should be followed.)

And that said corporation may be by order of Court, restrained from the use or occupation of said land until plaintiff's demand for a description thereof be complied with.

.....

(Petition should also be verified.)

§ 1742. Summons in such case. "A summons shall issue and be served upon the corporation, and thereafter the proceedings in such court be conducted to final judgment as provided in this chapter. [R. S. § 6449.][166]

§ 1742a. Judgment and execution. "If the corporation fails to pay the judgment and costs awarded against it in the proceeding, they may be collected by execution as in other cases. This section and the next preceding section shall not impair or lessen the right the owner or owners or the trustees or school officers may have to proceed against the corporation as in other cases of the unlawful entry upon lands." [R. S. § 6449.][166*]

§ 1743. Procedure, etc.

The above section specifically provides that procedure shall be the same as where the corporation is plaintiff and seeks to appropriate the property. A question has been made, whether

[165] §§ 11084-5 G. C.

[166] § 11086 G. C. Judgment is a lien. Stewart vs. Ry., 53 O. S. 172.

[166*] § 11087 G. C.

upon the preliminary hearing, the Court must find, before a jury can be empanelled, upon all the questions set forth in the petition. The Supreme Court, however, has decided that only the same preliminary questions need be passed on as is required where the corporation brings the suit. The other issues set forth are triable by jury.[167] If no demand be made for a jury, the Court might hear all the questions.[168]

§ 1744. When corporation may be enjoined from occupying the land. "If execution issued as provided in the next preceding section be returned unsatisfied, in whole or part, with the indorsement that no goods, chattels, lands or tenements, can be found whereon to levy, or if the judgment remains unsatisfied for more than sixty days from its rendition, the court, by injunction, may restrain the corporation from using or occupying the lands until the judgment and costs are paid." [R. S. § 6450.] [169]

§ 1745. Motion for injunction, etc.

If an execution is issued and no goods can be found upon which to levy, or if the judgment remains unsatisfied for more than sixty days, the Court may by injunction restrain the corporation from using the property. Whenever a person brings himself within the protection of the statute, he is entitled to an injunction.[170] The following may be used as a form of motion under the preceding section:

(*Title.*)

Now comes the plaintiff and moves the Court for an injunction, restraining the defendant from occupying the lands appropriated in this case for the following reasons: (Here state either that an execution has been issued and returned unsatisfied and indorsed, "No goods or chattels, lands or tenements can be found whereon to levy, or more than sixty days have elapsed since the judgment was rendered herein, and no part thereof has been paid.)

The following may be used as an entry granting the same:

(*Title.*)

On motion of the plaintiff, and it appearing that (here state the facts

[167] Kramer vs. Ry. Co., 53 O. S. 436.

[168] Railroad Co. vs. O'Harra, 48 O. S. 343.

The value of the land is to be determined at the time the proceedings are brought, notwithstanding the fact that the railroad has been a trespasser for fifteen years, etc. Ry. vs. Perkins, 22 C. C. 630; 49 O. S. 326.

[169] § 11088 G. C.

The court may enjoin although proceedings in error have been commenced. *In re* George, 5 C. C. 207; 3 C. D. 104.

[170] Varwig vs. Railroad Co., 54 O.

relied upon as stated in the motion); it is ordered that the defendant be, and it is hereby restrained from using or occupying the land appropriated in this proceeding for any purpose, or in any manner until the judgment and costs herein, amounting to.....dollars, be fully paid.[171]

§ 1746. Tender made by corporation.

If at the time the corporation files its petition it makes a tender of a certain amount, and no more is recovered, then the Court may apportion the costs, as provided in the following section:

"A corporation, by its proper officer, agent, or attorney, at the time of filing the petition with the probate judge, may deposit with him such sum of money, for each separate parcel of property as it deems a just compensation for the property, rights, and interests described in the petition, and sought to be appropriated. If the final verdict of the jury as to any parcel of property does not exceed the amount so deposited, and the owner has refused, after notice of such deposit, to accept it, the whole costs of the proceeding as to such parcel shall be equally divided between the corporation and the owner or owners of the property. When the final verdict as to any parcel or parcels exceeds, and as to other parcel or parcels does not exceed, the amount deposited, the probate judge shall apportion the costs in such manner as he deems just." [R. S. § 6452.][172]

S. 455; Toledo Bending Co. vs. Railway Co., 2 N. P. 317; 3 Dec. 430; Root vs. Railroad Co., 7 N. P. 337; 5 Dec. 315.

[171] A copy of this journal entry should be served by a corporation in the same manner as a summons. The fact that the case is taken up on error would probably not prevent the granting of an injunction.

The same rule being applied as in a proceeding brought by a corporation to appropriate the property, therefore the filing of a bond for proceedings in error would be no defense against the injunction.

A writ of injunction issued before sixty days had expired would be null and void. *In re* George, 5 C. C. 219; 3 C. D. 104.

[172] § 11090 G. C.

§ 11089 G. C. relates entirely to the fees of witnesses, officers and probate judge and the same is not herein inserted.

See Hill v. Durr, 47 Bull. 440, where it is held that the jury fee is not taxable against the corporation but is paid by the county like other cases. This seems not to be the law. See Cin., M. & L. Traction Co. vs. Felix, 5 C. C. (N.P.) 270, 25 O. C. C. 391; Detroit Southern Ry. vs. Lawrence Co., 71 O. S. 454; Hoosbrook vs. Traction Co., 5 C. C. (N.S.) 209, 27 O. C. C. 42.

§ 1747. School lands, how appropriated. "When a railroad company, incorporated in this state, has located its railroad through a part of reserved section twenty-nine or sixteen, or through a part of sections granted by congress instead of section sixteen for school purposes, and such lands remain unsold, or through a town lot or parcels of ground used for or devoted to school purposes, it may appropriate so much of such land or lots as is necessary for its purposes. Service of the summons made on such trustees or school officers, as have possession or control of the lands, shall have the same force and effect as service in other cases on owners of land sought to be appropriated. The money arising from such appropriation must be disposed of by such trustees or school officers in accordance with law." [R. S. § 6439.] [173]

[173] § 11067 G. C.
Board of Public Works cannot grant right to lay track along berme bank of canal. State vs. Ry., 37 O. S. 171.

CHAPTER XCV.

CONDEMNATION BY MUNICIPAL CORPORATION.

§ 1748 Introductory.
§ 1749 When action can be brought.
§ 1750 Application to Court, etc.
§ 1751 Essentials of application.
§ 1752 Form of petition or application.
§ 1753 Filing of application or petition.
§ 1754 Service of notice to owners of property, etc.
§ 1755 Notice, etc.
§ 1756 When to be heard.
§ 1757 Jurisdictional questions, preliminary hearing.
§ 1758 Court to fix time for assessment of compensation by jury.
§ 1759 Entry finding on preliminary questions and ordering jury.
§ 1760 How jurors drawn in Probate Court.
§ 1761 Empaneling jury, etc.
§ 1762 View of premises may be required.
§ 1763 How jury to return assessment. Open and close of case, etc.
§ 1763a Guardian *ad litem.*
§ 1763b Deposit of money.
§ 1763c How assessment signed.
§ 1763d When appropriation includes part of building.
§ 1764 Trial, etc.
§ 1765 Verdict in whole or in part.
§ 1766 Form and return of verdict.
§ 1767 Orders as to payment or deposit of assessment.
§ 1767a Effect of payment or deposit.
§ 1767b Re-appropriation to perfect title.
§ 1768 Distribution of funds.
§ 1770 Costs, how paid.
§ 1771 No delay from doubt of ownership.
§ 1772 Interested parties may give bond, etc.
§ 1773 Review of proceedings by motion.
§ 1773a Appeal to court of Common Pleas.
§ 1774 Motion and proceedings on new trial.
§ 1775 Entry confirming verdict, etc.
§ 1776 Proceedings in error. How execution of order suspended.
§ 1777 Appeal to Court of Common Pleas.
§ 1778 Notice of intention to appeal.
§ 1779 Appeal by guardian, executor, etc., and married woman.
§ 1780 Probate Court shall furnish transcript.
§ 1781 Original papers may be used.
§ 1782 Corporation not to appeal; or prosecute error except on leave.
§ 1783 Effect of failure to pay for or take possession of land within six months.

§ 1748. Introductory.

The Legislature has provided, by different sections of the General Code for the condemnation of property by municipal corporations than is provided for private corporations. The reason for these different provisions is not very apparent. Especially is this true in that part of the proceedings which occurs after the empanelling of a jury. There is certainly no reason why the Probate Court should have exclusive original

jurisdiction where the action is brought by a private corporation, and but concurrent jurisdiction when brought by a municipal corporation, and why a municipal corporation should have the right to appeal and a private corporation should not. The main issues to be tried and the constitutional provisions relating thereto are the same in both instances, although the procedure is somewhat different.[1]

§ 1749. When action can be brought.

The action can only be brought by a municipal corporation when authorized so to do by the Legislature, and in this respect, like in appropriation by private corporations, the law must be strictly complied with. The first three sections of the new municipal code provide when and how the corporation must proceed before its petition can be filed in Court. These sections are as follows:

Special powers. "Municipal corporations shall have special power to appropriate, enter upon and hold real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter.

"1. For opening, widening, straightening, changing the grade of, and extending streets, and all other public places, and for this purpose the corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement, and for obtaining material for the improvement of streets and other public places;

"2. For parks, park entrances, boulevards, market places, and children's playgrounds;

"3. For public halls and offices, and for all buildings and structures required for the use of any department;

"4. For prisons, workhouses, houses of refuge and correction, and farm schools;

[1] See § 1664, Constitutional provisions.

§ 1665, Who may exercise power.

§ 1672, Benefits.

§ 1673, Evidence.

§ 1674 *et seq.*, Condemnation by private corporations.

See §§ 1675, 1811.

A municipal corporation may appropriate land of a railroad for street purposes. Railway vs. Alorose, 13 Dec. 411; affirmed, 25 O. C. C. 739; Cleveland Terminal & Ry. Co. vs. City of Akron, 6 N. P. (N.S.) 81, 18 Low. Div. 231; 74 O. S. 457; affirming, without report, 1 C. C. (N.S.) 174; 4 C. C. (N.S.) 632; 16 Cir. D. 525.

"5. For hospitals, pesthouses, reformatories, crematories and cemeteries;

"6. For levees, wharves and landings;

"7. For bridges, aqueducts, viaducts and approaches thereto;

"8. For libraries, university sites and grounds therefor;

"9. For constructing, opening, excavating, improving or extending any canal, or water course, located in whole or in part within the limits of the corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvements;

"10. For sewers, drains, ditches, public urinals, bath-houses, water-closets and sewage and garbage disposal plants and farms;

"11. For natural and artificial gas, electric lighting, heating and power plants, and for supplying the product thereof;

"12. For establishing esplanades, boulevards, park ways, park grounds, and public reservations in, around and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and esplanades and parkways leading thereto;[2]

"13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and water works, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have the same right to a change of venue as is now given by law in the trial of civil actions;

"14. For the construction or operation of street, interurban, suburban or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, side-tracks, turnouts, machine shops, bridges and other appurtenances for the transportation of persons, packages, express matter, freight and other matter, in, from, into or through the municipal corporation; and for such purpose or purposes any municipal corporation may appropriate any property within or without its corporate limits; any municipal corporation may appropriate any property

[2] § 10, § 3677 G. C.

or right or interest therein theretofore acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over or under any street, avenue, alley, way or public place or part thereof of any other municipality, township or country [county]." [103 v. 496.]

May appropriate outside of corporate limits. Cemetery, etc. In the appropriation of property for any of the purposes named in the preceeding section, the corporation may, when reasonably necessary, acquire property outside the limits of the corporation. No land shall be purchased for public cemeteries within two hundred yards of a dwelling house without the consent, in writing, of the owner of the tract of land on which such dwelling house is situated. But any municipal corporation shall have the right to appropriate land for the establishment of a cemetery or the enlargement of any existing cemetery, within two hundred yards of any dwelling house, when such consent in writing can not be obtained, by making the owner of such dwelling house a party to all proceedings and actions for such appropriation; such appropriation shall be made in all respects according to the provisions of the chapter, and the amount of damages to which such owner will be entitled by reason of locating said cemetery within two hundred yards of such dwelling shall be determined by such appropriation proceedings. In such appropriation proceedings the damage to the remainder of the land of such owner shall be determined and included in the amount of damages, provided however, that for the purpose of making a necessary enlargement of an existing cemetery, any municipal corporation which shall own, or shall acquire by purchase, any lands suitable for such enlargement, may devote and use the same for cemetery purposes as such enlargement of such existing cemetery, if the said land shall be distant from any dwelling house not less than one hundred feet or the width of an existing street or alley intervening. The addition of any land across a street or public road, as now located or which shall be hereafter established, shall not be considered an enlargement of an existing cemetery under the provisions of this section. [103 v. 550.][3]

Resolution declaring intention to appropriate. "When it is deemed necessary to appropriate property, council shall pass a resolution, declaring such intent, defining the purpose of the

[3] § 11, § 3678 G. C.

These sections are the sole provisions for appropriation of private property by municipal corporations. Pitts., C., C. & St. L. Ry. vs. Greenville, 69 O. S. 492.

Must be strictly construed. T. & O. Cen. Ry. vs. Fostoria, 4 C. D. 602; 7 O. C. C. 298; affirmed, 56 O. S. 726.

Includes all incidental purposes. Want vs. Bridge, 6 O. S. 15.

As to cemeteries, see Moslock vs. Hostman, 12 C. D. 778; 10 O. C. C. 599; Cleveland vs. Poynter, 6 N. P. (N.S.) 129; 18 Dec. 815; Mansfield vs. Ballest, 65 O. S. 460.

appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may appropriate such property as it may determine to be necessary." [99 v. 208, § 12.][4]

Proceedings on passage of resolution. "Immediately upon the passage of such resolution, declaring such intent, for which but one reading shall be necessary, the mayor shall cause written notice thereof to be given to the owner, person in possession thereof, or having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent, and such notice shall be served by a person designated for the purpose, and return made in the manner provided by law for the service and return of summons in civil actions. If such owner, person, or his agent can not be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the corporation, and council may thereupon pass an ordinance by the votes of two-thirds of all members elected thereto, directing such appropriation to proceed." [99 v. 208, § 12.]*

The council of such municipality has not power, by an ordinance passed while the condemnation suit is being tried, to change the terms of its resolution and of its application so as to ask to appropriate more or less than is therein demanded.[4*]

[4] § 12, § 3679 G. C.

* § 3680 G. C.

The municipal corporation previous to the filing of its application in the court must have strictly followed the above provisions. In § 3679 G. C. above, it is provided that notice shall be given to the owners of the property sought to be appropriated. By § 2235 it is provided that owners must file a claim in writing with the clerk of the corporation setting forth the amount of damages claimed and the courts have held that if the owner fails so to do, he waives his right. Ry. Co. vs. Defiance, 52 O. S. 262.

Another matter that is to be observed is, that the ordinance must pass the council by a two-thirds vote of all the members elected thereto not merely two-thirds of the votes of those present.

See § 1651—2 R. S., Boards of education (§ 7624 G. C.).

§§ 1807-1809 G. C., Benevolent institutions.

§ 2446 G. C., County commissioners.

§§ 3441, 3455 G. C., Township trustees.

See §§ 1680, 1683, 1665, 1666, 1668.

[4*] Grant vs. Hyde Park, 47 Bull. 831; Joyce vs. Barron, 48 Bull. 114.

Whether there must be a certificate of the clerk of the municipal corporation filed showing that there are unappropriated funds, etc., is a question upon which the courts are not in accord.

The matter has never, in written opinion, been decided by the Supreme Court, and the last Circuit Court decision is that such certificate must be filed or the proceedings will be enjoined. Hurst vs. Bello Valley, 30 O. C. C. 563.

§ 1750. Application to Court, etc. "Upon the passage of such ordinance, the solicitor shall make application to the court of common pleas or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the land sought to be taken is located, which application shall describe as correctly as possible the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof." [98 v. 164, § 13.][5]

§ 1751. Essentials of application.

Whenever, as provided for in the previous section, the municipal corporation has in a proper manner passed a resolution to appropriate the property, then an application can be filed in the court for that purpose. For all general purposes this application might as well be called a petition, the proceedings, however, being a special proceeding and not a civil action. The *first* essential, or allegation, of the application should be that the plaintiff is a corporation duly organized under the laws of Ohio; *second,* that by the laws of Ohio it has power to appropriate property for the purpose alleged in the petition; *third,* that an ordinance has been passed by the council, etc., in the manner provided by law, to appropriate the premises in the petition described; *fourth,* an accurate description of the property; *fifth,* the purpose for which the property sought to be appropriated is to be used; *sixth,* the name of the owner of each lot or parcel of property to be taken; and while the law does not so state, it ought to be verified as pleadings usually are.[6]

However, the case of Pansing vs. Miamisburg (mills), 31 O. C. C. 130, which was decided the same year as the above and was affirmed by the Supreme Court without opinion, 79 O. S. 430, holds that the certificate can not be required in advance of any knowledge of the cost of the property and that proceedings are not invalid if such certificate is not on file at the time the appropriation proceedings are heard.

[5] § 13, § 3681 G. C.

The above section is very much similar to former § 2236 R. S., except that it gives jurisdiction to the insolvency court.

Where the action has once been commenced in the probate court, thereafter that court has exclusive original jurisdiction to determine all questions in the case. Cleveland Terminal & Ry. Co. vs. Akron, 25 O. C. C. 789; affirmed, 74 O. S. 457; 6 N. P. (N.S.) 81; 18 Low. D. 231; 74 O. S. 457; affirming, without report, 1 C. C. (N.S.) 174; 4 C. C. (N.S.) 632; 16 Cir. D. 525.

See Coppock, Municipal Code, 322.

There is no provision for filing answer but the court can permit same. Cin., P. & V. Ry. vs. Hyde Park, 6 Dec. 327; 4 N. P. 296.

A copy of the ordinance should be attached to the petition as an exhibit.

[6] See §§ 1686, 1740. As who should be made parties defendant, see § 1687.

§ 1752. Form of petition or application.

.....Court of.....County, Ohio.

The City (or Village) of ....., Plaintiff. vs. (Insert as defendants the names of all persons owning, or claiming any interest in the property appropriated),. defendant.	Application to Assess Compensation.

Plaintiff represents that it is (village, or city of the..... grade of the.....class) organized under the laws of Ohio, and that by virtue of the laws of Ohio it is authorized to appropriate property for the purpose of (here insert for what purpose property is to be appropriated) and that the council of said city, by ordinance, a copy of which is hereto attached and marked "exhibit A," declared its intention to and did appropriate to public use for street purposes for opening (widening, straightening, etc., as the case may be).....street, the following described property, to-wit:

(Here describe as accurately as possible the entire piece of property appropriated.)

The defendants own, or claim to own, or have some interest in or title to said property, as the same is divided into lots or parcels and delineated on the plat filed herewith and made part hereof.

The description of said several lots or parcels, and the names of the parties who own, or claim to own, or have an interest in the same are as follows: (Here insert separate description of each piece of land taken, as the same may be divided by ownership or occupancy.)

Lot No. 1. (Accurate description) belonging to.....or in which.....owns a leasehold estate for three years at a monthly rental of $50.00; .....owns a life estate by way of dower, as the widow of.....; and.....owns the remainder therein after the expiration of the life estate of the said.....; and in which.....claims an interest by way of mortgage (or any other interest that may exist).

Lot No. 2. Etc., etc.

Wherefore plaintiff asks the Court to cause a jury to be impaneled to make inquiry into and assess the compensation to be paid by the plaintiff for the property appropriated as above set forth, and that upon the payment to the owners or deposit of the amount so assessed, as the Court shall order, possession of said property may be awarded it according to law.

.....

Solicitor of the city (or village) of.....

.....County, Ohio.

(Add verification.)

The City (or Village) of ..... vs. .....et al.	PRECIPE.

To the Clerk:

Issue notice to the defendants named in the above application, that the plaintiff will apply to the Honorable....., Judge of the..... .....Court of.....county, on the.....day of..... ....., 190.., at.....o'clock...M., for the impanelling of a jury to make inquiry into and assess the compensation to be paid by the city (or village) of.....to the owners, for the following property, to-wit:

(Insert description of the entire piece of property appropriated, as first above set forth.)

.....

Solicitor of the city (or village) of.....

§ 1753. Filing of application or petition.

The procedure intended by the Legislature in the acts relating to the appropriation of property by municipal corporations is not very clear, but it seems to the writer that the better practice to be followed would be that, when the petition is properly prepared, it be filed in the Probate Court, and then that notice be given of the time when said application will be for hearing. In this manner the application would be on file and the parties could inspect the same, so that when the time came to determine the question whether a jury should be impaneled or not, all the preliminary questions could be properly made.[7]

The practice of filing a precipe, as suggested in the above form[8] commends itself, and therefore when a petition is filed the following entry might be appropriate:

(*Title.*)

This day came the plaintiff and filed its application or petition for the appropriation of certain property therein described, naming the defendants as persons owning or having an interest in such property and filed therewith its precipe for a notice for A. B., C. D. and E. F.

Wherefore it is ordered that a notice be issued directed to the sheriff of.....county to notify said A. B., C. D. and E. F. that on the .....day of....., at.....o'clock...M. an order will be asked to empanel a jury to assess the compensation to be paid by the city of.....to the owner for the property in said petition described.

Said notice to contain an accurate description of the entire piece of property to be appropriated. Said notice to be served at least five days before the time of said hearing; and it further appearing to the Court that G. H., one of the parties defendant, is a non-resident of the State, it is ordered that notice be given to said G. H. by publication as authorized by law, and that said application be set for hearing on the.....day of....., for the purpose of empanelling a jury. (Notice must be published for three weeks next preceding the time of application.)

§ 1754. Service of notice to owners of property, etc. "Notice of the time and place of such application shall be given in the ordinary manner of serving legal process, to all owners or agents of owners resident of the state, whose place of residence is known, and to all others by publishing the substance of the application, with a statement of the time and place at which it is to be made, once a week for three weeks next preceding the time of the application in some newspaper of general circulation in the county." [96 v. 28 § 14.][9]

[7] For a landowner, it seems, must take notice that such appropriation will take place from the time that the ordinance passes the council. Toledo vs. Bayer, 7 N. P. 324; 5 Dec. 87.

[8] Taken from Coppock's Municipal Code, 323.

[9] § 14, § 3682 G. C.

The above section is substituted for former § 2237 R. S. and is almost identically the same.

§ 3682 G. C.

[14] Courts have power to decide when service is complete and the same can not be collaterally attacked. Cin., S. & C. Ry. vs. Belle Center, 48 O. S. 273.

§ 1755. Notice, etc.

Every person to be in any way affected by the proceeding should be notified in the manner provided by law. These notices should be served the same as ordinary summons.[10]

Where an owner is to be served by publication, it would be well to make an affidavit of the facts which would permit the service in that manner.[11] It should be observed that this notice, whether actual or constructive, must contain the substance of the application, with a statement of the time and place at which it is to be made. The following is a form of notice by publication which can be adopted for actual notice:

NOTICE BY PUBLICATION. LEGAL NOTICE.

A. B., who resides in....., county of....., Indiana, and all other persons interested in the property hereafter described, are hereby notified that an application in writing substantially as herein set forth will be made by the city (or village) of.....to the Hon. ....., judge of the Probate Court of.....county, Ohio, on the.....day of....., 190.., at.....c'clock...M. to impanel a jury to assess the compensation to be paid by said city (or village) to the owners of the following described real estate. (Describe entire strip, and lots into which it is divided, giving the names of the owners.) Said property having been condemned and appropriated to public use for the purpose (state the purpose of the appropriation) by a resolution (or ordinance) passed by the council of said city (or village) on the.....day of....., 190.., and plaintiff asks that upon payment into Court or to the proper owners the defendants, of the amount of compensation equal to the sum so assessed as the value of the parcels of ground described in said application, the appropriation of said land may be allowed according to law and that the Court will divide the sum so paid or order its distribution among the several claimants in respect to their interests in the property.

.....

Solicitor for said city (or village.)[12]

§ 1756. When to be heard.

The first hearing to be had in the action is the empanelling of the jury.[13] It is further provided that if at the time of the application it appear that any of the owners of the property sought to be taken are infants or insane, and they have no

Where defendant dies during suit it is to be continued in name of heirs. Valley Ry. vs. Bohni, 29 O. S. 633.

[10] See § 1691; also § 839.

[11] § 1693.

[12] Whit. Prob. Code.

It must be published once a week for three weeks in a newspaper of general circulation, etc.

[13] § 1754.

[14] § 3683 G. C.

guardians, a guardian *ad litem* shall be appointed in their behalf.[14] Not only should a guardian *ad litem* be appointed, if it appear at the time of the application, but if it appear at any time, such appointment should be made. In no instance can the case be heard until five days have elapsed from the time that notice is given or when the application is completed. Some question may arise here, whether a case can be heard at the time publication is completed, when notice is given in that manner, or must five days intervene from the time that the publication is completed. It seems that the trial could be had when the publication is completed without waiting five days.[15] The Court would have power to make a continuance from time to time until all the parties have been properly served.

§ 1757. Jurisdictional questions, preliminary hearing.

The statute does not provide in so many words that certain jurisdictional questions must be determined as is set forth where an appropriation is made by a private corporation. That is, the legal existence of the corporation, its right to make the appropriation, and its inability to agree with the owner, and the necessity for the appropriation. One Court has held that all these questions are left with the municipal corporation, and the Court has no power over them.[16]

In another case it was held that at least three jurisdictional facts must be heard and determined. First, that the Council has duly passed a resolution; second, that the appropriation will not necessarily interfere with the reasonable use of such right of way (where the same was held by a railroad company), and at least five days' notice of the time and place of the hearing of the application has been duly served.[17] And in another

[14] § 16 New Code, § 2243 former R. S.

[15] See § 15 New Code, § 1758.

§ 845, As to appointment of guardian *ad litem*.

§ 1694, Condemnation by private corporations.

[16] Toledo vs. Bayer, 7 N. P. 324; 5 Dec. 87.

It seems the Probate Court has no jurisdiction over them. P., C. & C. & St. L. vs. Greenville, 69 O. S. 487; Railway vs. Youngstown, 5 C. C. (N.S.) 332; 26 C. C. 697.

[17] T. & O. Cen. Ry. Co. vs. City of Fostoria, 7 C. C. 293; 4 C. D. 602.

case it was held that the *necessity* was a question for the Probate Court to determine.[18]

It is very doubtful whether the position taken in the case of Toledo vs. Bayer,[19] that the question as to necessity, and a right to appropriate and the existence of the corporation, are absolutely left in the discretion of the corporation. It seems that these matters are jurisdictional, and while it may not be required that the court actually pass upon them before a jury is impaneled, yet they are questions which may be taken advantage of before the jury is impaneled, and in order to prevent a collateral attack, it would be well that at the time the jury is ordered that the court pass upon the following questions: *First*, that the plaintiff is a corporation organized under the laws of Ohio; *second*, that it has a right to appropriate the property in the petition described; *third*, that it has in the manner provided by law, appropriated the property, and that the same is necessary for the purpose therein described; *fourth*, that all the parties having an interest in the property have been properly notified, as provided by law, at least five days before the time of hearing.[20]

The question of what is to be appropriated is determined by the resolution of the council and the application filed in court in conformity therewith.[20*] The Supreme Court has settled the question that the only preliminary question before the Probate Court is whether the five days' notice has been given, and that if the proceedings prior are illegal the complaining party must go into a court of equity and have the proceedings enjoined[20a]

In the opinion of the writer here is a good opportunity for legislation that will permit all these questions to be raised and heard in the appropriation proceedings.

§ 1758. Court to fix time for assessment of compensation by jury. "If it appears that such notice has been served five days before the time of application, or has been duly published,

[18] T. A. & N. M. R. R. Co. vs. Toledo, 7 N. P. 285; 5 Dec. 306.

The Court in this case founds its decision upon that of Ry. Co. vs. Village of Belle Center, 48 O. S. 273.

[19] 7 N. P. 324; 5 Dec. 87.

[20] See § 1759 for entry.

It has recently been held by the circuit court, basing its opinion on the decision of the Supreme Court in P., C., C. & St. L. R. R. vs. Grenville, 69 O. S. 487, that the only preliminary question before the probate court, is whether the five days' notice has been given. That if the other questions are sought to be raised it must be in a separate proceeding in a court of equity, by injunction proceeding. This may be the law, but it seems it would be better if all these preliminary questions could be raised in one proceeding, and in the court in which the proceeding to appropriate was pending. See Railway vs. Youngstown, 5 C. C. (N.S.) 332, 26 C. C. 679.

And the necessity for the appropriation cannot be questioned except for fraud. Pansing vs. Miamisburg, 11 C. C. (N.S.) 511; 31 O. C. C. 130; affirmed 79 O. S. 430.

[20*] Grant vs. Hyde Park, 47 Bull. 831.

[20a] P., C., C. & St. L. R. vs. Grenville, 69 O. S. 487.

[21] § 3683 G. C.

The above section is very much similar to former § 2238 R. S. and specifically provides that the jury shall be drawn and the trial proceed

or that such notice has been waived, the court shall set a time for the assessment of compensation by a jury, but it may be made at a special term of court, and the jury shall be drawn and the trial proceed as in other civil actions." [96 v. 28 § 15.] [22]

§ 1759. Entry finding on preliminary questions and ordering jury.

This day came the plaintiff and.....and....., defendants (here mention all the defendants that appear) and it appearing to the Court that the plaintiff is a corporation, organized under the laws of Ohio, and entitled to appropriate the property in the application herein described and that it is necessary to appropriate said property for the purposes set forth in the application and that all the preliminary steps described by the statute have been taken as required by law, and due and legal notice has been served on all the defendants, as required by law.[22]

It is ordered that the clerk of the Court of Common Pleas proceed at once to draw from the box the names of twelve persons to serve as jurors in this case, who shall be summoned to appear in this Court on the.....day of ....., at.....o'clock (and if there is a minor defendant the following might be added), and it appearing that....., a defendant herein, is a minor and has no guardian,.....is appointed guardian *ad litem* for said..... This proceeding is adjourned until the.....day of....., at.....o'clock...M.[23]

§ 1760. How jurors drawn in Probate Court.

The statute now provides that the jury shall be drawn and the trial proceed as in other civil actions.[24] Formerly the statute provided that the jury should be drawn in the presence of the judge, consisting of twelve names or a less number that might be agreed upon by the party, and that if for any cause the panel is not full, the Probate Judge should fill the same by by-standers.[25] The statute makes applicable the law relating to the drawing of jurors generally in the Court of Common Pleas, and the method there observed should be followed relating to special venires, etc.[26] The clerk should proceed as directed in sec. 11427 G. C., and a venire should be isued to the sheriff, as in other cases,[27] made returnable on a day which is set for trial, and an entry to this effect should be put upon the journal.[28]

as in other civil actions. The former statute provided that the assessment and compensation may be made by a jury of twelve men, unless the parties agree upon a less number.

[22] § 3683 G. C.

§§ 1758, 1760.

[23] Former statute required the clerk to draw the jury in presence of the judge.

§§ 2240, 2241 R. S.

See § 1757.

[24] § 3683 G. C., § 1758.

[25] Former § 2240 R. S.

[26] § 11433 G. C.

[27] See § 409. For form of order to draw jury and form of venire.

[28] See § 1702

§ 1761. Empaneling jury.

In empaneling the jury the usual rules should be observed as in the trial of civil actions, the nature of the proceedings being very much similar to condemnation of property by private corporations. It would not be inappropriate for the judge to interrogate the jurors as in such cases required,[29] and the challenges to the jury might be made in much the same way. The statute requires the jury to be sworn, and I have no doubt that the form of oath used in administering the oath to the jury in condemnation by private corporations might be used.[30] The jury having been properly empaneled and oath administered, a view of the premises may be had, as provided in the next section.[31]

§ 1762. View of the premises may be required.

A view of the premises shall be ordered when desired by the jury or demanded by any party to the proceedings.[32] The statute does not provide that a description of the property should be given to the sheriff, nor does it say who may accompany the sheriff, but in such matters it would be well to follow the method provided for in proceedings by private corporations.[33]

§ 1763. . How jury to return assessment. Open and close of case. Assessment when building situated partly on adjoining land. "A view of the premises shall be ordered when desired by the jury or demanded by a party to the proceedings. The owners shall have the right to open and close the case." [96 v. 28, § 16.][34]

§ 1763a. Guardian ad litem. "If, at the time of the application, it appears that any of the owners of the property sought to be taken are infants or insane, and that they have no guardian,

29 § 1703.

30 See § 1706.

31 § 6423 R. S., § 1684.

§ 3689 G. C., § 1765.

32 §§ 3684, 3685, 3686, 3687, 3688 G. C., § 1763; former statute § 2242 R. S.

33 §§ 1707, 1708, 1709, 1710.

34 § 3684 G. C.

The doctrine of burden of proof does not apply in such a case. The jury acts merely as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted. Martin vs. City of Columbus, 101 O. S. —. See § 1714a, Burden of proof.

The first part of the above section is the same as former § 2242 R. S. The second part as to infants is the same as § 2243 R. S.; and the third part in reference to delay and deposits of money, is much similar to former § 2250 R. S.; and the remainder is similar to § 2245 R. S. There seems to be, however, no limitation of the number of counsel that may be heard, etc., like in the former section. That part in reference to buildings and structures is very

a guardian *ad litem* shall be appointed in their behalf." [96 v. 28 § 16.] [34*]

§ 1763b. Deposit of money. "No delay in the proceedings shall be occasioned by doubt as to the ownership of any property, or as to the interst of the respective owners, but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. As soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken." [96 v. 28 § 16.] [34†]

§ 1763c. How assessment signed. "The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained." [96 v. 28 § 16.] [34‡]

§ 1763d. When appropriation includes part of a building. "When a building or other structure is situated partly upon the land to be appropriated, and partly upon adjoining land, and such structure can not be divided upon the line between such lands, without manifest injury, the jury in assessing compensation to any owner of the land, shall assess the value thereof, exclusive of the structure, and make a separate estimate of the value of the structure. The owner of the structure may elect to retain and remove it, or to accept the value thereof as estimated by the jury. If he fails to make such election within ten days from the final determination of the cause, he shall be deemed to have elected to accept the value of the structure, as fixed by the jury." [96 v. 28, § 16.] [34††]

In a proceeding brought by a municipality to condemn land for a street, the inquiry necessarily embraces not only an ascertainment to the land owner for the land taken, but damages to the residue of the abutting land of such owner.[34***]

§ 1764. Trial, etc.

There is no provision that the separate owners of different tracts of land may have separate trials, like in condemnation

much similar to § 11057 G. C. See § 1715.

[34*] § 3685 G. C.

[34†] § 3686 G. C.

[34‡] § 3687 G. C.

[34††] § 3688 G. C.

The present section, however, provides that if the owner should not make an election he should have been deemed to have accepted the value of the structure as fixed by the jury, and the former section provided that in such cases he is deemed to have elected to retain and remove the structure.

[34***] Grant vs. Hyde Park, 47 Bull. 831.

for private corporations.[35] But I have no doubt that the same rule should be followed. After the view has been made, then the party desiring a separate trial, should file a motion for that purpose, and the same should be granted by the Court; and thereafter each case should be heard separately and a verdict of the jury should be returned separately and proceedings had in each case in error or appeal separately. The land owner has the right to open and close the introduction of evidence, and from this would follow that the burden of proof is upon him.[35a] Each or all the cases shall be heard in the manner that civil actions are usually tried.[36]

§ 1765. Verdict in whole or in part. "The jury shall be sworn to make the whole inquiry and assessment, but may return a verdict as to part and be discharged as to the rest, in the discretion of the court. If a jury is discharged from rendering a verdict in whole or in part, another shall be drawn and impaneled at the earliest convenient time, who shall make the whole inquiry and assessment, or the part not made." [96 v. 29, § 17.][37]

§ 1766. Form and return of verdict.

The jury having heard the evidence and arguments of counsel, and charge of the court, retire for their deliberation and upon arriving at a conclusion should return their verdict in writing, and this verdict must be signed by the jury.[38] This being a slight distinction from that in condemnation by private corporations, where it is required that the verdict shall be signed by the foreman. It seems here, that the verdict should be signed by all of the jurors and when returned to court, it should be entered upon the record. The entry provided for in

35 § 11048 G. C., § 1711.

35a This is denied. There is no burden of proof in such cases, see § 1714a.

36 See §§ 1711, 1712, 1713, 1714.

When property owners are entitled to separate trials it is not meant that if one person owns two or three tracts that he can have a separate trial for each, nor does it mean that if two or three persons have interest in one tract that each can have a separate trial. City of Cincinnati vs. Neff, 19 Bull. 404.

37 § 3689 G. C.

The above section is very much similar to former § 2246 R. S.

The right to take property does not accrue until compensation has been assessed. Garvin vs. Columbus, 5 Dec. 333; 5 N. P. 636.

Landowner is entitled to pay for all the rights of which he has been deprived. Dodson vs. Cin., 34 O. S. 276.

38 §§ 3684, 3688 G. C., former § 2245 R. S., § 1763.

a previous chapter,[39] can be adopted, and the following form of verdict may be used:

FORM OF VERDICT.

(*Title.*)

We, the jurors in this cause, duly impaneled and sworn, do assess as the compensation to be paid by the city (or village) of.....to the owner or owners of the several lots and parcels of land described in the application herein, as follows:

1. To the owner or owners of lot No. 1—
   A. Value of land, including buildings and other structures situated wholly or part taken,.....dollars and..... cents ($.....).
   B. Damages to residue.....dollars and..... cents ($.....).
   C. Value of buildings (or other structures) situated partly or part taken,.....dollars and.....cents ($.....).
2. To the owner or owners of lot No. 2, etc., etc.

(Signed by all the jurors.)[40]

§ 1767. **Orders as to payment or deposit of assessment.** "The court shall make such order as to payment, deposit or distribution of the amounts assessed as may seem proper, may require adverse claimants to all or a part of the money or property to interplead and fully determine their rights in the same proceeding, and may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order giving possession." [98 v. 164 § 18.][41]

§ 1767a. **Effect of payment or deposit.** "Upon the payment or deposit, by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in such corporation, unless a lesser estate or interest is asked for in the application, in which case such lesser estate or interest as is so asked for shall be vested." [98 v. 164 § 18.][41*]

§ 1767b. **Reappropriation to perfect title.** "A municipal corporation may again appropriate, in conformity with the provisions of this chapter, any real estate which it has previously, lawfully appropriated, in order to perfect, in it, a title in fee simple absolute to such previously appropriated real estate." [98 v. 164 § 18.][41†]

§ 1768. Distribution of funds.

The above section confers complete jurisdiction upon the court in which the action is brought to settle all questions as to the distribution of the fund in its possession. In this

[39] § 1716.

[40] See § 1823.

Coppock Municipal Code, 328.

A verdict might be rendered by three-fourths of the jury.

[41] § 3690 G. C.

[41*] § 3691 G. C.

[41†] § 3692 G. C.

Damage paid abutting property holders can not be assessed back upon such property for improvements. Fridman vs. Norwood, 1 C. C. (N.S.) 97; 15 Cir. D. 258; 25 O. C. C. 258; affirmed, 70 O. S. 431.

The above section embodies former § 2247 and § 2248 R. S.

respect it is unlike the action brought by a private corporation, for there the Probate Court where there are conflicting claims cannot adjudicate upon such matters.[42]

§ 1770. Costs. How paid, etc. "The costs of the inquiry and assessment shall be paid by the corporation, and all other costs taxed as the court directs. At or after the time of making the application, the corporation may offer to confess judgment for an amount to be stated, and the costs then made, in favor of any owner, who in any manner enters appearance, or upon whom or whose agent personal service may be made. If such owner refuses to accept such offer, and on the trial does not recover more, he shall pay all costs accruing after the offer, and an offer so made shall be governed by the provisions of statute for an offer to confess judgment." [96 v. 29 § 19.] [43]

§ 1771. No delay from doubt of ownership.

It was formerly provided by separate section that no delay in making the assessment of compensation or taking possession shall be occasioned by any doubt which may arise as to the ownership of the property.[44] The same is still the law, but is found in a section containing other provisions.[45] This provision is intended to secure to the owners whatever may be assessed as the value of their lands, but that doubts as to ownership, should not delay the proceeding, and if the corporation makes a deposit of the amount found by the jury, it may take possession of the property appropriated.

§ 1772. Interested parties may give bond, etc. "Before or after the passage of an ordinance for opening a street or other public highway, any person may execute his bond payable to the corporation to the acceptance of council, conditioned for the payment of all damage which may be assessed by the jury, and such bond shall be good in law, and if such person pay or deposit according to the order of court, then such street or other highway shall be opened; or the corporation may at its discretion make such payment or deposit, and collect by law the amount of such damages of such person or his sureties." [96 v. 29 § 20.] [46]

[42] §§ 11073, 11074, 11075 G. C., §§ 1729, 1730.

[43] § 3693 G. C.

It has been held in Hamilton county that the jury fees are to be taxed as in ordinary civil actions. Hill vs. Durr, 47 Bull. 440. But this is believed not to be the law.

[44] § 2250 R. S.

[45] See § 16 Municipal Code, § 1763.

[46] § 20, § 3694 G. C.

The above section is very much similar to former § 2251 R. S.

This section seems to have for its purpose, the protection of the corporation in a case where the corporation does not desire to make the appropriation except where some interested person will become responsible for the costs.

All the costs may be assessed against the corporation. Railroad Co. vs. County, 71 O. S. 456.

But the case intimates that there may be a distinction as to jury fees in appropriation by a municipal corporation.

For form of bond, see Mt. Adams, etc., vs. Cin., 10 Dec. Rep. 679; 23

§ 1773. Review of proceedings. "The municipal corporation, or the owner of property, the value of which has been assessed, as herein provided, may prosecute error as in other civil actions, and error shall lie to the court of appeals from the judgments of the court, except that from the judgments of the probate court error shall lie to the court of common pleas. The trial court, upon proper terms, may suspend the execution of any order, but in all cases where the municipal corporation pays or deposits the compensation assessed, and gives adequate security for any further compensation and costs, the right to take and use the property condemned shall not be affected by such review." [103 v. 420.][47]

§ 1773a. Appeal to court of common pleas. "If the proceeding is had in the probate court a party interested in the inquiry and assessment may take an appeal to the court of common pleas and thereupon the same proceeding shall be had as if the application had been originally made in that court, except that the corporation shall not be required to give notice of its application, and the inquiry and assessment shall be limited to the case of the party taking the appeal, and the court shall make such order for the payment of the costs accruing upon the appeal as seems equitable and just." [100 v. 100 § 21.][47*]

§ 1774. Motion and proceeding on new trial.

The previous section specifically provides that error may be prosecuted, as in other civil actions; under the former statute it was somewhat of a question whether error should be prosecuted as provided by the civil code or as provided by the law relating to condemnation by private corporations. The new municipal code, however, settles this matter and the proceedings now in relation to new trials, are the same as in civil actions generally. The motion for a new trial must be made at the term the verdict is rendered and within three days unless the party is unavoidably prevented from filing the same.[48]

The causes of a new trial are set out in another section of the General Code.[49] If the trial Court sustains the motion

Bull. 68. As to liability, T. & O. C. Ry. vs. Fostoria, 4 C. D. 602; 7 O. C. C. 293.

[47] § 3695 G. C.

[47*] § 3696 G. C.

Time runs from the entry of judgment or order directing assessments to be paid. Ryan vs. Hoffman, 26 O. S. 109.

The above section embodies what was formerly contained in §§ 2252, 2253, 2254, 2255, 2256, 2257, 2258 and 2259 R. S. The provisions of §§ 2252, 2253 and 2254 are substantially included in the above section, the others only by implication. These matters will be further considered in subsequent sections.

[48] § 11578 G. C.

[49] § 11575-6 G. C.

for a new trial, then the case would be tried *de novo*. No provision is made by the statute as to what shall be done with the case if it is taken up on error to the Court of Common Pleas and there reversed. Whether the Court of Common Pleas shall retain the case for trial or shall remand the same back to the Probate Court is a question. In condemnation by private corporation and generally when a case is taken up on error to the Court of Common Pleas and there reversed, such Court retains the same for trial.[50] It has, however, been held that the case should be remanded back to the Probate Court for further proceedings.[51]

§ 1775. Entry confirming verdict, etc.

When the question of a motion for a new trial has been settled or there is none made, the Court should make an entry either sustaining the motion for a new trial or confirming the verdict and where such can be done, make a distribution of the fund.[52] And direct the time and manner in which possession of the property may be taken and if necessary may give an order to deliver possession. The matter of costs may also be determined. The following may be used as form of such entry:

(*Title.*)

This cause coming to be heard upon the application, the evidence and the verdict of the jury heretofore rendered herein, assessing the compensation to be paid to the owner or owners of the lots and parcels of land described in the application, by reason of the appropriation of the same to public use by the plaintiff corporation, as follows: (Copy award of verdict.) And the Court proceeding to consider said cause upon the application, evidence and verdict aforesaid, doth find that said lots and parcels of land and the several interests therein belong to the persons whose names are set opposite to them herein, and that such persons are entitled to receive the proportion of said compensation as herein designated, viz: (Set out name of owner of each lot, or interest, and the amount to which he is entitled.)

It is, therefore, adjudged that said verdict be confirmed and that said plaintiff corporation, upon payment within six months from the entry hereof of the amount of said verdict to the owners of said lots and parcels of land as herein designated, or deposit of the same with the clerk of this Court for the use of said owners, shall be entitled to take possession of and

See Kinkead's Pract. 499.

[50] See § 11066 G. C., § 1722.

[51] Banning Trustees vs. Trustees, etc., R. R., 3 Bull. 966.

See §§ 1722 and 1723.

[52] §§ 3690, 3691, 3692 G. C. § 2247 R. S., § 1767.

hold said premises with all rights and interests thereto belonging and appertaining, for the uses and purposes of said appropriation, and upon such payment or deposit an order may issue to the sheriff of..... county to put the plaintiff in possession of said premises. And it is considered by the Court that the plaintiff pay the costs of this proceeding, taxed at .....dollars.[53]

§ 1776. Proceedings in error. How execution of order suspended.

It was provided by a former section of the Revised Statutes,[54] which section is now embodied in sec. 3395, G. C.,[55] that a proceedings in error should not suspend the order of execution, unless a proper bond is given, but that if the municipal corporation pays or secures by a deposit of money the compensation assessed by the jury and gives adequate security for any further compensation, then it has the right to use the property condemned, being liable, of course, if greater compensation is recovered in a new trial.[56]

§ 1777. Appeal to Court of Common Pleas.

Where the proceedings is had in the Probate Court, any party interested in the inquiry and assessment may take an appeal to the Court of Common Pleas and thereupon the same proceeding shall be had as if the application had been originally made in that Court, except that the corporation shall not be required to give notice of its application, and the inquiry and assessment shall be limited to the case of the party taking the appeal.[57]

§ 1778. Notice of intention to appeal.

The former statute,[58] specifically provided a method for taking an appeal, the present law contains no such provision.

[53] Coppock's Municipal Code, 329.

[54] § 2253 R. S.

[55] § 1773.

[56] § 2253 R. S.

The object of this section is to permit the corporation by making a deposit in Court of the sum required and a bond securing all the costs, to take possession of the property, notwithstanding the fact, that proceedings in error have been instituted. Trustees vs. Banning, 21 Bull. 9.

[57] A part of §§ 3695, 3696 G. C. (§ 1773) is substanially the same as former § 2254 R. S.

[58] § 2255 R. S. See Miller vs. Akron, 36 O. C. A. 126.

From the fact that the provisions of the new code provide that the procedure shall be the same as that in civil actions and from the further fact that the provisions of the law governing civil proceedings in the Court of Common Pleas, shall as far as applicable, govern in the Probate Court, when there is no provision on the subject;[59]

It would, therefore, seem to follow that the law governing an appeal from the Common Pleas to the Circuit Court would be the one to be followed in an appeal of this character.[60] I apprehend that it is a procedure very seldom brought into use, for the Probate Court is now considered to be as well qualified to try these questions as the Court of Common Pleas.[61]

§ 1779. Appeal by guardian, executor, etc., and married woman.

The former section of the General Code provided that when the appeal is taken by a person as guardian, executor or administrator, who has given bond as such in the State, no undertaking shall be required from such guardian, executor or administrator, etc.[62] These matters are omitted from the new code, but they are governed by general provisions of the General Code.[63]

[59] § 11212 G. C., § 36.

[60] See Kinkead's Pract. 593.

The section of the General Code § 12226 G. C., provides that a party desiring to appeal his cause to the Circuit Court shall within three days after the judgment or order is entered, file with the clerk of the Common Pleas Court written notice of such intention, and within thirty days after the entering of such judgment or order, give an undertaking with sufficient surety, to be approved by the clerk of the Court or a judge thereof, as hereinafter provided.

A circuit court has held that the notice must be signed by the party's name and not by the attorney, in the attorney's name.

For form of bond, see §§ 41, 47 and 48.

There may be some doubt on this question as to the method of procedure. It is possible that the method should be followed as provided generally for appeals from the Probate Court. § 36 *et seq.*

[61] This is evidenced from the fact that in condemnation proceedings by private corporations the Probate Court is made a court of original jurisdiction.

[62] § 6451 R. S. former.

[63] See §§ 12227-12468, 12268 G. C.

§ 1780. Probate Court shall furnish transcript.

The previous statute provided [64] that the Probate Judge should furnish a transcript, etc., upon the filing of the notice of an intention to appeal. The new code contains no specific provision. The law generally thereto would be applicable.[65]

§ 1781. Original papers may be used.

The statute formerly contained a provision [66] that the original papers pertaining to the proceeding may be used upon the hearing or inquiry in the Court of Common Pleas, and shall be transmitted by the Probate Judge for that purpose. While this is not now the present statute, yet it may be considered the law in reference thereto.

§ 1782. Corporation not to appeal; or prosecute error except on leave.

The previous statute [67] provided that the municipal corporation shall have no right of appeal; nor shall it prosecute error, except upon leave of the reviewing Court or a judge thereto. This is stricken out of the provisions of the new code and consequently in a prosecution of appeal or error no leave is required of the reviewing Court.

§ 1783. Effect of failure to pay for or take possession of land within six months. "When a municipal corporation makes an appropriation of property, and fails to pay or take possession thereof, within six months after the assessment of compensation shall have been made, its right to make such appropriation on the terms of the assessment so made shall cease and determine, and lands so appropriated shall be relieved from all incumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect, except as to the costs adjudged against the corporation. Upon motion of any defendant, such costs may be retaxed, and a reasonable attorney's

[64] § 2257 R. S.
[65] See §§ 49, 50 and 51.
[66] § 2258 R. S.
[67] § 2259 R. S.

fee paid to the attorney of such defendant, which, together with any other proper expenses incurred by the defendant, may be included in the costs." [96 v. 30 § 22.] [68]

[68] § 3697 G. C.

The above contains substantially the provisions formerly found in § 2260 R. S.

See §§ 1725, 1726.

After six months owner may waive his rights to property and ratify proceedings by accepting compensation. Ryan vs. Hoffman, 26 O. S. 109.

But it is not bound to accept compensation deposited after six months. Cin. v. Hosea, 10 C. D. 618; 19 O. C. C. 744; affirmed 66 O. S. 687.

Failure to take is no bar to new proceedings. Southern Ry. vs. Haas, 42 O. S. 239.

CHAPTER XCVI

ROAD APPEALS.

§ 1784 Appeals in road matters.
§ 1785 When order to open road to be executed.
§ 1786 When may appeal.
§ 1787 Matters upon which appeal may be taken.
§ 1788 Matters upon which appeals lie.
§ 1789 Questions for the jury and the court.
§ 1790 Who may appeal.
§ 1791 Notice of appeal and specifications shall be in writing.
§ 1792 Notice of intention to appeal, when to be given.
§ 1793 Form of notice of intention to appeal.
§ 1794 Bond, etc.
§ 1795 Form of appeal bond.
§ 1796 Date when notice must be given.
§ 1797 Appeal by minors.
§ 1798 Commissioners shall transmit papers.
§ 1799 Transcript.
§ 1800 Entry in probate court.
§ 1801 Hearing preliminary questions and motions.
§ 1802 Power of court to dismiss action.
§ 1803 Hearing on questions.
§ 1804 Granting appeal.
§ 1805 Trial by jury, drawing, etc.
§ 1806 Entry, preliminary hearing, etc.
§ 1807 When cases may be consolidated.
§ 1808 Challenge of jurors.
§ 1809 Oath of jurors, form.
§ 1810 Right to view premises, etc.
§ 1811 View, etc.
§ 1812 Trial.
§ 1813 Verdict of jury; what it shall contain.
§ 1814 Verdict, form, etc.
§ 1815 Journal entry confirming verdict, etc.
§ 1816 Record of proceedings.
§ 1817 Taxing costs.
§ 1818 Enforcement of judgment.
§ 1819 Transcript and papers certified, etc.
§ 1820 When orders for payment of compensation and damages shall be issued.
§ 1821 Additional compensation, how.
§ 1822 Order as to payment of damages.
§ 1823 Entry form.
§ 1824 Procedure when proceedings for appropriation abandoned.
§ 1825 Abandonment.
§ 1826 Fees and compensation of officers.
§ 1827 Procedure after judgment establishing improvement.
§ 1828 Reversal, etc.
§ 1829 Appeal, limitation.
§ 1830 Review of judgment of Probate Court.
§ 1831 Proceedings after trial.
§ 1832 Entry, form.

§ 1784. Appeals in Road Matters.

Under the road law as it existed when the second edition of this work was issued, there were at least four different proceedings in road matters, each of which might reach the Probate Court by way of appeal.

The first was an appeal from the order of the County Commissioners in granting a road. This was considered in chapter XCVI.

The second was an appeal from the order of the Township Trustees granting a road. This was considered in chapter XCVII.

The third was an appeal upon the question of compensation, etc., from the order of the County Commissioners or Township Trustees. This was considered in chapter XCVIII.

The fourth was an appeal on question of compensation when exceptions were taken to the action of the Commissioners or Trustees in approving a report of viewers, etc. This was considered in chapter XCIX.

All these causes and methods of appeal in road matters have been consolidated and there is now but one method of appeal to the Probate Court in Road Matters.

There are still a number of different instances in which there may be an appeal. The first is that provided by § 6891 G. C., *et seq.* This is the general provision and provides for appeals from the order of County Commissioners in locating, establishing, altering, straightening, widening or changing the direction of a public road. No other body now has authority to establish a public road but the County Commissioners, excepting when the same might be done by virtue of the law granting to the Township Trustees or the State Highway Authorities power to reconstruct, etc., a public road, and when any such authority is conferred and an appeal is granted, it is to be done under Sec. 6891, G. C., *et seq.*

Thus where a road is reconstructed, etc., by the Township Trustees, an appeal is granted for compensation under Sec. 3298-11, G. C., as provided in Sec. 6891-1, G. C., and a like provision is found when a township road district reconstructs a road under Sec. 3298-36, G. C.

So also when a county highway superintendent enters for the purposes provided for in Sec. 7207, G. C., and the County Commissioners or the Township Trustees can not agree on compensation, an appeal is provided according to the provisions of Sec. 6891-1, G. C.

Also when the line of a State highway deviates, etc., and it is necessary to appropriate certain lands, the County Commissioners or the Township Trustees must secure the land required, Sec. 1201, G. C., and an appeal * * * as provided in Sec.

6891-1, G. C., *et seq.*, from the compensation by them allowed. The statute does not seem in the latter case to provide an appeal upon any question but that of compensation. The order of the State authorities deciding its necessity seems to be final upon the right of taking the property and the vesting of such power in the State Highway Commissioner is not unconstitutional so long as the right to appeal to a jury on the question of compensation is provided for. Appeal is also provided for in case of the apportionment of assessment between the life tenant and remainderman. Sec. 3298-15, G. C., etc.; Sec. 6925 G. C.

§ 1785. When order to open road shall be executed.

No order for the County Commissioners for locating, establishing, altering, straightening, widening or changing the direction of a public road, shall be executed until ten days have elapsed after the County Commissioners have made their final order in the matter of compensation and damages, on account of said improvement. If, at the end of ten days, any person, firm or corporation interested, shall have effected an appeal, then said order shall not be executed until the matters appealed from shall have been disposed of in the Probate Court. [106 v. 583, § 37.]*

§ 1786. When may appeal.

The object and purpose of this preceding section is to give the person desiring to appeal time in which to perfect his appeal. If his appeal is perfected, by giving the required notice and filing bond, and a transcript is filed in the Probate Court, then all further action on the part of the commissioners is stayed, until the matter of appeal is decided by the courts.

§ 1787. Matters upon which appeal may be taken.

Any person, firm or corporation interested therein, may appeal from the final order or judgment of the county commissioners made in the proceeding and entered upon their journal determining either of the following matters:

1. The compensation for land appropriated.
2. The damages claimed to property affected by the improvement.
3. The order establishing the proposed improvement.
4. The order dismissing or refusing to grant the prayer of the petition for the proposed improvement. [106 v. 583, § 38]**

§ 1788. Matters upon which appeal lies.

The statute specifies four matters upon which an appeal may be taken.

* § 6890 G. C. ** § 6891 G. C.

The first is that upon the question of compensation for the land actually taken in the improvement. Not much question can arise as to what it may include. If a property right has been taken, even if the injury be but nominal, compensation must be allowed.

The second is for damages to property affected by the improvement. This means injury that may result to property rights and not included in the property taken, for which compensation must be allowed.

The third is from the order establishing the proposed road. This would include all the proceedings upon which this order was granted. This would seem to take to the Probate Court all questions that might have been raised before the Commissioners that would affect the legality of their decision in making the order. Upon all questions that might be raised upon this third ground, except whether or not the improvement will be conducive to the public convenience and welfare, will be questions for the court, and not the jury.

The fourth is from the order dismissing or refusing to grant the prayer of the petition. This would give the appellant the right to have the question as to whether the improvement will be conducive to the public convenience and welfare submitted to a jury, provided there were no other legal reasons justifying the order of dismissal made by the Commissioners.

§ 1789. Questions for the Court and Jury.

If the party appeals on all the grounds permitted by the statute, the effect would be just the same as if the right of appeal was granted by the statute in general terms upon the orders made by the Commissioners in establishing the road, and the rules generally applicable to appeals would apply. But the statute permits or rather requires the person appealing to specify the grounds of appeal, and therefore the matter could only be heard in the Probate Court on the matters specified in the notice of appeal. If only the matter of compensation or damages was appealed from, it might be held that the party had waived all irregularities that might have been in the proceedings of the Commissioners and the legality of the order of the Commissioners granting the improvement could not be gone into, and the only thing for the court to do, provided the appeal is properly perfected, is to submit to the jury these questions.

However, if the appeal is from the order establishing the improvement, then all matters pertaining to the legality of the action of the Commissioners would be before the court; and if this matter should appear from the record it would be a matter for the court to decide, and on motion the court might dismiss and hold for naught the entire proceedings. If the matter was appealed upon the question of compensation or damages, and the record likewise should show that the person appealing had not presented his claim in writing, and within the required time, the proceedings in appeal should be dismissed. These matters which are strictly of a legal character, are for the court to decide. The three questions for the jury to decide, provided they are all raised by the appeal, are, *first*, the amount of compensation; *second*, the amount of damages; *third*, whether the improvement will be conducive to the public convenience and welfare.

§ 1790. Who may appeal.

The statute says any person, firm or corporation interested therein may appeal. Just what the nature of this interest must be the statute does not determine. It can not be confined to persons having rights directly affected by the improvement, for the statute permits one to be a petitioner if he is a free holder and resides in the vicinity. And if the Commissioners refuse to grant the petition, such petitioner would certainly be a party interested therein even though not directly affected in his property rights.

However, if a person is neither a petitioner or is not in any manner affected in his property rights by the proposed road, it is not easy to see how he would have sufficient interest to constitute him a "person interested therein" within the meaning of the statute.

The former statute, however, provided an appeal might be taken by a person having an estate in fee, for life, or years, in lands or tenements, situated in a township in the county, in or through which such road passes.

A person interested we think would include a petitioner, all persons whose property rights might be affected, and possibly such other persons owning land in such close proximity to the proposed road, that they might be considered as interested in the question whether or not the road should be established.

§ 1791. Notice of appeal and specifications shall be in writing. (§ 6891-1.)

Any person, firm or corporation desiring to appeal to the Probate Court, when the improvement is located in two or three counties, may appeal to the Probate Court of either county in the manner hereinafter provided.

Any person, firm or corporation desiring to appeal from the final order or judgment of the county commissioners upon any of said questions, shall at the final hearing had before them upon such matters of compensation or damages, give notice in writing of an intention to appeal, specifying therein the matters to be appealed from. The commissioners shall fix the amount of the bond to be given by the appellant, which shall be reasonable, and cause an entry thereof to be made upon the journal.

Appeal bond. The appellant within ten days thereafter shall file, with the auditor, a bond in the amount so fixed with sureties to be approved by the auditor, and such bond shall be conditioned to pay all costs made on the appeal, if the appellant fails to sustain such appeal or the same is dismissed. [106 v. 584, § 39.]

§ 1792. Notice of intention to appeal—when to be given.

The time of the final hearing upon the matters of compensation and damages is the time fixed when a notice in writing must be given. This is an awkward statutory provision. Until this final hearing is completed and the order is made, it is presumed that the parties have no knowledge what it will be, and are not in a position to determine whether it is desirable to appeal or not. It would have been more consistent if a short time would have been fixed after the final order is made, within which the notice of appeal should be given, say three days.

If any one requests, it is suggested that after the commissioners have finally made up their minds, that they adjourn the matter for a few days to give the party time to consider whether he wishes to appeal, and upon what matters he desires to appeal. Generally, however, it is known in time that notice can be filed at once.

If a party desires to appeal he should take no chances, but have his notice ready and file it as soon as the final vote is taken. The commissioners shall fix the amount of the bond, and the party giving the notice has ten days in which to file his bond. This notice should be filed with the auditor.

§ 1793. Form of notice of intention to appeal.

In the matter of the road petitioned for, A. B. et al.:

The undersigned hereby gives notice that he intends to appeal from the orders of the commissioners herein, on the following matters:

1. Compensation for land appropriated.
2. Damages claimed to property affected by improvement.
3. The order establishing the said improvement.

[*Or*, if the cases should be such.]

4. The order dismissing or refusing to grant the prayer of the petition for the proposed improvement.

.....
.....

In order that the record might show the fact if a minor or other person under a disability appeals, it would be well if this notice would show the fact of disability.

BOND, ETC.

Within ten days from the time the order is made the appellant must file a bond with the auditor. The commissioners having fixed the amount, the bond is made subject to the approval of the auditor. When filed the auditor should mark his approval thereon and the date of filing. Minors and persons under disability need not give bond. [§ 6894.] Their property, however, is liable for costs, etc. At the end of the final order this fact of there being a minor, etc., and his not being required to give bond should be added when there is an appeal and a minor owns property affected.

FORM OF ENTRY—FIXING AMOUNT OF BOND, ETC.

[*Title.*]

C. D. having given notice in writing of his intention to appeal from [here insert matter appealed from] it is ordered that the amount of his appeal bond be fixed at $..... [*or*, if a minor (and it appearing that C. D. is a minor) no appeal bond is required of him] and upon the filing of such bond the auditor is directed to make a transcript of the procedure herein and file the same in the Probate Court of this county.

§ 1794. Bond.

Within ten days from the time the order is made, and notice of appeal is filed, the appellant must file a bond with the auditor. The commissioners having fixed the amount of the bond, it is made subject to approval by the auditor. When filed the auditor should mark his approval thereon, and the date of filing. Minors and persons under a disability need not give bond, but they should give notice of an intention to appeal. These matters are all jurisdictional so far as the right of appeal is concerned, and it would be well if appellant would personally see that they are done.

§ 1795. Form of appeal bond.

KNOW ALL MEN BY THESE PRESENTS, That we, A. S., L. R. and M. S., of ..... County, Ohio, are held and firmly bound unto the State of Ohio, for the use of ..... County, in the sum of ..... dollars, to the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents:

Signed by us at ....., on the ..... day of ....., 19...

The condition of the above obligation is such that whereas, the said A. S. appeals to the Probate Court of said ..... County, Ohio, from the final order of the commissioners of said ..... County, made at their ..... session, ..., 19..., establishing a county road [*or*, altering or

vacating a state or county road, *or*, changing the width of a county road, as may be] from ..... to ....., petitioned for by A. B. and others.

Now, if the said A. S. shall pay all costs that may be adjudged against him in the Probate Court, or in any other court to which the proceedings may be removed by petition in error, then this obligation shall be void; otherwise it will be and remain in full force and effect.

A. S., L. R., M. S.

Filed and approved ....., 19...

W. C., County Auditor.

[*Entry as to filing bond, and form of.*]

To keep the chain of the road record unbroken, an entry of the filing of the bond should be made in the commissioners' road record, which may be as follows:

In the matter of the ..... road, petitioned for by A. B. and others. } As to filing appeal bond.

A. S. appeals from the order of the county commissioners of ..... County, Ohio, made at the ..... session, 19..., establishing said road [*or*, otherwise, as may be, see the bond] and "has this day filed his appeal bond, approved by the auditor of said county."

§ 1796. Date when notice of appeal must be given. (§ 6892.) In case the petition for an improvement is dismissed, or the prayer thereof be not granted, then a person, firm or corporation desiring to appeal therefrom must give the notice hereinbefore provided on the date when the order is made dismissing said petition, or refusing to grant the prayer thereof, and file the bond required within the time prescribed herein. [106 v. 584, § 40.]

§ 1797. Appeal by minors, etc. (§ 6893.) Minors, or other persons under disability, or their respective guardians, may appeal to the Probate Court as aforesaid, without giving bond for the payment of costs. The Probate Court shall, however, cause an entry showing such disability to be made on the journal. The estates of such persons shall be liable for all costs adjudged against them or their legal representatives. [106 v. 584, § 41.]

When the party appealing is a minor, etc., this section makes it the duty of the Probate Court to cause such matter to appear on its journal. It would have been better had this duty been cast upon the commissioners, and it would be well if, notwithstanding this provision, the commissioners would make such entry.

§ 1798. Commissioners shall transmit papers to court. (§ 6894.) Within ten days after the filing of such appeal bond or the making of the entry as aforesaid, the county commissioners shall transmit to the Probate Court the original papers in the proceedings, and a certified transcript of the record of said commissioners of all proceedings in connection therewith. Upon receipt thereof, the probate judge shall forthwith docket the cause and the appellants shall be designated as the plaintiffs, and the county commissioners and other parties in interest shall be designated as defendants. [106 v. 584, § 42.]

§ 1799. Transcript.

This transcript means a certified copy of the commissioners' journal, containing the record of all the proceedings had in the road improvement under consideration. It must be transmitted within ten days after the bond is filed. If the auditor should fail so to do the right of appeal would not be lost. [Geddes vs. Rice, 24 O. S. 60.]

When the transcript is filed with the probate judge, it is his duty to docket the case and put an entry on the journal of this fact. The party appealing shall be the plaintiff and the county commissioners and the petitioners in the original proceedings shall be the defendants. If several parties appeal, an entry should be made of each one separately, and then the court should further order that all the cases should be consolidated and tried together.

The statute does not seem to provide for joint appeal, and a proper proceeding where several persons desire to appeal would be for them to perfect their appeals separately, and the court thereafter might order the cases to be tried together. The court must fix the time for the hearing of preliminary motions and examination of the papers filed. This hearing shall be fixed not more than five days thereafter.

§ 1800. Entry in Probate Court.

A. B. vs. Board of Co. Com. of ..... County and C. D.

PROBATE COURT ..... COUNTY, OHIO.

This day there was filed in this court a transcript of the proceedings heretofore had by the commissioners in the matter of a road petition for by C. D. and others, duly certified to, as showing all the proceedings had County, Ohio, made at the ..... session, 19..., establishing said road Also all the original papers in said matter were this day received from the auditor of said county in reference to the matter appealed from. It is therefore ordered that the hearing of preliminary motions and examination of papers so filed be fixed for the ..... day of ....., 19..., at ..... o'clock, and it is further ordered that the plaintiff notify the defendants of the time of said hearing.

If the party appealing is a minor or a person under a disability, the court must cause the entry to show the fact.

§ 1801. Hearing of preliminary questions and motions. (§ 6534-1.) The probate judge shall designate a day not exceeding five days thereafter for the hearing of all preliminary questions and motions on said appeal, and for the examination of the papers and proceedings. On the day so fixed all preliminary motions and questions arising upon the appeal shall be heard and determined, and if the Probate Court finds that

the proceedings are irregular, or that the appeal is not perfected according to law, he shall dismiss it at the cost of the appellants, and certify such dismissal with his proceedings thereon to the commissioners. The court may waive technical defects, errors or omissions in such proceedings. [106 v. 584, § 43.]

§ 1802. Power of Court to dismiss action, etc.

Sec. 6894-1, G. C., bears a close similarity to Sec. 6469, G. C., formerly relating to appeals in county ditch cases,[1] which in turn bear considerable similarity to the statutes formerly relating to appeals in township ditch appeals.[2]

In a case in the Circuit Court,[3] affirmed by the Supreme Court without opinion,[4] it was held that in "The Probate Court on appeal from the proceedings of township trustees in the location of a ditch, is not made a court of error to review their record and pass upon error and irregularities therein; but its jurisdiction is by statute limited to hearing and determining the preliminary questions pertaining to the case, and the dismissal of the appeal, if it is found that the same is not perfected according to law."

In this case the error complained of was that no sufficient bond was filed by the petitioners with the township trustees, etc. If this was true, as a matter of course the trustees had no jurisdiction to act, and all proceedings were null and void. Whether or not this question was raised in the Probate Court does not appear. The only thing disclosed was that the Probate Court found the proceedings relating to the appeal was regular, and ordered the matter submitted to a jury. It may have been for the reason that the matter was not properly raised in the Probate Court, that the decision of the Circuit Court was affirmed by the Supreme Court.

In a subsequent Circuit Court case,[5] affirmed without opinion,[6] the doctrine that the Probate Court had no authority to review the proceedings of the trustees for supposed errors or irregularities, etc., was applied evidently, on the authority of the case in the first Circuit Court report. The question here made was whether under the petition presented to the trustees

1 § 1833 G. C. The law relating to ditch appeals has been materially changed by the act of 1919.

2 § 1857 G. C.

3 Miller vs. Weber, 1 C. C. 130.

4 19 Bull. 350.

5 Board of Trustees vs. Jackson, 2 C. C. 48.

6 27 Bull. 187.

they had power to extend the improvement 290 feet beyond the terminus described in the petition. The Probate Court took the view that they had no such authority, and on trial limited the matter at issue to the route covered by the petition, and the Circuit Court held that the Probate Court had no right to limit the matter, but should have heard the case on the route as ordered by the trustees.

In this case two questions were involved, on either one of which the Probate Court might have been reversed, to-wit: *first,* that the Probate Court could not review the order of the trustees; *second,* that even if it had power to review, there was no error made by the trustees. The first was only considered by the Circuit Court, but its decision might have been affirmed by the Supreme Court on the second question.

The doctrine that the Probate Court had no authority to review, etc., was followed in a county ditch appeal case,[7] which was likewise affirmed by the Supreme Court without opinion.[8] Here the question involved was whether the commissioners could locate a county ditch over the route of a township ditch. The Nisi Prius Court held that they could, but even if they could not, this question could not be raised on appeal. Thus it will be seen that the question whether or not the court could review the proceedings of the commissioners and reverse for error, was not a vital one if the order the commissioners made was within their jurisdictional powers. There is much in the course of reasoning of the judges delivering the opinions in these cases that would justify the holding that the Probate Court has no power to review the orders of the commissioners, etc., but it has never been so held by the Supreme Court, nor was such holding necessary to justify the inferior courts in the decisions by them made. It must certainly be admitted that the statute is not clear or unequivocal in the language employed.

But we believe, while admitting that the law relating to road appeals is very similar to that relating to ditch appeals, that the proper and legal thing for the Probate Court to do, especially if the appeal is made from the order of the commissioners granting or refusing to establish the improvement, is on the hearing of preliminary questions, especially on motion of a party to review the proceedings of the commissioners, and if substantial

[7] Marsh vs. Clark Co. Commissioners, 26 Bull. 3.

[8] 33 Bull. 121 and 131.

error has been committed, to dismiss the entire proceedings and certify the action back to the commissioners, and let the petitioners commence anew their proceedings.

If the error is not jurisdictional and does not materially affect the rights of any one, it should not be considered vital, and the court should allow a correction by amendment when that is possible to be done.

We have come to this conclusion principally for two reasons: *first,* a fair and liberal construction of the statute justifies it; *second,* it is the proper and logical way in which such errors should be reviewed.

To the court's findings, exceptions may be reserved, which may all be reviewed in proceedings in error in the Common Pleas Court, made after the matter has been submitted to a jury. We think, however, that only such questions as appear from the record, *i. e., an examination of the papers and proceedings,* could be considered. If the errors complained of do not appear on the record, a suggestion of diminution of the record should be made, and the records made to conform to the truth.

To hold that the Probate Court can not review the proceedings of the commissioners, is to split up the remedies that may be pursued to prevent the injustice that may follow therefrom. If the Probate Court can not review such errors, it is difficult to see how the Common Pleas Court could have power to review them, on prosecution of error to that court from the proceedings in the Probate Court—and if it could not, the complaining party would be compelled to prosecute error in a separate action, direct from the commissioners to the Common Pleas Court, and at the same time prosecute his appeal in the Probate Court. Further, the finding of the jury in the Probate Court, if it was in the negative on any of the questions submitted to them, would nullify the action of the commissioners, whether such action were legal or illegal, and make unnecessary any other action. Yet this could hardly occur before the time limit for filing a petition in error to the Common Pleas Court direct from the commissioners had expired.

§ 1803. Hearing on questions.

If all the provisions of the statute have been complied with, then the action is properly pending in the Probate Court when

the transcript of the proceedings before the commissioners is filed in such court, and no finding of the Probate Court could affect their legality; however, as a precautionary matter that a jury might be called and attaching costs incurred, when there is legally no right to an action, or to even a pending action, the statute wisely provides that the court shall fix a day when preliminary questions may be heard. While every person who has received notice of the proceedings when the same was pending before the commissioners is bound to take notice of all future proceedings without further notice, the court should be satisfied before it goes into the hearing on preliminary questions, that the defendants know of the time of this hearing. If no objection is made that could properly be made to any matter, and the court should make its finding that the appeal has been properly perfected and the proceedings are substantially regular, the finding of the court would be conclusive and no such question could be again raised.

In view of this fact it becomes very important that the parties interested in contesting the action should make their objections in writing and exceptions be reserved that the record may show all things fully.

There is no reason why a party should sit idly by and allow a jury to be called and all the cost of a trial incurred, and then if the matter ends not to his liking, he be permitted to raise a question, and cause it dismissed, when it could have been done before the jury was called.

§ 1804. Granting appeal.

If no question has been raised as to the legality of the proceedings before the commissioners, then the court should consider the questions which relate to the legality of the proceedings relating to the appeal. That is, that a proper transcript was filed within the time limits and that a proper bond was filed within the required time, and that a proper notice of intention to appeal was given at the time required, etc. If the proceedings in relation to the appeal have been so irregular as to materially affect the legality of the proceedings, or if the matters required by the statute have not been complied with, so that the appeal has not been properly perfected, the proceedings of appeal should be dismissed, and the case should be certified back

[9] Geddes vs. Rice, 24 O. S. 60.

to the commissioners, who would then proceed with the improvement.

These matters relating to appeal are remedial and are liberally construed, and if the court finds the provisions of the statute have been substantially complied with, the proceedings of appeal ought not to be dismissed. If the appellant has done whatever he was required by law to do, he should not be denied his remedy. Thus if the auditor fails to file the transcript within the ten day limit, or, if he filed an imperfect transcript,[9] this would not defeat the appeal. If there are matters relating to the appeal or to the proceedings before the commissioners that are not of a substantial nature, they should be disregarded by the court, and where proper, supplied by amendments so that substantial justice should be meted out to all.

§ 1805. Trial by jury; drawing and listing of names; venire. (§ 6894-2.) If the probate judge finds that said appeal has been properly perfected, and that said proceedings are substantially regular, he shall fix a day, not more than twenty days thereafter, for the trial of the case by jury. He shall forthwith notify the clerk of the court of common pleas, who shall cause to be drawn from the jury box in the manner provided by law, the names of sixteen persons as jurymen. The clerk shall make a list of such names in the order in which they are drawn and certify it to the probate judge, and he shall issue a venire commanding them to appear on the day, and at the hour set for trial. He shall deliver it to the sheriff who shall serve it within five days thereafter, and make return of such service before the day set for trial. [106 v. 585, § 44.][10]

§ 1806. Entry on preliminary hearing. If the court finds that the appeal has not been perfected, or that the proceedings are irregular and clearly illegal, then a simple entry of dismissal might be put on ordering the costs paid as the court might deem proper. If the appeal is perfected then an entry should be put on containing a finding of such fact and ordering a jury to be drawn, which entry may be in the following form:

[*Title.*]

This day having been heretofore fixed for the hearing of preliminary questions and motions, and for an examination of the papers and proceedings herein, the parties appeared [or failed to appear, as the case may be], and this cause came on to be heard on the motion of defendants to dismiss said appeal [and was argued by counsel], and the court, being fully advised in the premises, do find said motion not well taken, and the same is overruled [to which defendants except and their exceptions are entered of

[10] This notice would be similar to that in appropriation cases.

record], and the court having examined the papers and the proceedings, do find that said proceedings are substantially regular and said appeal is properly perfected; and thereupon the court fixes the ..... day of ....., 19.., at 8 o'clock, a. m., as the time for the trial of said case to a jury, and it is ordered that a notice issue to the clerk of the Court of Common Pleas, and the sheriff of the county, to draw sixteen names from the jurybox to serve as a jury herein, as provided by law; that said clerk certify a list of the names so drawn, in the order in which they are drawn, to this court forthwith, and that a venire issue for said jurors, returnable, as required by law, commanding them to appear at the day and hour above named, until which time this cause stands adjourned.

....., Probate Judge.

§ 1807. When cases shall be consolidated. (§ 6894-3.) If more than one party appeal, the probate court shall order the cases to be consolidated, and tried together, but the rights of each person, firm or corporation, as to compensation or damages shall be separately determined by the jury in its verdict. [106 v. 585, § 45.]

[**Consolidation of cases—Entry, etc.**] The statute does not indicate at what time in the proceedings that this order for consolidation should be made, but it ought to be made as soon as all appeals have been made that can be made. When the cases are ordered consolidated, the questions presented on preliminary hearing might be tried at the same time. If any plaintiff has not perfected his appeal, then as to him, the court should make such order as is proper. The idea of consolidation is, that there shall be but one jury selected, parties, however, having a right to have their cases separately heard after a view of the premises has been made. The entry consolidating several cases might be as follows:

CONSOLIDATION OF CASES.

..... vs. The board of commissioners of ..... County, and .... vs. The board of commissioners of ..... County, and ..... [So state each appeal, then say:]	..... County, Probate Court. Appeal from the decision of the commissioners as to [describe matter appealed from]. ..... County, Probate Court. Appeal from the commissioners' decision as to ..... [State matter appealed from.]

The above stated cases, being all appeals from the decision of the county commissioners in reference to the several matters noted in each, in the same proceedings, to-wit: [state the improvement by the name or description by which it is known in the record of commissioners' proceedings]. It is ordered that said several causes be consolidated, and tried together, as provided by law.

....., Probate Judge.

§ 1808. Challenge of jurors. (§ 6894-4.) On the trial, the probate judge shall take the list of jurymen as furnished by

the clerk and call each name in the order in which it appears on the list, until twelve answer, when each of them must answer as to his qualifications as a juror. If a juryman is challenged for cause and excused by the court, the next on the list shall be called, until the panel is full.

[**Filling of panel.**] If the panel is not filled from the jurymen whose names appear on the list, the sheriff shall fill the panel from among the bystanders who have the lawful qualifications, unless for good cause shown the court order a special venire to issue. The appellants shall be considered as one party and the defendants as one party, and each party shall have the number of peremptory challenges allowed in civil cases in the common pleas court. [106 v. 585, § 46.]

As the statute now stands[11] this would give all the plaintiffs four peremtory challenges and all the defendants the same number.[12]

§ 1809. Oath of jurors. (§ 6894-5.) The probate court shall administer to the jurors an oath that they will faithfully, impartially and to the best of their ability, determine the particular matters appealed from, and render a true verdict according to the evidence, under the charge of the court. [106 v. 585, § 47.]

FORM OF OATH TO JURY.

You and each of you, do solemnly swear that you will faithfully, and impartially and to the best of your ability, determine the matters particularly appealed from, in the cause now pending before you, in which .... are plaintiffs and .... are defendants, and render a true verdict according to the evidence under the charge of the court. This you do as you shall answer unto God.

§ 1810. Right to view premises before testimony submitted. (§ 6894-6.) On motion of either party, the jury under the care of an officer of the court and with such person or persons as the court may designate to show them the premises, and before any testimony shall be submitted, except the plat and a survey of the improvement and the title papers of the claimant, if produced, which the jury may take with them, shall examine the route or location of the improvement as petitioned for or as ordered, and the property of the several claimants who have appealed on account of property taken therefor, or alleged to be damaged thereby, and after making such examination, the jury shall return to the probate court at the time appointed therefor. After the jury has returned to the probate court, the parties shall offer their evidence to the jury under the direction of the court, upon the matters appealed from.

11 § 11439 G. C.

12 See § 11437 G. C. for causes for challenge.

The rules of law and procedure governing civil cases in the common pleas court shall apply to the trial of the cause in the probate court. [106 v. 585, § 48.]

§ 1811. **View, etc.** Either party has a right to demand a view of the premises along the route of the proposed road; invariably such right is exercised. The jury will be under the care of an officer of the court, and such other persons as the court may designate may go along to *show the jury the premises.* These persons should not try to influence the jury, other than call the jury's attention to pertinent matters along the route that will enable the jury to properly consider the questions for them to decide. This view shall be made before any evidence is heard. The court should charge the jury before the view as to their duties on such view.[13] An entry should be put on, which may be in the following:

FORM OF ENTRY—ORDERING VIEW.

[*Title.*]

A jury having been impaneled and sworn as provided by law, on motion of ..... it is ordered that said jury under the care of ....., an officer of this court, shall examine the route and location of the said proposed road improvement, and shall examine the property of ..... and ....., claimants, who have applied on account of property taken therefor or damaged thereby, and ..... and ..... are hereby designated as persons to accompany said jury and show them the premises. After making such examination, the jury is ordered to return to this court on ..... day of ....., 19..., at 8 o'clock, a. m., for further hearing, to which time this cause is adjourned.

.....

§ 1812. **Trial.** At the time to which adjournment has been made, the case shall come on for trial under the rules of law and procedure governing civil cases in the Court of Common Pleas. In such trial the defendants, petitioners, shall be entitled to the opening and close, and it might be said the burden of proof is on them.[14]

When several persons appeal, they are not entitled to separate trials, but the rights of each party appealing is entitled to have his compensation and damages separately determined by the

[13] See Thomas vs. Commissioners, 5 N. P. 449; 5 Dec. 503, where there is given a charge to a jury before view in a ditch proceedings, which may aid in forming a charge to be given in a road appeal.

[14] See recent case of Martin vs. Columbus, where it is held that in the technical sense of the term there is no burden of proof. That the jury merely acts as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted. 101 O. S. —.

jury, and they must find separately the compensation of each in their verdict.

The view is not evidence, although if no other evidence is offered I apprehend a verdict would not be set aside for want of evidence to sustain, or because it is not sustained by the evidence. The statute is not as broad as that in distinct appeals, where it has been held that the view is evidence, and the court would probably hold that the rule should be applied the same as in condemnation cases.[15]

§ 1813. Verdict of jury; what it shall contain. (§ 6894-7.) At the conclusion of the trial, the court shall charge the jury and the jury shall find and return a verdict separately upon each claim for compensation and damages, if a final order or judgment or the county commissioners in reference to compensation and damages be appealed from. The jury shall also determine in their verdict whether the improvement petitioned for or granted will be conducive to the public convenience and welfare, if an order establishing the proposed improvement or dismissing or refusing to grant the prayer of the petition be appealed from.

[**Rendition of judgment.**] If a new trial shall not be granted for cause shown, the probate court shall render a judgment in favor of the appellants for the amount of the verdict, if any, returned by the jury in their favor. He shall also make a finding for or against the improvement, based on the verdict of the jury.

[**Error proceedings.**] In case of error proceedings to the common pleas court, a bill of exceptions shall be allowed as in cases in the common pleas court. [106 v. 586, § 49.]

§ 1814. Verdict, etc. At the conclusion of the trial—that is, the introduction and evidence and arguments of counsel—the judge shall charge the jury, etc., and the jury shall return a verdict, etc.

Particular attention of the jury should be called to the questions they must consider.

There are four things upon which there may be an appeal; only three could be in one appeal, to-wit: 1. Compensation; 2. Damages, and 3. Granting the improvement. The fourth matter upon which there might be an appeal, to-wit, refusing to grant the improvement, would necessarily be in an action on that question alone.

15 See Railroad Co. vs. Bolen, 76 O. S. 376. § 1710.

On the question of granting or refusing the improvement, the statute requires that the jury find whether the improvement granted as petitioned for, will be conducive to the public convenience and welfare.

It seems, then, that if the question was alone on the granting of the improvement the following might be used as a

FORM OF VERDICT.

[*Title.*]

We, the jury, impaneled as such in the above case, do find that the granting of the improvement as established by the order of the commissioners herein, will [not] be conducive to the public convenience and welfare, and that in favor of or against the establishment of the same as ordered by the commissioners herein.

.....
Foreman.

FORM OF VERDICT WHERE DAMAGES ARE CLAIMED, ETC.

[*Title.*]

We, the jury, duly impaneled as such in the above case, do find that the granting of the improvement as established by the order of the commissioners herein, will be conducive to the public convenience and welfare, and we find in favor of the establishment of the same.

We further find that John Jones is entitled, as compensation, to $..... and damages, $....., total, $.....; and Sam Smith is entitled, as compensation, to $..... and damages, $....., total, $.....

.....
Foreman.

Three-fourths must agree on all matters contained in the verdict,[16] and they must find for the entire route, not part; also must find on each person's claim for both compensation and damages.

§ 1815. Journal entry confirming verdict, etc.

....., et al.	..... County,
vs.	Probate Court.
The Board of Commissioners of ..... County et al.	Appeal [*or* consolidated appeal] from County Commissioners.

This day came the parties [by their attorneys], and the jurors whose names are attached to the verdict below, having been heretofore duly impaneled and sworn, according to law, and having been sent to view the premises, came again into court, and having heard the evidence and argument of counsel [and charge of the court], retired for deliberation; and in due time returned into court, and delivered their verdict in writing, which was received by the court, and which verdict is in the words and figures following, to-wit:

[Here copy verdict entire.] The said findings and said verdict are

[16] The three-fourths jury law applies in verdicts assessing the value of land taken for a county road. Smith vs. Craig, 40 O. C. C. 544.

approved and confirmed, and the court finds in favor of said improvement as established by order of the commissioners herein; and thereupon this cause came on further to be heard, upon questions arising touching the taxing of costs; and the court, being advised in the premises, proceeded to tax the costs herein as follows:

The appellants, ..., having prevailed in all matters appealed from by them, the costs are taxed in their favor, and against the defendants. It is therefore considered that the said ....., ..., ..., recover of the board of commissioners of ..... County, and ....., their costs herein taxed to $.....

....., Probate Judge.

[**Motion for new trial, etc.**] If any of the interested parties desire to take the case to a higher tribunal, they can do so on all matters had in the proceeding. The method to be pursued is the same as in ordinary jury trials had in the Court of Common Pleas in proceedings in error.

This matter of procedure is fully discussed in Bates' Pleading and Practice, Secs. 805 to 842, to which the reader is referred.

§ 1816. Record of proceedings in probate court. (§ 6895.) The probate judge shall make a record of all proceedings before him, and tax the costs in favor of the prevailing party and against the losing party. If more than one matter be appealed from, and a party prevail as to one matter and lose as to another, the court shall determine how much of the costs each party shall pay. The costs on motions or continuance and the like shall be taxed and paid as the court directs.

[**Taxing costs.**] If there are several persons upon the side taxed with costs, the court shall apportion the costs equitably among them, and in case several persons are interested on one side of the case and part of them fail, the court shall make such order as to costs as he shall deem just and equitable. In cases not hereinbefore specifically provided for, the court shall render such judgment in respect to costs as is equitable, and the county commissioners shall pay any costs adjudged against them out of the county treasury. [106 v. 586, § 50.]

§ 1817. Taxing costs. In these matters of appeal the appellants are plaintiffs and the other parties in interest shall be defendants. Just exactly who are meant by "the other parties in interest" is not clear, but the author is of the opinion that it is intended to mean the petitioners. Especially is this true if the commissioners had ordered them to pay the compensation and damages assessed in favor of or against the appealing landowners. If the appellants lose on all propositions, then the statute is clear that the cost must be taxed against them; if appellants prevail on all matters, the costs would need to be taxed against the commissioners and the

petitioners. The statute gives no rule for guidance, whether in such cases it shall all be taxed against the commissioners or all against the petitioners. If the road was not of sufficient public importance to justify the commissioners in issuing an order that the county pay the costs of compensation and damages, and the court is of the opinion that the commissioners were right in the order they made, then the court might be justified in assessing all the costs against the losing petitioners. However, no general rule can be laid down; the court should tax the costs in an equitable and just manner. If the road was of sufficient importance to justify the county in paying the assessments made for compensation and damages, then there are strong reasons for the court to assess the costs entirely against them.

Then, too, as the petitioners defendants generally employ counsel and assume the costs in that direction, there may be strong equitable grounds for, in almost every case where defendants lose, to assess a portion or all the costs against the county.

This is equally true in a case where an appeal is made from their order against allowing the road. The author remembers that once in a hotly contested ditch case where the petitioners bore the burden of the costs of employing counsel, a considerable sum, and they lost, all the costs were assessed against the county.

§ 1818. Enforcement of judgment. (§ 6896.) Any judgment rendered by the probate court in favor of any party in such cause may be enforced by execution issued out of the probate court on its own motion or at the instance of the persons entitled to said judgment or a part thereof, and the money when collected shall be paid to the persons respectively entitled thereto. [106 v. 586, § 51.]

[**Comments.**] If the amounts recovered on appeal do not exceed the amounts that had been allowed—in the aggregate —this must mean the aggregate allowed each claimant, and not the aggregate to all claimants, for if there is a variance between what any claimant was awarded by the commissioners and the jury, then the same must be adjusted by the commissioners, provided the county does not pay all the damages and assessments.

Where the amounts are not all the same, the auditor should wait for action by the commissioners before assuming to act under this section.

§ 1819. Transcript and papers certified to county auditor. (§ 6897.) The probate judge shall make a record of all proceedings had in the probate court, and after the termination of such proceedings, or at the conclusion of error proceedings, if error be prosecuted, shall certify the same to the county auditor, together with all of the original papers filed with the probate court on appeal. [106 v. 586, § 52.]

§ 1820. When orders for payment of compensation and damages shall be issued. (§ 6898.) If it appears by the transcript so transmitted to the county auditor, that the damages allowed on appeal do not in the aggregate exceed the amount assessed, approved and ordered paid to the claimants by the county commissioners, then the auditor shall forthwith make a record of the proceedings had on appeal, together with the proceedings had before such commissioners prior to the appeal, and the county auditor shall issue the necessary orders for the payment of compensation and damages in connection therewith. Such orders shall be drawn in favor of claimants for the amounts allowed them on appeal in all cases where appeal is taken to the probate court. [106 v. 587, § 53.]

§ 1821. Additional compensation and damages, how determined and paid. (§ 6899.) If the compensation and damages so assessed exceed in the aggregate the amount allowed by the commissioners, the county auditor shall lay the papers and transcript of the proceedings before the county commissioners at their next meeting. Thereupon, the county commissioners may order said improvement established, and order the additional compensation and damages allowed to be paid out of the county treasury, or they may order such additional compensation and damages to be paid by the petitioners, or they may order a portion of such additional compensation and damages paid out of the county treasury, and the balance thereof by the petitioners. In determining whether the damages so allowed on appeal exceed the amount of the aggregate allowed by the commissioners, the aggregate amount of such compensation and damages allowed in the probate court on appeal in favor of the appellants, shall be added to the compensation and damages awarded to the claimants who did not appeal. [106 v. 587, § 54.]

§ 1822. Order as to payment of damages, etc. When the auditor receives the transcript and orders of the court he must, at the next meeting of the commissioners, lay the matter before them. Whatever adjustment is necessary as to pay-

ment of the extra sums allowed, or vice versa (for, I assume, there will be cases in which the matter will work the other way and appellant will receive less than the commissioners had awarded him), the commissioners should take up the matter and make such orders as are just and equitable. From this order of the commissioners there seems to be no appeal, nor would the order be interfered with on proceedings in error unless there was fraud or manifest abuse of discretion.

§ 1823. Form of Entry.

[*Title.*]

This day the auditor laid the papers and transcript of the proceedings, had in the above matter, before the Probate Court of ..... County, Ohio, before the commissioners, and it appearing that the amount allowed appellants is greater in the aggregate than the sum allowed them as compensation and damages, before the commissioners, it is ordered that the said sum of $..... which is the sum so found in the aggregate in excess of that found by the commissioners, be paid by the county to the extent of $....., and the petitioners pay the balance, to-wit: $.....

That the sum of $....., including that made by former order of the commissioners in this action, to-wit: $....., and the above sum of $....., both be now paid by the county and that the petitioners pay into the county treasury the sum of $....., including that made by the former order of the commissioners herein, to-wit: $..... and the above sum of $....., within ten days from this date.

That upon the payment of the sum above ordered paid by the petitioners, the auditor is ordered to draw an order on the county treasury for the sum of $....., compensation and damages awarded John Jones, and the sum of $....., compensation and damages awarded Sam Smith; and that upon the payment of said sums and the issuance of such orders, it is ordered and directed that the said road petitioned for in this proceeding be, and the same is established and the county highway superintendent is ordered and directed to open the same, in such manner as in his judgment is wise and as provided by law.

And it is further ordered that the auditor make a full and complete record of the proceedings had in this matter, including those had before the commissioners and the Probate Court. The same to be made in the Road Record of this county.

§ 1824. Procedure when proceedings for appropriation of land abandoned. (§ 6900.) The county commissioners may abandon the proceeding for the appropriation of lands for any such improvements as aforesaid, upon paying into the probate court the amount of the appellant's costs and expenses, and attorney fees as fixed and determined by the court, and the court is hereby empowered to fix and determine the same. In case the county commissioners fail to pay the compensation and damages awarded to appellants within thirty days after confirmation of the verdict, on motion of any party entitled to such payment, the judge shall enter an order directing the county commissioners to make such payment, or deposit the same with the court within ten days, and unless the county commissioners within the time fixed make such payment or

deposit, they shall be held thereby to have abandoned the property, rights or interests sought to be appropriated, and all claims under said proceedings, and the judge shall so order.

[**Judgment against commissioners.**] He shall also enter a judgment against such commissioners and in favor of the parties entitled thereto for the amount of costs, expenses, and attorney fees, as the court may deem just, for which execution may be issued as in other cases. In case the county commissioners abandon the improvement contemplated by the proceedings, they shall so order upon their journal; provided, however, that in case error is prosecuted to the proceedings had in the probate court, the probate court shall make no order in respect to the payment or deposit of the amount allowed as compensation, damages, costs or attorney fees, until such error proceedings have been finally determined. [106 v. 587, § 55.]

§ 1825. Abandonment, etc. The commissioners, and through them the petitioners may abandon the proceedings, even after verdict is had and judgment rendered, provided they pay the costs and attorneys' fees as fixed by the court; that is, if the commissioners and the other parties interested as defendants feel that the improvement is not worth the cost, which they must pay, they can drop the matter.

This is abandonment by positive action on their part.

The other way is when they fail to pay the damages and compensation awarded, an interested party may invoke the order of the court, and unless the damages, etc., are paid within ten days, the proceedings shall be held to be abandoned.

In case error is prosecuted no order of abandonment can be made until the proceedings in error have been finally terminated.

§ 1826. Fees and compensation of officers. (§ 6901.) For their services required on appeal the officers and other persons herein mentioned shall be entitled to the fees and compensation which they are entitled to by law for like services in other cases. The persons appointed by the court, if any, to show the premises to the jury, shall receive such compensation as the court may direct, and the same shall be taxed with the other costs in the case. [106 v. 588, § 56.]

§ 1827. Procedure after judgment establishing improvement. (§ 6902.) If an appeal is taken from the order of the commissioners dismissing or refusing to grant the prayer of the petition, and the jury find in favor of such improvement, the probate court shall render judgment establishing such improvement, unless a new trial is granted by the probate court, and

the said improvement shall henceforth be established unless the judgment of said court be reversed by proceedings in error.

[Platted and surveyed.] The commissioners shall thereupon take the necessary steps to have said improvement platted and surveyed, and shall proceed in the manner hereinbefore provided to have the compensation and damages, on account of said improvement determined.

[Notice for compensation.] The commissioners shall give notice as hereinbefore provided of the time of hearing on the questions of compensation and damages, and all proceedings shall thereafter be had as if no appeal had been taken. [106 v. 588, § 57.]

§ 1828. **Reversal of order dismissing proceedings.** This section is applicable when the appeal was had from an order of the commissioners dismissing the petition. If the jury find for the improvement, that is, that it will be conducive to the public convenience and welfare, and the proceedings are certified back to them, then the commisioners order the surveyor to plat and survey the same just the same as they would have done had they under § 6 considered that said improvement was of sufficient public importance to justify the same. In this order they shall fix the time and place for hearing of claims for compensation and damages, and shall give notice as required in Sec. 6871.

An appeal may be had on the orders that the commissioners make on compensation and damages, but there having been one appeal on the question of the granting of the improvement, no further appeal on that question is permitted.

§ 1829. **Appeal; limitation.** (§ 6903.) An appeal may be taken from the order of the commissioners upon the questions of compensation and damages when said improvement is established by the verdict of the jury upon appeal. But no further appeal can be taken upon the question of whether the improvement will be conducive to the public convenience and welfare. [106 v. 588. § 58.]

§ 1830. **Review of judgment of probate court.** (§ 6904.) The final judgment of the probate court may be reviewed by proceedings in error as in other cases. If error is prosecuted to the judgment of the probate court, the county commissioners may enter upon the land appropriated by first paying into the court for the use of the appellants, the amount of the judgment in their favor with the proportion of the costs and expense of said proceedings adjudged against the county, and at the same time, the commissioners shall pay to those persons who did not

appeal, the amount of compensation and damages allowed such persons; provided, however, if an appeal has been taken to the probate court involving the question of whether said improvement will promote the public convenience and welfare, such commissioners shall not enter upon said land until said proceedings are finally disposed of. [106 v. 588, § 59.] [17]

§ 1831. Proceedings after trial. There is no appeal from the Probate Court to any higher court; if any person desires to litigate farther he must do so by petition in error. If the county is to pay all the compensation and costs, or if the petitioners have paid in the sum ordered to be paid by them, the commissioners may order that payment be made to claimants, who are not prosecuting error, the sums found due them for compensation and damages, and paying into court the sums found due those prosecuting error, and then enter upon the lands appropriated and order the road opened. The following might serve as an entry for the commissioners to make:

§ 1832. Form of Entry.

[*Title.*]

It appearing in the above matter that C. D. and E. F., claimants of compensation and damages, have prosecuted error from the findings of the Probate Court to the Court of Common Pleas, and that the money is now in the county treasury, the petitioners having paid the sum ordered paid by them, and it appearing further that said improvement should be established and said road opened to the public, it is ordered that the auditor draw a warrant on the county treasury for the sum of $..... in favor of G. H. and the sum of $..... in favor of I. K., the several sums due them as compensation and damages, they being persons who are not prosecuting error; and that said auditor draw a warrant on the county treasury in favor of the Probate Judge for the sum of $....., the same being the total amount heretofore awarded in this matter to C. D. and E. F., as compensation and damages herein, they being persons now prosecuting error to the Court of Common Pleas, including therein all costs and expenses herein adjudged against the commissioners and the petitioners. And it is further ordered that upon the auditor's compliance with this order, that the county superintendent of highways in this county enter upon the lands herein appropriated for said road and open the same to the public, and the improvement herein petitioned for, be and is hereby established as a road for the uses and purposes prescribed by law.

If the only question involved in the appeal to the Probate Court was whether the improvement was conducive to the public convenience and welfare, then the commissioners could not enter upon the lands until this question was finally disposed of.

The same rule would no doubt apply where this question was one of the matters appealed from, if error was prosecuted on this question.

17 § 6904.

CHAPTER XCVII

CONDEMNATION OF MATERIALS FOR ROAD BUILDING.

§ 1833. (7214) Power to purchase materials and appropriate land; application to court.
§ 1834. Condemnation of road material.
§ 1835. What may be condemned.
§ 1836. Resolution to appropriate.
§ 1837. Application to probate judge.
§ 1838. (7215) Notice to landowner; how served; contents.
§ 1839. Proceedings in probate court.
§ 1840. Notice to landowner.
§ 1841. (7216) Appointment of appraisers; assessment of value and damage.
§ 1842. Entry appointing appraisers.
§ 1843. Report of award.
§ 1844. (7217) Copies of award to commissioners and owners; summoning jury.
§ 1845. Entry of return of award.
§ 1846. Form of appeal bond.
§ 1847. Costs and expenses.
§ 1848. (7218) Bond when jury trial requested.
§ 1849. (7219) Date and conduct of trial.

§ 1833. Power to purchase materials and appropriate land; application to court. (§ 7214.) The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material. If the county commissioners or township trustees, and the owner of such material or land, can not agree on the price therefor, the county commissioners or township trustees may apply to the probate court or common pleas court of the county in which the same is located, and on receipt of such application, the court shall proceed to assess the value of the material or right to be appropriated in the manner hereinafter provided. [106 v. 645, § 230.]

§ 1834. Condemnation of road material. Private property shall remain inviolate, but ever subservient to public welfare. The appropriation of private property to the building and repairing of roads is a public use; however, in all such cases, before the property can be taken, compensation must be made to the owner, and unless the price be agreed upon, the owner has a right to have a jury fix the value of the same.

The commissioners or trustees, as the case may be, dependent upon the fact which body desires the material, etc., are to determine the necessity of condemning the same, and their judgment will not be reviewed or disturbed, in the absence of fraud or gross abuse of discretion.

Three things should be done before appropriation proceedings are begun:

First. An investigation should be made and the advice of the county highway superintendent acquired as to whether the property is suitable and proper for the purpose desired, and how much should be acquired, and its probable value.

Second. An attempt should be made to buy it from the owner at an agreed price.

Third. A resolution should be passed determining to appropriate the same. In all these matters the minutes should show a call aye and nay vote.

§ 1835. What may be condemned. Whatever the commissioners or trustees determine is necessary, for the purpose of constructing, improving, maintaining or repairing any highway, bridge or culvert within the county, may be taken; also when additional land is required to make a cut or a fill, it may be condemned, as well as a right of way from the land condemned, to a public highway. These statutory provisions seem to be broad enough to cover everything that may be necessary or proper to be acquired for road building or maintenance purposes. The lands of neither a cemetery nor public institution can be condemned. It is probable although the statute is not very clear that all that can be appropriated is an easement in the land, to take from it all such material as the trustees may need or desire for road purposes.

§ 1836. Resolution to appropriate.

Whereas in the judgment and opinion of the ..... commissioners of ..... county [*or* trustees of ..... county], it is necessary to acquire [here describe land, material, etc., desired for the purpose of constructing, improving and repairing the highways of this county], and they are unable and can not agree with ..... the owner thereof, as to the price to be paid. Therefore, be it resolved by the commissioners [*or* trustees] that it is deemed necessary, and that it is intended by said board to condemn said property, and that said board does hereby condemn and appropriate for the purpose of [here state purpose] the following described property, to-wit: [here describe] and it is ordered that an application be filed with the probate judge of this county to proceed under the statute laws of this state to have the same appropriated for the uses and purposes above declared and allowed by law.

§ 1837. Application to probate judge.

To the Hon. ....., Probate Judge of ..... County, Ohio:

On the ..... day of ....., 19..., a resolution was duly passed by this board, a copy of which is as follows [here insert resolution] and they hereby make application and petition the court to proceed to assess the value of the property, etc., sought to be appropriated, as provided by law.

.....
.....
.....
Commissioners of ..... County, Ohio.

§ 1838. Notice to landowner; how served; contents. (§ 7215.) Upon the filing of such application, an order shall be made by the court, directing that notice in writing be served by the county commissioners or township trustees upon the person or persons whose property is sought to be appropriated, that at a day fixed which shall not be less than ten days thereafter, appraisers will be appointed to assess the value of the same. Such notice shall contain a description of the property or rights sought to be appropriated, state the use to which it is to be put and the time when such appraisers will be appointed. [105 v. 646, § 231.]

§ 1839. Proceedings in probate court. When the application is filed in the Probate Court, the case should be docketed, styling the case with the commissioners, etc., as plaintiff, and the landowner defendant, and an entry should be put on ordering notice to be given that on a certain day appraisers will be appointed to assess the value of the property to be appropriated. The time for naming the appraiser must be within ten days from the time the application is filed.

ENTRY ORDERING NOTICE.

Commissioners of .....
County, Ohio, Plaintiff,
vs.
....., Defendant.

Probate Court, ... County, Ohio.

This day came the commissioners of ..... county and filed herein their application for the appointment of appraisers to assess the value of certain property in said application described, and the court fixes the ..... day of ....., 19..., at 10 a. m., as the day upon which three disinterested persons will be appointed to assess the value of the property appropriated, and also assess the damage, if any, that will accrue to the owner by the removal of said ..... through his premises, and it is ordered that notice be given by the commissioners to said ....., the person whose property is sought to be appropriated, of the time so fixed for the appointment of said appraisers, and that said notice shall contain a description of the property sought to be appropriated, and state the use to which it is to be put.

Said notice shall be served upon said ..... by the commissioners through the county auditor, by mailing the same in a registered letter to his last known address, within three days after the order is made, and this cause is adjourned to said ..... day of ....., 19...

§ 1840. Notice to landowner. This notice must be served on the landowner by the commissioners or some person authorized by them.

The statute does not fix how the notice shall be given; it is a general rule where the statute does not fix the manner of service that the court may do so. A very good way is to send the same by registered letter, and have the commissioners file a copy of the notice, with the statement that it was mailed on a certain day, and also the card of its receipt, signed by the owner. Of course, the notice must be in writing.

FORM OF NOTICE.

To .....

You are hereby notified that on the ..... day of ....., 19..., the commissioners of ..... county, did file in the Probate Court of ..... County, Ohio, their application to appropriate the following described property [here describe fully], the said property to be used for [here state fully use to which it is to be put] and the court has fixed the ..... day of ....., 19..., at 10 a. m. as the time when three disinterested freeholders of the county, will be appointed to assess the value of the property appropriated, and also assess the value of the damages that will accrue to your property by removal of same through your lands.

.....
.....
.....

Commissioners of ..... County,
By ....., Auditor.

§ 1841. Appointment of appraisers; assessment of value and damage. (§ 7216.) Upon the day so fixed, the court before which such application is filed, shall appoint three disinterested freeholders of the county, who, after being duly sworn to impartially assess the value of the material or right to be appropriated, shall enter upon the premises of the owner and assess the value thereof. They shall also assess the damages, if any, that will accrue to the owner by the removal of the material through his premises, and within ten days after their appointment, they shall return their award to the court. [106 v. 646, § 232.]

§ 1842. Entry appointing appraisers.

[*Title.*]

This day this cause came on for hearing upon the matter of appointing of appraisers, and the court finds that ..... has been duly and legally notified of the day fixed by the court, for the appointment of three appraisers, as required by law and the former orders of the court.

After due consideration thereof, the court appoints ....., ... and ....., three disinterested freeholders of the county, to, after being duly sworn, enter upon the premises of the said ..... and assess the value of the property appropriated, and assess the damages that may accrue, to the remaining property, and they shall make return to this court within ten days from this date of their proceedings hereunder.

NOTICE AND AWARD OF APPRAISERS.

....., ... and ..... will take notice that on the ..... day of ....., 19..., they were appointed to assess the value of [here insert description of property appropriated], by the commissioners of [*or* trustees] sought to be appropriated in their application filed in this court. You will, after being first duly sworn, enter up the premises of the said ....., owner thereof, and assess the true value of the property appropriated, also damages that may accrue to his remaining property by use of .....

You will make due return of your proceedings hereunder, within 10 days from this, the ..... day of ....., 19...

.....

Probate Judge of ..... County, Ohio.

OATH.

State of Ohio, ... County, ss.:

....., ... and ..... do hereby swear that they will faithfully and impartially fix the value of the property sought to be appropriated by the commissioners [*or* trustees] in a proceeding pending in the Probate Court of ..... County, Ohio, now belonging to ..... and the damages that may accrue therefrom, to the best of their ability.

. .....
.....
.....

Sworn to and subscribed before me and in my presence this ..... day of ....., 19...

.....

§ 1843. Report of award.

The undersigned respectfully report that on the ..... day of ....., 19..., after being duly sworn, they did enter upon the premises of the said ..... and did view and appraise the property sought to be appropriated herein, as directed in the application of the commissioners of ..... county, filed in the Probate Court, and the damages that might result from appropriation to said .....:

And we do find and assess the value of the property sought to be appropriated of ..... herein at $..... and the damages, etc., ... at $.....

.....
.....
.....
Appraisers.

§ 1844. Copies of award to commissioners and owners; summoning jury. (§ 7217.) The court upon the return of the award shall forthwith furnish the county commissioners with a copy thereof, and also furnish a copy to each owner of the material or right which it is sought to appropriate. Thereupon, if either party within three days after such copy is furnished requests, the court shall cause a jury to be summoned in the manner provided in the statutes relating to appeals in road cases. If neither party requests the court to summon a jury, the court shall forthwith render judgment for the amount of compensation and damages awarded by the appraisers aforesaid, and order that upon payment of such sum and costs, to be taxed by the court, the county commissioners

or township trustees may enter upon such lands and remove such material and enter into possession of such rights or easement as may have been appropriated. [106 v. 646, § 233.]

§ 1845. Entry of return of award.

[*Title.*]

This day came the appraisers heretofore appointed in this case and filed herein, their award of the value of the property sought to be appropriated in this proceedings, and it is ordered that a copy thereof be furnished to the commissioners [*or* township trustees] and a copy to ..... the landowner of the land (*or* material] appropriated.

.....

ENTRY OF JUDGMENT.

[*Title.*]

This matter came on further to be heard and the court finds that a copy of the award made by the appraisers heretofore appointed and filed in this court was duly furnished to ..... and to ..... on the ..... day of ....., 19..., and three days having elapsed, and neither the said ..... nor the said ..... having requested a jury to be summoned, judgment is rendered against said ..... for $..... compensation and for $..... damages, a total of $....., and the costs, amounting to $..... in favor of ....., and it is further ordered upon payment of the said sum $....., the amount awarded to ..... and the costs herein taxed by the court, the said commissioners [*or* trustees] may enter into possession of the property appropriated, and enjoy and use the same for the purposes and uses as in their application herein filed, set forth.

.....

ENTRY WHERE REQUEST FOR JURY IS MADE.

[*Title.*]

This day this matter came on further to be heard and the court finds that a copy of the award made by the appraisers, heretofore appointed, and filed in this court, was duly furnished to ..... and ....., on the ..... day of ....., 19..., and within three days after the same was so furnished to the said ....., he appeared in court and requested that a jury be summoned to fix the value of the property sought to be appropriated, in the manner provided in the statutes relating to appeals in road cases, and it is therefore ordered that the amount of the appeal bond be fixed at $....., conditional that the said ..... shall pay all the costs and expenses of said trial, in case he fails to recover more at the hands of such jury than the amount fixed by the appraisers.

.....

§ 1846. Form of appeal bond.

Know All Men by these Presents, That we, A. S., L. R. and M. S. of ..... County, Ohio, are held and firmly bound unto the State of Ohio, for the use of ..... county, in the sum of ..... dollars, to the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators, by these presents:

Signed by us at ....., on the ..... day of ....., 19...

The condition of the above obligation is such that whereas the said A. S. et al., appeal from the awards of the appraisers fixing the compensation of land and materials taken, and damages thereon to him awarded has requested a jury trial of the same.

Now if the said A. S. et al, shall pay all the costs and expenses of said trial, in case he fails to recover more than the amount fixed by the appraisers in their said award and judgment that may be rendered

against them for the same, then the obligation shall be void; otherwise to be and remain in full force and effect.

.....
.....
.....

§ 1847. **Costs and expenses.** The statute does not indicate who shall pay the costs of the proceedings in the Probate Court prior to the jury trial, and the matter no doubt rests in the discretion of the Probate Court. Generally in condemnation cases the costs of the trial in the first instance is taxed against the party condemning, the idea being that that should be done so that the property owner may get the full value of the property condemned, and I see no reason why the rule should not be followed here. If either party appeals and does not succeed in getting a better verdict than the award of the appraisers, such party is taxed the costs caused by the appeal. The fees of the appraisers are not fixed by statute; probably a fair rule to follow would be that allowed to ordinary appraisers of real estate, to-wit, $2 per day. The court might increase this if it thinks proper so to do.

The remainder of the proceedings is similar to that in road appeals and the condemnation of property.

§ 1848. **Bond when jury trial requested.** (§ 7218.) In case an owner of land or material sought to be appropriated, requests a jury trial, the court shall fix the amount of bond which shall be given by the party making such request, and such bond shall be conditioned that the party requesting such jury trial shall pay all costs and expenses of said trial in case he fails to recover more at the hands of the jury upon such trial than the amount fixed by the appraisers heretofore provided for. [106 v. 646, § 234.]

§ 1849. **Date and conduct of trial.** (§ 7219.) In all cases where a jury trial is requested the court shall forthwith after the drawing of such jury, fix a date for such trial, which shall not be more than twenty days thereafter, and such trial shall be conducted in all respects as is provided in appeals in road cases, and in all matters not covered by the practice relating thereto the ordinary rules governing similar matters shall apply. [106 v. 646, § 235.]

CHAPTER XCVIII

APPEAL IN CONSTRUCTION OF DITCHES, SINKHOLES, LEVIES, ETC.

§ 1850. Ditch construction and appeal.
§ 1851. What deemed final order (§ 6473).
§ 1852. Final order.
§ 1853. Who may appeal (§ 6474).
§ 1854. Persons that may appeal.
§ 1855. Notice of appeal.
§ 1856. Form of notice of appeal.
§ 1857. Perfection of appeal (§ 6475).
§ 1858. Bond.
§ 1859. Statement to be filed in court of common pleas, etc.
§ 1860. Form of statement.
§ 1861. Auditor to file transcript (§ 6476).
§ 1862. Filing transcript.
§ 1863. Issue; how determined.
§ 1864. Trial governed by rule in civil cases (§ 6477).
§ 1865. Trial by the court.
§ 1866. Trial by jury.
§ 1867. View of location by jury (§ 6478).
§ 1868. Verdict by jury (§ 6479).
§ 1869. Matters pertaining to verdict.
§ 1870. Judgment; motion for new trial (§ 6480).
§ 1871. New trial, etc.
§ 1872. Transcript after judgment (§ 6481).
§ 1873. Proceedings in error (§ 6482).
§ 1874. Proceedings shall not suspend construction (§ 6483).
§ 1874a. Stay of proceedings.
§ 1874b. When owner may recover tax paid, etc. (§ 6484).
§ 1874c. Claims from owner not having notice.
§ 1874d. Evidence in action to recover taxes, etc. (§ 6485).
§ 1874e. Action in proceedings to enjoin.
§ 1874f. Not enjoined for error; when (§ 6486).
§ 1874g. When injunction will not lie.

§ 1850. Ditch construction and appeal. The first general law for the construction of public ditches gave the jurisdiction to township trustees.[1] Later this act was repealed and jurisdiction was given to the county commissioners.[2] And still later jurisdiction was restored to the trustees,[3] and from the time of the last above act, 1862, until the present law of 1919, Vol. 108 v. 926, both the county commissioners and the trustees had jurisdiction. In the meantime the laws were at various times amended. The county commissioners exercised jurisdiction generally when the ditch affected two or more townships, but the

[1] 51 vs. 351.
[2] 58 vs. 49.
[3] 59 vs. 93.

jurisdiction of the trustees was enlarged so they might act jointly when two or more townships were interested. This distinguishing feature, however, finally was more one of construction than anything else. In county ditches the work was sold out to the highest bidder; in township ditches the work was apportioned among the interested parties, so that they could do themselves, or have done, the work. If they failed or refused it was then sold.

Some of the early laws did not provide for appeal and jury trial on the question of the appropriation of property and were declared unconstitutional. These were supplanted by amendments providing for such appeal. This appeal was, so far as I am aware, always to the Probate Court, and very properly so as that court had exclusive jurisdiction in condemnation by private corporations, and concurrent in municipal corporations, and such was the law when the former editions of this work were issued. The present ditch law takes this jurisdiction away from the Probate Court and puts it in the Court of Common Pleas. Whether this was wise or not remains to be seen. As the Probate Court has now no jurisdiction, the matter might in this volume very properly be omitted, but as the matter of appeal in ditch cases was treated of in the former editions, it has been deemed proper not to omit it in this. The act itself is the result of a commission appointed a few years ago to codify the ditch laws of Ohio. Experience no doubt will show that it will need some amendments. All former laws relating to the construction or maintenance of ditches, drains, sinkholes, levees, etc., have been repealed.

§ 1851. **What deemed final order.** (§ 6473.) The finding of a board of county commissioners, or the court, for or against any improvement petitioned for under this chapter, and the decision or judgment of either upon any claim for compensation for property taken or damage to property by reason of the construction of an improvement or the confirmation of any assessment for benefit to property shall be deemed to be a final order of the date on which such finding or decision is made. And the same shall be entered as of such date on the journal record of proceedings of said improvement. [108 v. 947.]

§ 1852. **Final order, etc.** The present law very wisely defines what is the final order from which an appeal may be taken. This is a matter of vital importance, and in other instances considerable confusion and uncertainty has been experienced in

determining what constituted the final order from which an appeal could be taken. Notably in condemnation proceedings.

The first matter that is specified is the finding for or against the improvement petitioned for. This is the action of the commissioners under Sec. 6449, G. C., if they find for the improvement, and Sec. 6453, G. C., if they find against the improvement. The matters that are decided under these sections, are the necessity of the improvement, whether it will be conducive to the public health, convenience and welfare, and whether the cost will be disproportionate to the benefits, etc.

When the order is one of dismissal the commissioners shall put a finding of the facts on which the order is made, on their journal. If they find for the improvement the papers in the findings and the record of the commissioners will contain the facts upon which the appeal may be taken.

The second matter upon which an appeal may be taken is the judgment or decision of the commissioners upon the question of compensation for land taken or damage to property by reason of the construction. This is provided for under Sec. 6449, G. C. In all cases the actual value of the land taken must be allowed, unless the parties have waived the same by not filing their written claim for it. If a person has not been notified or is under a disability, the failure to file a written claim would not be a waiver.

The statute provides, that in considering the question of compensation for property taken or damages, no deduction shall be made for any benefits that the property might receive from the improvement. Sec. 6479, G. C.

The third question upon which an appeal may be had is that upon the amount of assessments charged to the various properties to pay for the construction of the proposed improvement. This is the order made under Sec. 6472, G. C. The question of granting or dismissing the improvement and confirmation of assessments shall be tried by the court. The question of compensation and damages are to be submitted to a jury. Sec. 6477, G. C.

§ 1853. Who may appeal. (§ 6474.) Any interested party to an improvement proceeding under this act, or any number jointly interested, may appeal from any final decision or order made therein, by a board of county commissioners, to the common pleas court of the county wherein the proceeding was instituted. And if the county commissioners of any county be a

party, and the proceeding was commenced originally in the common pleas court, then any interested party may appeal from any final order or judgment of such common pleas court granting, refusing or locating the improvement petitioned for, to the superintendent of public works as the drainage commissioner provided for in a subsequent section of this act.

Notice of. Notice of appeals herein provided for may be given at the time the decision, order or judgment is made or rendered, and noted by the commissioners or court on their minutes or docket; or written notice of such appeal may be filed in writing within three days from the date of the decision, order or judgment, with the county auditor, or clerk of court, as the case may be.

Put on journal in absence of party. But if the decision be rendered in the absence of parties interested, notice of appeal shall be entered for them as a matter of course, by the county commissioners or court. [108 v. 947.]

§ 1854. **Persons that may appeal.** Any interested party in the improvement may appeal singly, or join with others jointly interested. Persons interested, we apprehend here, mean one whose lands adjoin, or whose lands are assessed for the costs of the improvement. And yet there might be others; for instance if the proposed improvement should direct a stream of water, or cause an unusual flow of water on his land. However, the mere fact that an assessment was placed on the county or township or municipality, would not give an individual taxpayer of the county, township or municipality the right of appeal. Possibly the township or the municipality would be an interested party and have the right of appeal. Where different persons join in an appeal, all must be interested in the matter upon which they jointly appeal. This would leave it an open matter whether they could join on an appeal on the question of compensation and damages or assessments. Probably not unless they were tenants in common of the land affected. The safer way in such cases would be to file a separate appeal.

§ 1855. **Notice of appeal.** It is well settled that all matters of appeal in court proceedings are purely of a statutory nature, and no appeal exists unless provided for by the statute, and in order to have an appeal the statute must be strictly followed.

If the party is present when the decision is made, he must, within three days, file a written notice of his intention to appeal. If the party is absent it is the duty of the commissioners to enter a notice of appeal on their journal. The commissioners

may, no doubt, if they so choose, enter his notice or appeal if he is present, but they are not obliged so to do. When the person is present and files his written notice, it would be advisable for the notice to state upon what matter the appeal is taken. If the appeal is entered for him in his absence, it would include what the record shows.

§ 1856. Form of notice of appeal.

In the matter of the ditch improvement No. .....

To the commissioners of ..... County, Ohio.

The undersigned, an interested party, hereby gives notice of his intention to appeal from the decision made by you on the ..... day of ....., 19..., on the question of granting said improvement [*or* dismissing the proceedings for said improvement] [*or* upon the amount allowed me for compensation and damages] [*or* upon the amount assessed against me or my lands for payment of the costs of said proceedings].

.....

§ 1857. Perfection of appeal. (§ 6475.) To perfect appeal, the appellant shall within ten days from the date of the final order appealed from, file with the county auditor, if the appeal be from the decision or order of the county commissioners, and with the clerk of the common pleas court, if it be from the decision, order or judgment of the court,

Bond. An appeal bond, with surety to be approved by the auditor or clerk, as the case may be, conditioned to pay all costs on appeal if the decision, order or judgment appealed from be sustained on the hearing or trial thereof.

Time for filing. Within said ten days the appellant shall also file in the court or with the drainage commissioners, to whichever the appeal is taken (wherein it shall be docketed as are other civil cases, and entitled in the matter of the improvement known as—giving by name and number, if it have one—),

Statement for appeal. A concise statement of the decision, order or judgment appealed from, and the grounds of such decision, order or judgment as entered of record, and the claims of the appellant as to the error or injustice thereof; and on default of such bond and pleading being filed within said ten days said appeal shall be without effect and shall be dismissed at the cost of the appellant. [108 v. 947.]

§ 1858. Bond, etc. Within ten days (including the three days in which notice of appeal is given) from the date of the final order, appealed from, an appeal bond must be filed with the auditor, with surety to be approved by the auditor, conditioned to pay all costs on appeal, if the judgment, order or decision appealed from, be not sustained, etc. It would be well

if the party appealing would see that this bond is filed and approved by the auditor within the time limit.

The form of bond used in road appeals, Sec. 1795, might easily be changed to use in ditch appeals. There are no particular qualifications attached, as to who may be accepted as surety or their number, but they must be such as the auditor approves. Of course it should be signed by the person appealing and the surety.

§ 1859. Statement to be filed in court of common pleas, etc. Within the same time that a bond is filed a statement must be filed in the Court of Common Pleas. This statement must be a narration in concise form of the decision, order or judgment, as entered of record, and the claim as to the error or injustice of the same.

This statement will serve as the petition in the case. It need not be verified. As the case is to be docketed and therein entitled in the matter of the name and number of the improvement, it *would* be advisable to so head this statement to preserve uniformity. As a matter of fact the person appealing occupies the position of plaintiff, and all the other parties defendants.

§ 1860. Form of statement.

In the matter of the improvement known as the ..... ditch improvement. No. ..... } Court of Common Pleas, ... County, Ohio.

STATEMENT ON APPEAL OF .....

Now comes ....., an interested party in the above proceedings had before the commissioners of ..... county, and says that on the ..... day of ....., 19..., the said commissioners made and entered a finding on their journal in favor of granting the said improvement; that the said improvement is necessary and will be conducive to the public welfare and convenience, according to the statements and prayer of the petition filed in said proceedings [*or*, whatever the matter is upon which an appeal is taken]. That said improvement is not necessary; that it will not be conducive to the public convenience; that the costs of constructing said improvement will exceed the benefits that would accrue therefrom, and the cost and expense thereof will be greatly disproportionate of the benefit to the petitioner, or advantage to the public. Wherefore the undersigned asks that said proceedings be dismissed.

.....

§ 1861. Auditor to file transcript. (§ 6476.) If said appeal be perfected, the auditor or clerk, as the case may be, shall within ten days from the filing of the appeal bond and state-

ment, make and file in the appellate court or with the drainage commissioner, a full transcript of the journal entry containing the finding and decision appealed from, with the original petition and engineer's report, assessment or such other original papers as are pertinent to the appealed issue.

Issue made for trial. The issue for hearing or trial shall be deemed to be made by the original petition, the said statement of the appellant and the entry of the decision appealed from, and all parties to the proceeding not joining with the appellant in the appeal shall be considered defendants, and prima facie opposed thereto.

Answer not required. No answer need be filed by any defendant. But after appeal has been perfected by any party, any other interested party may by motion made in person, or by counsel, oral or written, in session or at chambers, be entered on the record and considered as joined in interest with the appellant, and in such case, shall, with the appellant, be bound for costs, if the decision, order or judgment appealed from be sustained. [108 v. 948.]

§ 1862. **Filing of transcript.** Within the same time limit of filing bond and statement, the auditor must make up a transcript of the proceedings before the commissioners, and file it and the papers in the case in the Court of Common Pleas. While the failure of the auditor to file the papers required within the time limit would not defeat the appeal, it is always advisable for the appellant or his attorney to see that these things are done within the time limit. If all papers are not filed that should be, the court on motion will order them filed.

§ 1863. **Issue. Determined how.** Issue is made up in this kind of a case from the original petition, the statement of the appellant and the entry of the decision appealed from. All persons in the proceeding other than the appellant, are considered as defendants, and opposed to the appeal. No other pleadings are required. These may be made however. Motions may be filed the same as in other civil cases. It is particularly provided that on motion an interested party may be made a party joined in interest with the appellant. No notice need be given as all the parties who were notified of the proceedings before the commissioners are in court from that time on, and are bound to take notice of all future proceedings in the case.

When, however, there are persons interested who are under a disability, it might be advisable to appoint a guardian *ad litem* for them.

§ 1864. **Trial governed by rule in civil cases.** (§ 6477.) Trial or hearing of said appeal on the issue made shall be had under the rules of law for civil cases, so far as the same are applicable, the appellants being considered as plaintiffs having the affirmative, and being required to produce the predonderance of evidence to reverse or modify the decision, order or judgment appealed from.

When heard by court. If the appeal be from a decision or order for or against the locatoin or construction of an improvement, or an assessment for benefits, the same shall be heard by the court as a case in equity.

When heard by jury. But if the decision, order or judgment appealed from be for the payment of, or the refusal to pay, a sum of money in compensation for property taken for such improvement, or as to damages to property affected thereby, the trial shall be to a jury as for a money demand.

If the appeal be from a court of common pleas to the drainage commissioner, the same shall be heard and decided by said drainage commissioner, or his official board of appeal, if he summon the same, as in this act provided, as are equity cases in courts having such jurisdiction.

Precedence for trial. So far as consistent with the rights of others, appeal under this act, shall by the trial court, or drainage commissioner, be given precedence over other matters.

Jury may view premises. The common pleas court, when the case is triable by jury, may at the request of plaintiffs or defendants, under rules as in other civil cases, have the jury view the location of the improvement, and the expense of such view shall be taxed as are other costs upon the appeal. [108 v. 948.]

§ 1865. **Trial by the court.** If the appeal is upon the question of the granting of the petition for the construction of the improvement, or dismissal of the application, or upon the question of the assessments, the matter is tried before the court. The court proceeds to try questions of both law and fact. The ordinary rules of civil cases apply and the court sits as a court of equity.

The proceedings before the commissioners are *prima facie* correct, and the appellants are under obligation by a preponderance of the evidence to show that they are wrong before he can prevail.

§ 1866. **Trial by jury.** If the matter appealed from is upon the question of compensation for property taken or damages caused to property by reason of the improvement, it is to be tried by a jury. The appellant would have the opening and

closing of the case, and notwithstanding the fact that the Supreme Court has recently held in condemnation of property by a municipal corporation, that there is no burden of proof, and the jury acts merely as an appraising or assessing board, determining the fair market value of the property from all the evidence submitted.[4] The burden of showing by a fair preponderance of the evidence on the part of appellant would be required before the former decision could be disturbed.

The jury would be selected in the same manner as is done in civil cases in the Court of Common Pleas; the same rules of evidence would apply. In analogy the action would be much similar to condemnation proceedings. Upon request of the appellant, the jury may view the premises. Such view would probably not be considered as evidence, but merely to enable the jury to better apply the evidence produced in open court. Three-fourths of the jury could return a verdict.

§ 1867. View of location by jury. (§ 6478.) The sheriff, or his deputy, and the surveyor or engineer who surveyed, leveled, apportioned, and platted the improvement, in case a view be directed, may accompany the jury, and point out its location and route; but no other person shall give any information to the jurors in the discharge of their duty.

On return of jury, etc. After the jury has fully examined the premises, and returned to court, either party may be heard, in person or by counsel, and offer evidence to the jury under the direction of the court, upon any matter given it specially in charge as in other civil trials. [108 v. 949.]

§ 1868. Verdict of jury, etc. (§ 6479.) The jury shall, upon the case being submitted to it, under the proper charge of the court, and upon a form provided by the court, return its verdict determining the matter in issue appealed from, upon which judgment shall be rendered by the court as in other cases.

How signed. The verdict shall be signed by the jury as is provided by law, and by at least nine of the panel to make the same effective. The amount of the compensation or damage to be paid, if any, is the issue to be determined by the jury, and it may sustain the award that has been appealed from, or if it does not find such amount to agree with justice and equity determine the amount which upon the facts put in evidence does so accord.

Where differ from award. In case such amount differs from the award appealed from, the difference shall be pro-rated by

[4] Martin vs. Columbus, 101 O. S. —.

addition or deduction from the assessments, if assessments have been made, upon the property assessed for such improvement.

Where more than one appellant. If in jury trials there are more than one appellant, and with separate claims and issues as to different properties, the court may in its discretion submit all the several claims and issues to the same jury together, or it may direct separate trials for the separate claims and issues or any number of them. In case of such joint submission, the jury shall be approximately charged, and provided with a form to return the compensation or damage separately as to each property and appellant.

Where appeal on different matters. Also if one appellant shall have appealed from an award as to each compensation for property taken and damages to property caused by the improvement the verdict of the jury shall separately state its findings as to each issue in controversy. In finding its verdict for compensation for property taken, or for damages to a property by an improvement, the jury shall not consider, or deduct, the value of any benefit that it will receive from the construction of such improvement.

Court to hear court matters, others submitted to jury. If the appeal be upon both court issues and jury issues as in this act defined, the court shall appropriately separate the same for hearing and trial, and render its order or decree upon the court issues, and its judgment upon the verdict of the jury. [108 v. 949.]

§ 1869. **Matters pertaining to verdict.** The above section has several matters of importance in the matter of trial and rendition of judgment.

First, the verdict shall in form be returned as usual in civil cases.

Second, the verdict may be returned by nine of the jurors. If the panel should by agreement be less than twelve, at least nine must sign.

Third, it seems that the amount returned by the jury may be modified by the court to agree with justice and equity.

Fourth, if the amount found by the jury should be different from that allowed by the commissioners, the court shall change the assessments to meet the same.

Fifth, if there are a number of appellants, the court may direct separate trials or all may be submitted to the same jury at the same time, the jury finding or designating each appellant's claim, etc.

Sixth, the jury shall separately state its findings on matters of compensation and damages.

Seventh, no deduction shall be allowed for benefits on either the matter of land taken, or damages to property. In condemnation cases no deduction can be allowed on the question of compensation for land taken, but special benefits might be deducted on the question of damages.

Eighth, if the appeal involves the issues that are properly triable to the court, such as the granting or dismissal of the proceedings, or matter of assessment, and also those that should be tried by jury, the court shall separate them and hear them in the proper way.

§ 1870. **Judgment—Motion for new trial.** (§ 6480.) The court trying such appeal shall receive the verdict, and if no motion for new trial thereof be filed within three days, which motion may be filed as in other civil cases at law and for like causes; or if such motion be overruled, it shall render judgment according to said verdict, and for or against the plaintiffs separately, if there be more than one.

Taxation of costs. And the court shall tax the costs on appeal in favor of the prevailing party or parties. If the plaintiffs prevail, then their costs shall be taxed against the county, and the county commissioners shall pay the same from the general ditch improvement fund, and add the same to the costs and expense of the improvement to be assessed upon all benefited property. If the plaintiffs shall not prevail, then the costs on appeal shall be taxed against and collected from them on their bond as in other civil cases.

Where several matters appealed. If more than one matter is appealed from, and plaintiff prevails as to one, and loses as to another, then the court shall determine how much of the costs each party shall pay and tax the same accordingly against and collected from them or their bond as in other civil cases, plaintiff, and costs be taxed against them, the court shall apportion and tax the costs to be paid by the plaintiffs equitably among them. [108 v. 950.]

§ 1871. **New trial.** If a party wishes to prosecute error upon the findings of the court or verdict of the jury, within three days from the return of the verdict, a motion for a new trial must be filed as in other civil cases, and for like causes.

If no motion is filed or if it be overruled, the court shall render judgment according to the verdict.

Exceptions may be taken on the motion for a new trial and also on the judgment rendered by the court on the questions triable to the court alone.

§ 1872. Transcript after judgment. (§ 6481.) After the final judgment, decree or order upon an appeal is rendered by the appellate court, the clerk thereof shall within ten days make a transcript of the same, and certify and transmit it with all original papers in the case and the taxed bill of costs to the county auditor, or the court from which it came on appeal.

Duties of auditor on receipt. The auditor, or clerk of court, receiving such transcript and papers shall forthwith notify the county commissioners, or court, of such receipt and the judgment, decree or order shall be entered on their journal, and thereupon such commissioners or court shall proceed with said improvement proceedings in compliance with such final judgment, decree or order, from the point at which they were terminated by such appeal, as if the same had not been taken.

Costs, etc. And if costs have been taxed against the plaintiffs, and are not paid before the assessment for the improvement is placed upon the property, such costs may be added to the amount of the assessment of such plaintiffs, and certified to the county treasurer for collection and collected with the assessment for benefit, and upon collection paid to the proper court for distribution to the persons, or fund, to which they belong. And any such costs belonging to the county shall be paid into the general ditch improvement fund. [108 v. 950.]

§ 1873. Proceedings in error. (§6482.) In addition to the right of appeal in the preceding sections of this act provided for, error may be prosecuted to the court of appeals from a final order or a judgment rendered by a court of common pleas upon either proceeding in the matter [manner] of a petition originally filed therein, or heard or tried therein on an appeal from a final order of a board of county commissioners.

Governed by rule in civil cases. Proceedings in error hereunder and the costs thereof shall be governed by the provisions of law now or hereafter in force in civil cases.

Who made parties. If the plaintiff or plaintiffs in error be not a board of county commissioners, or joint board of county commissioners, it shall be sufficient to make the board or joint board of county commissioners which originally rendered the decision complained of, or is opposed in interest, defendant in error, and such board or joint board shall be deemed to represent those opposed in interest to the plaintiff in error; and if the plaintiff or plaintiffs in error are a board or joint board of county commissioners, it shall be sufficient to make the petitioners for the improvement defendants in error.

Who deemed parties. All parties to said proceeding in the court of common pleas affected by said proceeding in error shall be deemed to be parties defendant in error, and opposed to the contention of the plaintiffs in error, unless by motion therefor

they be admitted and joined with plaintiffs in error or interest. [108 v. 950.]

§ 1874. Proceedings shall not suspend construction. (§ 6483.) No appeal, nor any proceeding in error allowed or provided for the parties to an improvement proceeding under this chapter, except an appeal from a final order granting a petition for an improvement, shall operate to suspend or defer any of the proceedings provided for the surveying and estimating the cost of any improvement, or the letting of the contract for and the construction of it, all of which shall proceed as if no appeal had been taken or error had been prosecuted. [108 v. 951.]

§ 1874a. Stay of proceedings. The above section only gives one ground upon which an appeal or error proceedings may operate as a stay upon the proceedings, that is upon the final order granting the *improvement*. Of course there is another which necessarily follows, from its nature and character; that is upon the order dismissing the proceedings.

If the question of appeal or error is for compensation or damages, or on assessments, the commissioners may go ahead with the proceedings, letting contract, etc.

§ 1874b. When owner may recover tax, etc. (§ 6484.) Any owner of land affected by an improvement as defined in this chapter, who has not received notice thereof, and had opportunity to be heard as in this act provided, may bring an action in the common pleas court of the county wherein the improvement is located, against the county commissioners in their official capacity to recover any tax or assessment therefor, if paid, or to enjoin any tax, assessment or levy therefor upon his lands, or to recover for any damages sustained, or for compensation for any property taken, and his rights and remedies in such action shall be as for any like demand arising from any other cause. But in such action, it shall be competent for the defendant to plead and prove the value of any actual benefit, or increase of value of the premises affected by the improvement by reason thereof in mitigation of any claim for damage or compensation that may be pleaded by the plaintiff. [108 v. 951.]

§ 1874c. Claims from owner from not having notice. It sometimes happens in proceedings for construction of ditches, some one who should have been notified, has not been notified as the law provides. Nothing is known until it is attempted to collect an assessment that has been placed against his property. Then on the ground of not having been notified, he seeks to enjoin the collection of the assessment. Of course if he has re-

ceived no notice, not having had his day in court, he is entitled to relief. But it often happens, yes, generally happens, that his property has received some benefit from the improvement, and it is obvious from a sense of justice, that he should not reap a benefit without paying his just proportion of the cost of that which causes the benefit. That this may be done is the object and purpose of the previous section, a very commendable one.

§ 1874d. Evidence in action to recover tax, etc. (§ 6485.) The court in which a proceeding is brought to recover a tax or assessment paid, or to declare void the proceedings to locate or construct an improvement, or to enjoin a tax or assessment, levied or ordered to be levied to pay the costs and expense thereof,

Manifest error. If there is manifest error in the proceedings, whether the same be before the court on appeal, or by action brought as in this act provided, shall allow the plaintiff in the action to show that he has been injured thereby:

May order survey, etc. And the court in its discretion upon application of either party may direct and cause any necessary survey of the premises affected to be made by a competent disinterested engineer, who shall upon oath report his findings by his survey upon the matters covered by the court's order, and such report shall be received and considered by court and jury as is other competent evidence upon the issue to be determined.

Oral testimony as substantial compliance. And the court shall allow oral testimony that any acts required by law for an improvement hereunder have been substantially complied with, notwithstanding the record required to be kept, or kept by any board or officer.

Case if notice actual may be shown. And in case of claimed want of notice as by this act required, any evidence may be offered that the plaintiff had knowledge of the proceedings for said improvement and actual opportunity to appear therein and be heard, which also may be considered upon the issues.

When may bear upon question of necessity. And if said cause is tried before the construction of said improvement is let by contract, then oral evidence may be offered for and against the necessity of the same, and whether it be conducive to public health, convenience and welfare as defined in this chapter.

Such judgment shall be rendered as is equitable. Upon such trial to the court or jury, the court shall upon its findings, or upon the verdict of the jury, render such judgment or make such order as will be equitable, and may order any tax or assessment to remain on the duplicate for collection, or order it to be levied, or perpetually enjoin it or any part thereof as to the plaintiff, or if it has been in whole or part paid under protest

or without knowledge, order the whole or such part as is just and equitable to be refunded. And if said improvement is not constructed, and would irreparably injure the plaintiff if constructed so that his damage could not be measured by money recovery, the court may perpetually enjoin such construction. And upon a partial recovery by the plaintiff the court may apportion the costs equitably between the parties. [108 v. 951.]

§ 1874e. Action in proceedings to enjoin. The above section is somewhat similar to former § 6500, G. C., and §§ 6645 and 6646. The object and purpose is to permit in such an action all matters to be gone into, so that justice may be done all parties. It of course is clearly a proceeding in equity, and if the party bringing the action has a remedy at law, he must fail in this action, or if he can have a remedy under the previous section. § 6484, G. C. (§ 1861).[5]

The basis of the above action is that there is manifest error in the proceedings. If the proceedings are substantially correct the writ will not be allowed. The court may have a re-survey by a disinterested engineer.

If the plaintiff alleges want of notice, a very common complaint, and one which from the nature of the proceedings is likely to occur, the court may hear evidence as to whether or not the plaintiff had knowledge of the proceedings and had actual opportunity to appear and be heard. If he did and failed to take advantage of his knowledge and opportunity, he shall not now be heard, to complain. The nature of the proceedings is such that they can hardly be carried on without an affected landowner knowing as he ought to know, of the proceedings. The law intends to give every one his day in court in every instance where his individual or property right will be affected, but it also expects him to be diligent in asserting them, and if he knows of a matter that may or will affect him, if he lies still when he should have acted, he will have sinned away his day of grace.

If the action is brought before the contract for the improvement has been let, the question of the necessity of the improvement may be considered, and whether it is justified, or will be conducive to the public health, convenience and welfare. If it is past this time, this matter can not be considered. Of course in no case can any of these questions be considered on an injunc-

[5] See Commissioners vs. Krauss, 53 O. S. 628. See Andersonville vs. Hicksville, 17 Dec. 201; 4 N. P. (N.S.) 545.

tion proceedings, if the party had proper notice of the proceedings.

If in justice an assessment should be enjoined, in whole or in part, the court will do so. If paid under protest or without knowledge, it may in like manner be in the whole or in part refunded. And if the improvement is not constructed, and would irreparably injure the plaintiff if constructed so that his damage could not be measured by a money recovery, a perpetual injunction may be granted against its construction.

The next section provides when it shall not be enjoined. This section may cure irregularities, but it does not save jurisdiction where no jurisdiction existed or where jurisdiction had been lost. Anderson vs. Miller, 13 N. P. 42; 22 Dec. 166.

§ 1874f. **Not enjoined for error, when.** (§ 6486.) Neither the location or construction of an improvement, nor the taxes or assessments levied or ordered to be levied to provide for the cost and expense thereof shall be perpetually enjoined, nor the proceedings therefor declared void in consequence of an error committed by the engineer, the county auditor, county commissioners or other officer, in the location, construction or record thereof; nor shall such error if not materially affecting the rights of any interested party, or causing actual damage to property, be a defense to the collection of any tax or assessment therefor levied thereon, if such tax assessment or levy was made or done within the jurisdiction conferred by law on the board or taxing officer making or levying the same. [108 v. 952.]

§ 1874g. **When injunction will not lie.** *First*, an injunction is a proceeding in equity, it will not be granted when plaintiff has a remedy at law.

Second, it will not be granted if the plaintiff was properly notified of the proceedings.

Third, it will not be granted in consequence of an error committed by the engineer, the county auditor, the county commissioners or other officers in the location, construction or record.

Fourth, nor for any error that does not materially affect the right of an interested party.

Fifth, neither shall such error be a defense against the collection of an assessment, if the same was done within the jurisdiction conferred by law on the board or officers making it.

CHAPTER XCIX.

PRESCRIBING MODE OF USE OF STREET BY TELEPHONE AND TELEGRAPH COMPANIES.

§ 1875 Introductory.
§ 1876 How right to use public grounds acquired.
§ 1876a Compensation only for damages.
§ 1877 Petition. Form, etc.
§ 1878 Hearing and decree.

§ 1875. Introductory.

The statute[1] has placed upon the Probate Court, the duty of determining under certain contingencies, the manner in which a telephone or telegraph company may use the streets of a municipal corporation. It has been seriously contended, that this statute was unconstitutional as conferring upon the Court, duties which belong to the legislative department of our government; and this view was of such a strong character that at first the Supreme Court followed that view and declared the law unconstitutional.[2] Upon a rehearing, however, the Supreme Court reversed itself, and while admitting that there was some doubts upon the question, it held that they were not of that character that would justify the Court in declaring the law unconstitutional.[3]

In this latter case, Judge Williams very thoroughly discussed the scope of the statute and the method in which a proceeding should be conducted. It is there declared that the proceeding is practically a proceeding for appropriation against the municipality, and that such is necessary in order to enable the company to make a necessary use of the streets of the corporation. Being a statutory proceeding, before the action can be

1 §§ 9178-9 G. C., § 1876.

2 Zanesville vs. Tele. & Telegraph Co., 63 O. S. 442.

3 Zanesville vs. Tele. & Telegraph Co., 64 O. S. 67.

In action in Probate Court, company must prove its incorporation and election of directors. Cen. Union Tel. vs. Columbus Grove, 8 C. C. (N.S.) 81; 28 O. C. C. 132; Queen City Tel. Co. vs. Cin., 15 C. C. (N.S.) 411; 27 O. C. C. 385; 73 O. S. 64.

Where, under a decree of Probate Court, right to erect poles was obtained subject to rights of other companies to use its poles, another company can not do so, etc. Hauss Elec., etc., vs. Electric Co., 10 Dec. 709; 26 Bull. 104.

See Ohio Light Co. vs. Gertrude, 59 Bull. 354, for charge of judge to jury in fixing method of compensation for easement of light poles.

maintained, the plaintiff must show that it has complied with all the statutory requirements. The proceedings are not very frequently called into vogue, but a form of petition and some suggestions may not be inappropriate in a work of this character. The section of the Revised Statutes relating thereto is as follows:[4]

§ 1876. How right to use public ground acquired. "When lands authorized to be appropriated to the use of such company are subject to the easement of a street, alley, public way, or other public use, within the limits of a city or village, the mode of use shall be such as is agreed upon between the municipal authorities of the city or village and the company. If they cannot agree, or the municipal authorities unreasonably delay to enter into an agreement, in a proceeding instituted for the purpose, the probate court of the county shall, subject to the provisions of section eleven thousand forty-six of the General Code, direct in what mode the telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of it." [R. S. § 3461; 101 v. 289.] [5]

§ 1876a. Compensation only for damages. "Nothing in the preceding section shall authorize a municipal corporation to demand or receive compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." [R. S. § 3461.] [5*]

§ 1877. Petition. Form, etc.

The petition must necessarily show that the corporation is authorized to appropriate the property, and that it is necessary for its proper management that it have the use of certain streets, alleys, etc., within the limits of a municipal corporation, and that it has been unable to agree with the corporation as to the method of such use. The following may be used as a form of petition:

In the Probate Court of.....County, Ohio.

S. C. T. Co., Pltf.,
vs.
City of S., Deft.

Petition.

The plaintiff says that it is a corporation duly created, organized and existing under the laws of the State of Ohio, and that more than ten per

[4] The Probate Court has full and complete jurisdiction to determine the terms upon which a telephone company may occupy the streets of a city, etc. Fitzsimmons vs. Cincinnati, 47 Bull. 171.

[5] § 9178 G. C.

[5*] § 9179 G. C.

The Court, however, cannot fix the rates the telephone is to charge. State *ex rel.* Sheets vs. Toledo, etc., 72 O. S. 526.

Grant to telephone company subject to abutter's rights. Mantell vs. Telephone Co., 11 C. D. 274; 20 O. C. C. 345.

Grant to use street for certain time cannot be extended beyond its express terms. State vs. Tel. Co., 5 C. D. 311; 11 O. C. C. 55.

City cannot stipulate for compensation beyond what may be necessary to restore streets. Farmer vs. Tel. Co., 72 O. S. 526.

cent. of its capital stock has been subscribed and that fact certified to the Secretary of State of Ohio, as required by law.

The plaintiff further says that it is and was organized as aforesaid for the purpose of acquiring a franchise or franchises for, and constructing, acquiring, maintaining and operating in the city of....., Ohio, and elsewhere, telephone and signal lines, together with the stations, poles, wires and conduits, fixtures and appliances used in connection therewith, and for carrying on the said business and doing any and all things incident and necessary thereto.

The plaintiff further says that the said defendant is a municipal corporation organized and existing under the laws of said State of Ohio, and located in the county of....., in the said State; and is a city of the second grade, third class A.

The plaintiff further says that it has endeavored to agree with the municipal authorities of said defendant city upon the mode in which the telephone lines of the complainant shall be constructed along and across the following streets and alleys of said city, to-wit: (here name them), and for that purpose, more than four weeks ago on the.....day of....., the plaintiff presented to the Board of Public Affairs of said city, an ordinance upon the subject, a copy of which is hereto attached, and marked "Exhibit A" and made part hereof; and requested the said board to pass said ordinance or suggest such reasonable modifications thereof as to the said board should seem proper; but the said board has wholly failed either to adopt the said ordinance, or to suggest any modifications thereof, although a reasonable time for that purpose has long since expired.

On the contrary, said board has notified the plaintiff on the.....day of....., 190.., in writing by resolution duly passed, that it would not consider said proposed ordinance nor attempt to agree with the plaintiff upon the mode in which it should use said streets; but there being other parties (some of whom are not organized for telephone purposes) at present requesting said board to agree with them on the same subject, said board has notified all of said parties, including this plaintiff, that on the..... day of....., 190.., it would consider all ordinances on the subject which might be presented, and that it would pass the one of such ordinances which contained the terms most favorable to the city, and embraced the largest cash bonus to the city, and that it would reject all others.

Wherefore the plaintiff prays the Court to direct in what mode the telephone lines of the plaintiff shall be constructed along and across the following streets and alleys and public ways of said defendant city, according to the statute in such case made and provided.

.....

State of Ohio,.....County, ss.

D. F. S., being first duly sworn, says he is the treasurer of the plaintiff company and that he believes the facts stated in the foregoing petition are true.

Sworn to before me and subscribed in my presence this.. ...day of....., 190..

§ 1878. Hearing and decree.

While the statute does not indicate the mode of procedure and power to issue summons, etc., yet the power conferred to hear the matter includes the power to do whatever is necessary to consummate the purpose intended.[6] While pertaining some-

[6] Zanesville vs. Telephone & Tele. Co., 64 O. S. 83.

what of the nature of an appropriation proceeding, the parties are not entitled to a trial by jury.[7]

It should be remembered that the property of the adjoining land owners is not taken in this proceeding, a municipal corporation does not own the streets and has no right to place additional burdens thereon. Before the telephone company could proceed to erect its poles, it must in some manner have procured the right so to do from the adjoining property holders. But this is a matter with which the municipality has nothing to do. The jurisdiction conferred on the Court is to determine the controversy between the disputant corporations, arising from their disagreement or failure to agree, by an order binding on both, directing in what mode the telephone lines shall be constructed in the streets and alleys, so as not to incommode the public in the use of the same.[8] The decree or order should specify with reasonable certainty the mode of construction of the company's lines, so that they will not incommode the public in the use of the streets.[9]

No power to grant right to put wires under ground unless city consents. Queen City Tel. Co. vs. Cin., 5 C. C. (N.S.) 411; 17 Cir. D. 385; affirming 2 N. P. (N.S.) 349; 15 Low. D. 43; affirmed 73 O. S. 64.

Court will remove line constructed without consent of owner. Smith vs. Printing Co., 1 C. D. 475; 2 O. C. C. 259.

Probate Court cannot make general regulations as to use of all streets by telephone company. Queen City Tel. Co. vs. Cin., 5 C. C. (N.S.) 411; 27 O. C. C. 385; affirmed 73 O. S. 64.

Company must prove incorporation and election of directors. Cen. Union Tel. Co. vs. Columbus Grove, 8 C. C. (N.P.) 81; 28 O. C. C. 132.

Probate Court cannot fix price of service. Macklin vs. Tel. Co., 1 C. C. (N.S.) 373; 24 O. C. C. 450; affirmed 70 O. S. 507; Farmer vs. Tel. Co., 72 O. S. 526.

[7] *Id.* 81, 82.

[8] *Id.* 83.

[9] *Id.* 89.

The order can be reviewed on error. But as the Probate Court is vested with a discretion, the order will not be set aside unless the discretion has been abused. The reviewing Court may modify the order of the Probate Court. Telephone vs. Chagrin Falls, 1 N. P. (N.S.) 534; 14 Dec. (1904) 449.

CHAPTER C.

PARTITION.

§ 1879 Introductory.
§ 1880 Certificate from Probate Court when proceedings for partition commenced and deficiency of assets found.
§ 1881 Application. Form.
§ 1882 Hearing and order of Court.
§ 1883 Form of certificate.
§ 1884 Court shall order so much of proceeds to be paid over to him, provided, etc.
§ 1885 Proceedings in Court of Common Pleas.
§ 1886 Form of motion and entry ordering money paid.

§ 1879. Introductory.

Partition is the division which is made of lands between several persons which belong to them as co-heirs.[1] This division may be made by amicable arrangement between the parties or by an action brought in Court for that purpose. Such proceedings generally occur between the heirs of a deceased person, and generally belong to a Court of general jurisdiction, and only a small number of Probate Courts in this State have jurisdiction of such proceedings; and where they have such jurisdiction, the proceedings are conducted in the same manner as in the Court of Common Pleas. It will therefore not be discussed in this work, but reference made to general works on pleadings, etc.[2]

The statute[3] has recently been amended as to the time in which an order for partition might be granted, and it has been held that under such section a petition for partition of real estate will not lie within one year from the death of the ancestor from whom the estate is derived, unless it is averred and

[1] Bouv. Dic.
See § 911, Title by purchase.
§ 1524, Assignment of dower by Gdn.

[2] Kinkead's Code Plead., § 953, etc. Form of petition. § 957.
Whittaker's forms, 542.

Parties in partition acquire no new title. McBain vs. McBain, 15 O. S. 337.

[3] § 12028 G. C.
A trustee in bankruptcy cannot maintain action. Lindsay vs. Runkle, 82 O. S. 325.

proved (1) that there is sufficient personal property to pay the debts of such ancestor's estate, (2) that the debts are paid, or (3) that the debts are secured as provided in sec. 10785, G. C.[4] And it is also held that while the order may not be granted within one year, yet a petition may be filed, and after the end of the year an order might be granted.[5]

The statute was no doubt so amended that a partition could not be had before one year, for the reason that the statute gives one year's time for the presentation of claims against the estate of a deceased, and that therefore the administrator ought to know within that length of time whether it is necessary to sell the real estate to pay debts. No action that the heir can take will at any time defeat the right of the administrator to bring proceedings to sell the real estate to pay debts; and a person buying in partition proceedings does so with the risk that such real estate may be subject to the unpaid debts of the deceased owners, unless the statutory limit has expired. In all instances where partition proceedings are brought and an administrator is still acting, such administrator ought to be made a party. A deceased person may, however, by will, provide that no partition shall be made of his estate for a certain number of years after his death.[6]

If a partition suit has been brought, and it is necessary to have funds to pay debts of the deceased, the administrator may elect to commence a new proceeding and have the real estate sold, or may file a certificate in the Court of Common Pleas, in which the action is pending, as provided for in the next section.[7]

[4] Smith vs. Montag, 32 Bull. 153; 1 Dec. 224. See § 826.

[5] Fryman vs. Fryman, 9 C. C. 91; 6 C. D. 377.

[6] *In re* Reynolds, 7 N. P. 626; 5 Dec. 570.

See Craighead vs. Pike, 4 Rec. 199.

As to advancements, see Boyer vs. Boyer, 7 N. P. 153; 7 Dec. 525.

[7] An administrator made party to a partition case and needing a sale to pay debts may have an order of sale on his answer and cross petition, and no statute of limitations applies. Lafferty vs. Shinn, 38 O. S. 46.

If the administrator claims the proceeds of the partition sale instead of subjecting the property, the rights of a *bona fide* buyer of one of the partition notes are paramount to his. Rowecamp vs. Meyer, 10 Rec. 566.

I have been asked, suppose the heirs should file a suit in partition more than one year after the death of the ancestor, and the administrator not being made a party, could he then file a suit to sell real estate, and would the Probate Court have jurisdiction; and I answered in the affirmative. It is doubtful if even by making the administrator a party in the partition suit he can be deprived of his right to an order of sale. (See 38 O. S. 46, above), much less

§ 1880. Certificate from Probate Court when proceedings for partition commenced and deficiency of assets found. "If after the institution of proceedings for partition of the lands of a deceased person, it is found that the assets in the hands of his executor or administrator are probably insufficient to pay the debts of the estate and expenses of administration, the executor or administrator must make a written statement to the probate court of such assets, indebtedness and expenses, and it forthwith shall ascertain the amount necessary to pay such debts and expenses in addition to the assets, and give a certificate thereof to the executor or administrator." [R. S. § 6173.][8]

§ 1881. Application. Form.

The statute says that the administrator or executor shall make a written statement to the Probate Court of said assets and indebtedness and expenses. This means that such a statement shall be made to the Court of the total assets and the total liabilities as will enable the Court to determine what amount is necessary to pay such indebtedness. The form may be as follows:

In the Matter of the Estate of .....,
deceased.

Probate Court,
.....County, Ohio.
Statement of Assets, Debts, etc., to Procure Certificate to File in Partition Proceedings.

Now comes A. B., administrator (or executor) of the estate of C. D., deceased, and respectfully represents to the Court that the assets, indebtedness and expenses of said estate are respectively as follows:

ASSETS.

Cash on hand.....dollars. Promissory notes from which will be probably realized.....dollars (and here state such other facts that will show the entire amount to be realized from all assets from every source).

if he is not a party. *Until the Court in which partition proceedings is brought makes its order,* he can oust that Court of its jurisdiction by filing his petition to sell real estate. His right is always superior to the heirs unless he waives it or is in some manner estopped. Since the above was written the Supreme Court has held the same. Stout vs. Stout, 82 O. S. 358.

See Myers vs. Myers, 9 C. C. (N.S.) 449; 29 O. C. C. 390.

[8] § 10818 G. C.

The creditor of a decedent cannot be made a party to the suit in partition, he must work out his claim through the administrator, and the administrator must proceed as above stated. Weis vs. Gerdes, 1 Dayton Term Rep. 31.

Where an administrator had commenced an action to sell the real estate for the purpose of paying debts, and the widow, in order to prevent the sale of the real estate, gave a bond as provided by statute (§ 10485 G. C.), conditioned to pay the debts against said estate, and the administrator, then dismissed his petition and afterwards the lands where sold on partition between the heirs, said widow was entitled to have paid to her out of the proceeds of such partition sale, the amount of money that she advanced to pay the debts of the deceased. Corey vs. Hayes, 13 C. C. 185; 7 C. D. 272.

DEBTS AND EXPENSES.

Expenses of last sickness.....dollars; funeral..... dollars; widow's allowance.....dollars; accounts due G. H., I. J., etc. (and here give all other matters relating to liabilities against said estate).

BALANCE REQUIRED, $.....

Said administrator therefore respectively asks the Court that a certificate may be granted to him of the amount which will be necessary to pay said indebtedness and expenses in addition to the assets which are in his hands, so that he may present the same to the Court of Common Pleas of..... .....county, where a proceeding in partition is pending of the lands of said deceased.

(Sign.)

Sworn to before me and subscribed in my presence this.....day of ....., 190...[9]

§ 1882. Hearing and order of Court.

The action seems to be purely *ex parte,* and no notice is required [10] to be given to any one, and the Court is to proceed as soon as convenient to hear the matter set forth in the application and find the amount which will be necessary for the administrator to have in order to liquidate all indebtedness against the estate. The amount which the Court should find to be necessary from the nature of the case can never be precisely determined, but sufficient should be allowed to reasonably cover all liabilities of the estate. This order of the Probate Court cannot be attacked in the Court of Common Pleas. When presented in the proceedings in the Court of Common Pleas, the amount therein certified must be allowed the executor. If it is sought to attack the order, this must be done in the Probate Court. The entry granting such certificate may be as follows:

Suit in partition does not prevent sale by administrator to pay debts. Myers vs. Myers, 9 C. C. (N.S.) 499; 29 O. C. C. 396.

Right of administrator is superior. Stout vs. Stout, 82 O. S. 363.

[9] A journal entry, under which a certificate of indebtedness is issued by the Probate Court for the purpose of filing the same in a partition suit in the Common Pleas and obtaining money to pay debts, as authorized by § 10818 G. C., will be set aside where the statement of the executor does not show all the assets and indebtedness of his estate, and especially where it does not show that the personal property is insufficient to pay the debts thereof. A proceeding under §§ 10818, 10819 G. C., to procure a certificate of indebtedness to file in a suit in partion is one to sell lands to pay debts, and where the claims for the payment of which the sale of the land is required include one due the executor, the heirs should have notice and be allowed to defend against it if such claim is denied. *In re* Estate of DeSerisy, 8 N. P. 694.

But it cannot be attacked collaterally, or in the action pending for partition.

[10] *In re* DeSerisy, 8 N. P. 694.

(*Title.*)

This day came A. B. and filed herein, a written statement of the assets and indebtedness and expenses, pertaining to the administration of said estate, praying that a certificate might be granted to him of the amount of money which will yet be required to pay all the indebtedness of said estate for him to file in a partition proceedings pending in the Court of Common Pleas of.....county, of the lands of said deceased; and the same was submitted to the Court. Whereupon the Court ascertains and finds that the amount of.....dollars will be necessary to pay the indebtedness of said deceased, and expenses of administration of said estate in addition to the assets in the possession of said administrator. And it is therefore ordered that a certificate of such fact be issued by the Probate Court of this county to said administrator (or executor) for him to file in said partition proceedings pending in said.....county.

§ 1883. Form of certificate.

State of Ohio,.....County, ss.

In the Probate Court.

In the Matter of the Estate of

A. B., deceased.

I, H. F., sole judge and ex-officio clerk of the Probate Court within and for the county aforesaid, do hereby certify that I have ascertained, from a statement of the assets, indebtedness and expenses of the said estate, made and presented by said administrator to this Court, and from other sources, that the sum of.....dollars, in addition to said assets will be necessary to pay said indebtedness and expenses.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court at....., this.....day of....., A. D. 190...

(Seal.) H. F., Probate Judge and ex-officio Clerk.[11]

§ 1884. Court shall order so much of proceeds to be paid over to him, provided, etc. "The executor or administrator thereupon shall present such certificate to the court in which the proceedings for partition are, or have been pending, and on his motion that court shall order the amount named in the certificate as necessary, to be paid over to the executor or administrator out of the proceeds of sale of the premises, if thereafter they are sold, or have already been sold. Nothing herein contained shall prohibit an executor or administrator from proceeding to sell land which belonged to such estate, to pay debts, although it has been sold on partition or otherwise, or the proceeds of such sale fully distributed." [R. S. § 6174.][12]

[11] This certificate filed in the Common Pleas Court is not conclusive to creditors as to the amount required, thus where the administrator in making his statement inadvertently overlooked a claim, which had been presented, it was yet held, that the creditor could insist on having the real estate sold to pay the claim which was inadvertently omitted. *In re* Cavagna, 8 N. P. 557.

Where the creditor's claim is in the nature of a judgment, it need not be even presented to the administrator. Ambrose vs. Byrne, 61 O. S. 146.

[12] § 10819 G. C.

It is not the duty of the Probate Court to provide for the payment of claims no one is asserting. Cox vs. John, 32 O. S. 532.

§ 1885. Proceedings in Court of Common Pleas.

It will be observed that the executor or administrator shall at once present said certificate to the Court in which the proceedings for partition are pending, and on his motion the amount of such certificate must be paid over to him. Of course, if there is any money remaining in the hands of the administrator after he has paid all the debts and expenses, such money must be distributed as real estate among the heirs of the deceased, the same as if it had not been turned over to the administrator. It will also be observed that the above section reserves to the administrator or executor the full right to bring a separate proceeding if he so desires. On the administrator's motion, the Court will set apart to him such part of the proceeds as his certificate calls for.

§ 1886. Form of motion and entry ordering money paid.

The State of Ohio,.....County, ss.
In the Court of Common Pleas.

F. B. et al.) No. Case.....
vs.)
B. B. et al.) Motion for portion of purchase money.

Now comes C. D., administrator of the estate (or executor of the will) of A. B., deceased, producing the certificate of the Probate Judge of..... .....county, to the effect that the personal estate of said decedent, subject to administration, amounts to.....dollars, and that the valid debts of said decedent, with the expenses of administering his estate, amount to.....dollars, and that the real estate sold by proceedings in this case is liable for the payment of such deficit; and he therefore moves the Court to make an order, directing that out of the first moneys arising from said sale, an amount sufficient to pay the residue of said debts and expenses be paid to him by the sheriff of said county.

C. D., Administrator (or Executor) as aforesaid.

JOURNAL ENTRY ORDERING MONEY TO BE SO PAID.

(Title as next above.)

This cause coming on to be heard on motion of C. D., administrator of the estate of A. B., deceased, and the certificate of the Probate Judge of said (or of.....) county, to the effect that the personal estate of said decedent, subject to administration, will be insufficient to pay the debts of said estate and the expenses of its administration, and that the sum of .....dollars from the proceeds of the sale of the real estate of said decedent, the partition whereof is sought in this cause, may be ordered paid to said administrator.

It is therefore ordered that the sheriff pay over to said administrator the said sum of $.....out of the proceeds arising from the sale of said land, according to law, and take his receipt therefor.[13]

[13] Giauque's Settlements of Estates, 806, 807.

CHAPTER CI.

ADOPTION AND DESIGNATING HEIR. COMMITTING VAGRANT CHILD.

§ 1887 Introductory. Definition, etc.
§ 1888 How a child may be adopted.
§ 1889 Who may adopt.
§ 1889a Court shall fix time of hearing.
§ 1889b Duties of next friend.
§ 1890 Adoption of child by stepfather or stepmother.
§ 1890a Consents required.
§ 1891 Who may be adopted.
§ 1892 Application and form.
§ 1893 How consent of wife ascertained.
§ 1894 Consents of parents, child or next friend, etc.
§ 1895 The order of the court.
§ 1896 Hearing.
§ 1897 Entry of adoption.
§ 1898 Recording and effect of the order.
§ 1899 Extra-territorial effect.
§ 1900 Rights of inheritance.
§ 1901 Power to revoke order of adoption.
§ 1901a Child must have resided with adopting parent six months.
§ 1901b When child develops certain infirmities order may be revoked.
§ 1902 Heir at law how designated, etc.
§ 1903 Nature of proceedings.
§ 1904 Form of designation.
§ 1905 Entry designating person as heir.
§ 1906 Parent of vagrant or incorrigible child may be summoned to appear before Probate Court.
§ 1907 Proceedings under Section 8031 G. C.
§ 1908 Entry, on filing of affidavit.
§ 1909 Entry, ordering child committed.

§ 1887. Introductory, definition, etc.

Adoption is defined by statute in New York[1] "to be the legal act whereby an adult takes a minor into relation of child, and thereby acquires the right and incurs the responsibility of parent in respect to such minor." This will answer for a general definition under our statute. Such proceedings were not recognized by the common law, but were sanctioned by the civil law as it existed in many of the continental countries of Europe.[2] It therefore exists purely by statutory law in our country, and being in derogation of the common law, such statutes are strictly construed, and in order to constitute a legal adoption, must be strictly followed. In some States the action

[1] Laws of 1896, Chapt. 272, § 60.

[2] 1 Am. & E. Ency. of Law, 2 ed. 726.

of adoption is merely a ministerial act, like the signing of a deed, etc. In other States it is a judicial procedure. The several sections of our General Code comprise both of these methods. The section [3] providing generally for the adoption of a minor requires a judicial act. The other section,[4] which provides how a person may designate another to be his heir, is merely a ministerial act, and does not require a judgment of the Court to make it effectual.[5]

While the statute must be strictly followed in order to make a legal adoption, yet there have been cases in which persons were held to be entitled to inherit as heirs and be treated as children when no legal adoption had been made. But this has not been upon the ground that the defective proceedings constituted a valid adoption, but upon the ground that there was a contract made by the alleged parents to leave their property to such children, and that the children having performed the conditions of the contract, were entitled in equity to have a specific performance.[6]

[3] §§ 8024-5 G. C., § 1888.

[4] § 8598 G. C., § 1902.

[5] Bird vs. Young, 56 O. S. 210.

[6] Vantine vs. Vantine, 15 Atl. Rep. 249; Healey vs. Simpson, 113 Mo. 340; Vandyne vs. Vreeland, 11 N. J. Eq. 370; Godine vs. Kidd, 19 N. Y. Supp. 335.

Two very interesting cases upon this question have come before our Supreme Court; in both instances, the Court of last resort reversing the Circuit Court. Swan vs. Shahan, 48 O. S. 25; Rev. 1 C. C. 216; 1 C. D. 119; Steele vs. Swartz, 55 O. S. 685; Rev. 8 C. C. 154; 4 C. D. 321.

In Swan vs. Shahan, the infant was taken when about two years of age into the family of another party and always thereafter treated as their child, introduced into society as such, given away in marriage as their daughter, entered the infant's name in their Bible as their own, reared and educated her in every respect as if she was their own child. Yet the Court held, that this was not a legal adoption and that the facts were not sufficient to support a decree for specific performance.

In the case of Steele vs. Swartz, a verbal contract was entered into with the mother to adopt and make her infant daughter the heir of the person taking the child; in pursuance of the agreement the infant two years old, was delivered and the contract faithfully performed, except that the statutory requirements for the adoption were delayed until the daughter became twenty years old, at which time the formal requirements of the statute were complied with, yet the Court held that this was neither a legal adoption nor a sufficient part performance to take the case out of the operation of the statute of frauds.

In Kendall vs. Kendall, 8 Bull. 1,

§ 1888. How child may be adopted. (§ 8024.) Any proper person, or a husband and wife jointly, may petition the probate court of the county in which he or they have a legal settlement, of [or] the county in which the child resides or of the county in which the child had a legal residence when it became a public charge, for leave to adopt a child and for a change of the name of such child.

Statements of petition. Such petition for adoption shall specify the name, age, and place of residence of the petitioner and of the child, and the name by which the child shall be known; whether such child is possessed of any property, and the full description of the property, if any; whether the child has one or both parents living; in case one or both are alive, then the name or names and place of residence of such father and mother shall be given unless proven to be unknown to the petitioner.

When names of parents may be omitted. Provided that if such child sought to be adopted is, by previous order of a juvenile court, under the legal guardianship and permanent custody of a state board or of an institution or agency certified by the board of state charities for the care of children, or has been legally surrendered to the guardianship of such institution or agency, then the names of parents shall be omitted from such petition,

Verification of petition. But the court shall cause such allegation and the petition to be verified. [109 v. 177.][7]

§ 1889. Who may adopt.

Several jurisdictional facts must appear, entitling a person to file his petition for adoption. In the first place, he must be an inhabitant of this State and must also show that he is an inhabitant of the county in which the proceedings to adopt are

it was held that the acts showing an adoption of the child, as treating it as the parents' own, acknowledging that he was her child without statutory adoption, are not sufficient to constitute the child an heir as against other children. In this case, the supposed mother had the child baptized as her son and gave him a name.

See *Ex parte* Clark, 26 Bull. 281, where it was held that no matter how persuasive may be the equities of the child's case, or how clear the intention of all the parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed and the right to inherit never was acquired.

[7] § 8024 G. C.

A decree of adoption is not invalid because it does not recite nor the petition allege an assent by the parents or facts excusing their assent. Taylor vs. Bushnell, 29 O. C. A. 497. See Snyder vs. Shuttleworth, 37 O. C. C., for contract to adopt—how to enforce.

brought.[8] In the second place, if the party be married, the husband and wife must jointly file the petitions, except possibly where an adoption is made by a step-father of the children of his wife, or *vice versa*.[9] An unmarried person may adopt a minor. In addition, it must be shown that the parties seeking an adoption are able to properly educate the child, having reference to, to the degree and condition of the child's parents.[9*]

Societies and corporations can not adopt children, although in some cases where children are placed in their charge they have full and complete control over them.[10]

It has been held that a guardian might adopt.[10*]

§ **1889a. Court shall fix time for hearing.** (§ 8024-1.) Upon the presentation of such petition the same shall be filed with the court and the said court shall appoint a day for the hearing of said petition and the examination, under oath, of the parties in interest, not less than ten nor more than thirty days from the filing of the petition. It shall be at the option of the court to adjourn the hearing of said petition or the examination of the parties in interest, from time to time, as the nature of the case may require.

Appointment of next friend. If it shall be necessary, under the provisions of this act, that a discreet and suitable person shall be appointed as next friend to the child sought to be adopted, the court shall make such appointment and shall thereupon assign a day for the hearing of said petition and examination of the parties in interest, not less than ten nor more than thirty days from the time of appointing the next friend. In case there is in the county an institution or agency approved by the board of state charities, such institution or agency may be designated as next friend and consent be given as indicated in section 8025. Or the court may order the board of state charities through an authorized representative to act in such capacity.

Report of next friend. Such person, institution, agency or board thus designated shall proceed to verify the allegations of the petition, shall make appropriate inquiry to determine whether the proposed foster parents and their home are suitable for such child, and whether such child is a proper subject for adoption in such home.

[8] Inhabitant is synonymous with permanent resident. Wolff's Appeal, 22 W. N. C. (Pa.) See §§ 74, 93.

[8*] Statute now permits application to be made in county of the residence of the adopters or that of the child. See § 1888 G. C.

[9] § 8026 G. C.

[9*] § 8027 G. C.

[9*] § 8029 G. C.

[10] § 8031 G. C.

[10*] Bancroft vs. Bancroft, 53 Vt. 9; Sewell vs. Robert, 115 Mass. 262.

When next friend not to be appointed. If such child is under the legal guardianship of a state board or of any certified institution or agency, no next friend shall be appointed, but such board, institution or agency shall prepare the report required by this section. As soon as practicable, there shall be submitted to the court a full report in writing, with a recommendation as to the proposed adoption and any other information concerning such child or the proposed home as the court may require.

Hearing, etc. Upon the day so appointed, the court shall proceed to a full hearing of the petition and the examination of the parties in interest, under oath, with the right of adjourning the hearing and examination from time to time as the nature of the case may require. The board of state charities shall prepare and furnish to the probate court a suitable blank for use by persons designated to make the report required by this section. [109 v. 178.]

§ 1889b. Duties of next friend, etc. The next friend, whether it be a person or an institution such as the statute provides, shall verify the allegations of the petition; that is, shall satisfy itself that the allegations are true, and shall by appropriate inquiry learn whether the persons filing the petition are suitable and proper persons to adopt the child and will give it a proper home. The next friend shall also find out whether the child is a proper subject for adoption. Just what the latter includes is not readily discernible, but it recognizes that the child might be in such condition that it ought not to be adopted. For instance, if it had a good home and good surroundings, which would likely continue, it might not be to its interests to be adopted by any one. It might not be advisable to permit a child of Protestants to be adopted by Catholics, or *vice versa*, if the blood relatives objected; or a child of one race adopted by those of another race; or if it was delicate or diseased, or not strong mentally or physically, or viciously inclined.

Whether or not the "next friend" should file a report such as the state board, etc., should file where no "next friend" is appointed, may be questionable, but it would be advisable so to do. The statute provides that the state board of charities should prepare and furnish such a blank upon which to make a report.

When this report is made, the "next friend" or board, institution or agency should file its written consent, or refusal to consent.

§ 1890. Adoption by step-father or step-mother. "An inhabitant of this state, the husband of a woman who has a minor child or children by a former husband; or an inhabitant of this state the wife of a man who has a minor child or children by a former wife, may petition the probate court of his or her proper county for leave to adopt such minor child or children and, when the application is made by the husband alone, or jointly

with his wife, for a change of the name or names of such child or children. When each have such minor child or children, the application may be made jointly by the husband and wife." [R. S. §3137a.][9]

Sec. 8027. In any adoption in accordance with section 8026 the provisions of section 8025 shall apply in the manner of consent, so far as applicable. [109 v. 179.]

The paramount purposes of these sections is to make an adopted child the equal to all intents and purposes of a natural child.[11a] This section does not make an adopted child the child of the petitioner so that an action for wrongful death of such child may be maintained, etc.[11b]

§ 1890a. Consents required. (§8025.) In any adoption proceedings written consents must be given to such adoption as follows:

(a) **[Of child.]** By the child sought to be adopted if more than thirteen years of age.

(b) **[Of parent.]** By each of the living parents or by the mother of an illegitimate child, except as follows:

(c) **[Of person awarded custody by juvenile court.]** By the parent or person awarded the legal custody and guardianship by a juvenile court because of dependency, or because of the mental, moral or other unfitness of one or both parents; provided that such juvenile court approves of such consent whereupon the jurisdiction of such court over such child shall cease.

(d) **[Of divorced parent.]** By the parent awarded custody of child by divorce decree, provided the court which granted such decree approves of such consent, and because of such approval the jurisdiction of such court over such child shall thereupon cease.

(e) **[Of guardian.]** By legal guardian of the person of such child, if parents are dead or their residence has been unknown for at least one year, or if the parents have, because of mental, moral or other unfitness, been deprived of legal custody and guardianship of such child by juvenile court; but if there is no guardian and such child is not the ward of a state board or of a certified institution or agency, a next friend shall be appointed as hereinbefore provided, to give consent.

(f) **[Of person having custody, etc.]** If the parent or parents having the legal custody give the custody of such child for the full term of its minority to any institution or agency established

[11] §§ 8026 and 8027 G. C.

Step-daughter is not a daughter within § 11738 G. C. Kraft vs. Wolfe, 3 N. P. (N.S.) 105; 19 Dec. 556.

[11a] Kroff vs. Armhein, 94 O. S. 282; 27 O. C. A. 193.

[11b] Boswell vs. Railway, 22 C. C. (N.S.) 251; 25 C. C. 522.

under the laws of the state to care for children and under the approval of the board of state charities, or if such institution or agency has otherwise legally acquired the custody and control of such child,

[Certified copy of resolution] the president or secretary of such institution or agency shall file a certified copy of the consent of the board of trustees, or of the proper officers authorized by such institution or agency to act in matters of adoption; and if such child is a ward of the board of state charities or other state board the secretary of such board shall file a certified copy of the consent given in accordance with its rules.

All such consents to such adoptions shall be acknowledged and witnessed. [109 v. 178.]

§ 1891. Who may be adopted.

Only minors can be adopted,[12] and if it is sought to make an adult an heir, it must be done under the statute for designating a person an heir,[13] and where an infant is placed in a home of a public character, the trustees may sanction an adoption.[14]

§ 1892. Application and form.

The application or petition should state all the jurisdictional facts. One author says,[15] "Much unnecessary confusion prevails in reference to this topic, owing to the slovenly manner in which these proceedings are many times conducted." The action fixing the status of the child often becomes of very great importance, to both the child and adopting parents, in determining questions of inheritance. As the court gathers much of its information from the petition filed in the case, it will be apparent that a full statement of, not only jurisdictional facts should be given, but such others as will enable the court to rightly determine the matter before it. The petition should state, *first,* the names of the petitioners and whether married or single; *second,* their place of residence and age; *third,* the name, age and place of residence of the child, and the name by which it shall be known; *fourth,* the property which the child has and a description of the same; *fifth,* a statement that petitioners are possessed of sufficient means to properly bring up and educate the child; *sixth,* whether one or both parents be living; if not both, which; *seventh,* if living, the names and residence of the parents given;

12 Steele vs. Swartz, 55 O. S. 685; Rev. 8 C. C. 154.

13 § 8598 G. C., § 1902.

14 See when a minor becomes of age, § 1321.

15 Rice's Prob. Law, 551.

if not known this fact should be stated; *eighth,* in case the child by judgment of a juvenile court, has been placed under guardianship, the names of the parents, the statute provides, may be omitted, but the author thinks they should be given; also if such child is under such guardianship this fact should be fully stated; *ninth,* that said child has resided in the home of the petitioners since ....., and the application should be verified. If a change of name is desired, this should also be stated. The following may be used as a general form:

PETITION FOR ADOPTION.

To the Honorable Probate Judge of ..... County, Ohio.

Your petitioners, being husband and wife, hereby state his name is ....., his age ..... years and his place of residence ....., ...; that her name is ....., her age ..... years and her place of residence ....., ..., and he [they] hereby file.. his [their] petition for the adoption of a child as his [their] own. That the name of the child whom he [they] wish to adopt is ..... and that the name by which it will hereafter be known is ..... That the said child's place of residence is ....., ... and that its age is ..... years.

That the said child is possessed of the following described property. That these petitioners are possessed of sufficient means to properly maintain and educate said child. That the parernts of said child are living and reside at ..... [*or,* if one or the other be dead, so state, *or,* if not known state all facts so far as known in full.] [If the child has been under control of Juvenile Court or has a legal guardian, state fact and give place of residence of party now having control of child.]

That said child has resided in the home of the petitioner.. since the ..... day of ....., 19...

Your petitioner.. presents herewith the written consent of ...., the parents of said child, and also that of the child [if more than thirteen years of age].

Your petitioner.. prays such proceedings may be had as required by law, and that the court may by its order approve of such adoption, and declare said ..... to be the child of ..... and ....., your petitioners, and that the name of the child be changed to .....

.....
.....

State of Ohio, County of ....., ss.:

....., being first duly sworn says the allegations in the above petition are true as ..... verily believe.

.....
.....

Sworn to and subscribed before me and in my presence this ..... day of ....., 19...

.....
Notary Public.

ORDER FIXING TIME OF HEARING AND APPOINTMENT OF NEXT FRIEND, ETC.

The statute now requires when the petition is filed, that the court shall fix a day for hearing, not less than ten days nor more than thirty days from the time the petition is filed, and the court may continue the case from time to time, thereafter. At this time the court appoints a next friend to act for the infant, and the time of hearing will be not less

than ten days nor more than thirty days from the time of said appointment. If there is an institution in the county approved by the state board of charities, it may be designated as the next friend. If the child is already under the legal guardianship of a state board, no next friend shall be appointed; said board shall act as such.

JOURNAL ENTRY ON FILING PETITION, ETC.

[*Title.*]

On this day came ..... and filed their petition in this court for the adoption of ....., the child of ....., and the ..... day of ....., 19..., at ... m. is fixed for the time of hearing the same and ..... is appointed to act for child as next friend, and make the examinations required by statute, and report thereon at the time of said hearing; and it is ordered that ..... give notice to said ..... as to his appointment as next friend, and the time fixed for hearing.

[It appearing to the court that said ..... is under the legal guardianship of ....., a state board, etc., no next friend is appointed, but it is ordered that notice hereof be given to said ....., and the time fixed for hearing the same.]

§ 1893. How consent of wife ascertained. "When the petition is filed by a husband and wife, the court shall examine each separate and apart from the other and refuse leave for such adoption unless satisfied from the examination that each petitioner of his or her own free will and accord desires it." [R. S. § 3138; 109 v. 179.][16]

§ 1894. Consents of parents, child or next friend, etc.

The statute must be strictly followed in reference to having the consent of the child, if over 13 years of age, and also the consent of both parents, *except*

First, when the legal custody of the child has been awarded to some other person by the juvenile court; then it seems the consent should be signed by the person to whom the child was awarded and the juvenile judge.

Second, when the child was awarded to the custody of one of the parents by decree in divorce, then such parent signs the consent and also a judge of the court which granted the divorce.

Third, when there is a legal guardian of the child, and the parents are dead, or their residence has been unknown for one year, or if the parents have been deprived of the custody of such child by the juvenile court, then the guardian may give such consent.

Fourth, if there is no legal guardian and such child is not the ward of a state board or of a certified institution or agency, a "next friend" shall be appointed, and if the parents are dead

[16] § 8028 G. C. See note, § 1888.

or their residence unknown for at least one year, or if the parents have been deprived of the legal custody of such child, etc., then the "next friend" gives such consent.

Fifth, if the parents have surrendered the custody of such child for its full term of minority, to any institution, etc., established by law to care for children, etc., or if such institution, etc., has legally acquired the control of such child, then the consent shall be given by a copy of the consent of the board of trustees or proper officials being filed by the president or secretary of the institution.

The statute further provides that all consents shall be acknowledged and witnessed. This would undoubtedly apply to all *consents* given by *parent, guardian* and *"next friend,"* but might not apply where an institution acts by resolution of its governing body and certified copy of resolution is filed, etc.

CONSENT OF PARENTS.

[*Title.*]

The undersigned represent that they are the parents of E. F., a minor child of the age of ..... years. And they hereby consent to the adoption of said child by A. B., and C. B., his wife, of ..... County and State of Ohio. They also consent that the name of said child may be changed.

[Signed.][19]

Signed in our presence.

.....
.....

State of Ohio, ... County, ss.:

Be it remembered that on the ..... day of ....., 19... appeared before me a ..... in and for said county, personally ..... and ..... and acknowledged the signing of the foregoing consent to be their voluntary act and deed, and for the uses and purposes therein expressed.

.....
.....

§ 1895. The order of the Court. (§ 8029.) If the court, from the testimony, shall be of the opinion that the facts stated in the petition are true, and that the petitioner or petitioners are of good moral character and of reputable standing in the community, and of ability to properly maintain and educate the child sought to be adopted, and that the best interests of the child would be promoted by such adoption, and that such child is found to be suitable for adoption, and is satisfied that all the provisions relative to adoption have been complied with, then the court shall make a decree reciting the facts at length, and the name by which the child shall hereafter be known. [R. S. § 8139; 109 v. 179.][20]

[19] Whittaker's Prob. Code.

[20] § 8029 G. C.

Adopted child is not a child of the petitioner until provisions of the statute are complied with. Kraft vs. Wolfe, 2 N. P. (N.S.) 105; 15 Dec. 556.

§ 1896. Hearing.

Before the court can make the order, it must affirmatively appear that the statutory provisions of sections 8024, G. C., to 8028, G. C., have been complied with, and in addition to this fact, the court must be satisfied of the ability of the petitioners to bring up and educate the child in a proper manner, and further that such adoption is a fit and proper thing and for the best interest and welfare of the child. In all cases the courts have held that the welfare of the child is the highest matter of consideration for the court. These matters being somewhat of a *pro forma* character, the Probate Judge sometimes, I fear, does not consider the questions presented in such cases as fully as the rights of the parties demand. The court should be satisfied that the adopting parents are not only *financially able* to properly take care of the child, but that they are of such a *moral character* that the interest of the child will be enhanced by such an adoption. The child's future social welfare should be considered, and much the same care should be exercised, only in a higher degree, as when the court makes choice of a guardian.[21]

§ 1897. Entry of adoption.

The State of Ohio, ... County, ss.:

..... County Probate Court.

In the matter of the adoption and change of name of ..... It appearing to the court, from the petition of ..... and ....., his wife, residents of this county, that they desire to adopt ....., a minor child, not theirs by birth, and that the name of said child may be changed to ....., said child being ..... years of age, on the ..... day of ....., A. D. 19..., and said petitioners having produced the written consent of ..... to such adoption and change of name: And the court having examined ....., the wife of said petitioner separate and apart from her said husband, the court is satisfied from such examination that said ..... of her own free will and accord desires such adoption. And the court being satisfied of the fitness and propriety of such adoption, and of the ability of said petitioners to bring up and educate said child properly: now, therefore, the court orders that such adoption be and is now made; and that from this date the said ....., minor child, to all intents and purposes is the child of the said ..... and ..... And it is further ordered that the name of said child be and is now changed from ..... to ....., as prayed for in said petition.[22]

[21] § 1330.

It has therefore been held that the court would not sanction the adoption of a white boy by a Chinese man and wife, although in needy condition, and the consents of the parents has been given. 20 Cen. L. J., 320.

[22] Whittaker's Prob. Code.

If it was necessary to appoint a suitable and discreet person to act for the child in giving consent, this fact should be stated in the entry.

§ 1898. Recording and effect of order. (§ 8030.) The petition, decree and proceedings shall be recorded in a book kept for that purpose and properly indexed; such book shall become part of the records of the probate court and all reports and affidavits shall be properly filed.

Natural parents divested of rights, etc. Except when such child is adopted under the provisions of sections 8026 and 8027, upon such decree of adoption the natural parents of the child, if living, shall be divested of all legal rights and obligations due from them to the child or from the child to them; and the child shall be free from all legal obligations of obedience or otherwise to such parents;

Rights of adopting parents. And the adopting parent or parents of the child shall be invested with every legal right in respect to obedience and maintenance on the part of the child as if said child had been born to them in lawful wedlock;

Rights of child. And the child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate, or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock;

When inheritance limited. Provided, such child shall not be capable of inheriting property expressly limited to the heirs of the body of the adopting parent or parents; and provided also, on the death of the adopting parent or parents and the subsequent death of the child so adopted, without issue, the property of such deceased parent or parents shall descend to and be distributed among the next of kin of said parent or parents and not to the next of kin of the adopted child; and provided, also, if such adopting parent or parents shall have other child or children, then the children by birth and adoption shall, respectively, inherit from and through each other as if all had been children of the same parents born in lawful wedlock.

Inheritance from natural parent. Nothing in this act shall be construed as debarring a legally adopted child from inheriting property of its natural parents or other kin. [R. S. § 3140; 109 v. 179.][23]

The intent of the statute is to invest the child with all the rights and privileges, the same as a child born in wedlock and begotten of the blood of the adopter, except as to limitations provided in the statute.[23a]

§ 1899. Extra-territorial effect.

The judgment or decree of the court which allows the adoption affects the legal status of both the adopting parents and

[23] § 8030 G. C. See statute as to limitation of inheritance.

[23a] Kroff vs. Armhein, 94 O. S. 282.

the child,[24] and it is now settled that a child adopted in one State in accordance with the laws of such State, while the parties are domiciled there, will be recognized in another State, and such child will be held to be the legal child of the adopting parents in such other State for the purpose of inheriting the property there.[25]

§ 1900. Rights of inheritance.

While the adopted child is the legal heir of the person so adopting him or her, yet as to the inheritance of property both by and from the child, there is some difference between an adopted child and a child by birth. In one case,[26] where an adopted child died intestate and leaving its natural mother and its adopting parents surviving it, it was held that the property of such adopted child passed to the natural mother to the exclusion of the adopting parents and their natural children. In another case it was said: "The statute enables the adopted child to inherit from its adopter, but not through him. The statute does not make the adopted child the heir of the ancestors of its adopter, and the right of the adopted child to inherit can not be extended beyond where the statute has fixed it."[27]

Where a child was adopted and the adopting mother died without issue, and thereafter such adopting mother's father died, leaving real estate, it was held that the adopted child could not inherit such property. The court said, "that adoption of the child did not make her of the blood of her adopting mother's father."[28]

The acts of adoption give to the adopted heir the legal status of a child of the adopter, born in lawful wedlock; and the stat-

[24] Paul vs. Davis, 100 Ind. 422.

[25] Craighead vs. Pike, 4 Rec. 199; Keegan vs. Geraghty, 101 Ill. 26; 1 Am. & Eng. Ency. of Law, 2d ed., 733. The fact that an adopted child has been absent from home and missing for eleven years does not extinguish her title to the property left her by her foster parents. Oglesby vs. Rose, 11 N. P. 188; 21 Dec. 291.

[26] Upson vs. Noble, 35 O. S. 655.

[27] Phillips vs. McConica, 59 O. S. 1. See Spangenberger vs. Guiney, 3 Dec. 163; 2 N. P. (N.S.) 39, for inheritance from child dying without issue. Adopted child can inherit from, but not through, adopting parent. Theobold vs. Fugman, 64 O. S. 473. Does not take away right to inherit from natural parents. Kneese vs. Hake, 3 O. L. R. 610; 16 Dec. 470. Property of such child passes to its natural mother. Lathrop vs. Young, 25 O. S. 457. A child adopted in a foreign state has inheritative capacity to lands in the state. Simpson vs. Simpson, 9 C. C. (N.S.) 137; 29 O. C. C. 503. A widow of a deceased person can not inherit from an adopted child property received by such child from such deceased person. *In re* Rasfold, 6 N. P. (N.S.) 172; 18 Dec. 396.

[28] Quigley vs. Mitchell, 41 O. S. 375.

ute requires him to be regarded as such child in tracing descent to or from him in the cases therein specified. But in cases which do not come within those acts, the operation of the statute of descents is the same as if such acts had not been passed.[29]

A grandchild duly adopted by the grandparent becomes his heir, and takes the share of his lands like the other children, but is not entitled to inherit the *additional share* of its parent.[30]

§ 1901. Power to revoke order of adoption.

The statute provides no right of appeal in adoption proceedings. No doubt exists, however, but that the order made is a final order from which a proceeding in error might be prosecuted under the statute relating thereto. As to the power of the court to directly revoke the order, some little difficulty is experienced. There seems to be, however, no good reason, where the order was made under a misapprehension of fact, or where fraud was practiced upon the court, why the court should not entertain jurisdiction and revoke such order. In a case in Massachusetts it was said there would seem to be nothing in the nature of a decree of adoption to take away the power of the Probate Court to revoke and annul it on the ground that it had been procured by fraud practiced upon the court.[31]

In one reported case in Ohio,[32] where representation was made to the court that the mother had abandoned the child, and a few days thereafter to revoke the order, the court entertained jurisdiction and revoked its former order. It would seem to be the law, however, in Ohio that if a motion is filed to

[29] Lathrop vs. Young, 25 O. S. 451, 463; Spangenberger vs. Guiney, 2 N. P. 39; 3 Dec. 163.

See § 4174 R. S., § 936, as to capability of bastards as to inheritance.

An adopted child as next of kin has the right to administer the estate of its deceased parent. Woerner on Admin. 522.

[30] Smith vs. Carven, 36 Bull. 189 (Sup. Ct. unreported).

A husband whose wife before marriage had adopted a child is entitled to dower in the wife's property—the same as if the child was the wife's by birth. Clark vs. Harlan, 17 Bull. 320.

Where the record or deed of adoption of a child states that it was duly and legally done; in order to invalidate the adoption, it must affirmatively be shown by clear proof that the adoption was irregular in some essential particular. Simpson vs. Simpson, 9 C. C. (N.S.) 137; 29 O. C. C. 503.

It has been held in McClure vs. Williams, 78 So. Rep. 1918 (Ala.), that a court of chancery might, if the best interests of the child demanded it, restore an adopted child to its natural parents and cancel the record of the Probate Court showing its adoption. The order was refused in the case, however, beause it was not shown that the best interests of the child demanded it. In Ohio it has been held that the order could not be collaterally attacked. Taylor vs. Bushnell, 29 O. C. A. 497.

[31] Tucker vs. Fisk, 154 Mass. 574; Brown vs. Brown, 101 Ind. 340.

[32] *In re* Olson, 3 N. P. 304; 3 Dec. 668.

no notice was given to the mother and a motion was filed within revoke an order of adoption, it must be done during the same term that the order was made, and for this purpose the Probate Court has three terms in each year.[33] If the order is sought to be set aside after the term at which it is made, then a proceeding must be had as provided by the general statute.[34]

One court, however, has held that when the Probate Court makes its order that is exclusive so far as that court is concerned.[35] Further, it may be generally said, that as the Probate Court is a court of record, and its orders and decrees impute absolute verity, an order of adoption can not be attacked in any collateral proceeding.

§ 1901a. Child must have resided with petitioner six months. (§ 8030-1.) No decree of adoption shall be made until such child has resided in the home of the petitioner for at least six months, unless the court for some special reason which shall be entered in the record deems it best to waive this requirement. [109 v. 180.]

§ 1901b. When child develops certain conditions—order may be revoked. (§ 8030-2.) If, after its adoption and before it becomes fourteen years of age, a child develops feeble-mindedness, epilepsy, insanity, or venereal disease as a result of conditions existing prior to adoption, and of which the adopting parent had no knowledge or information, a petition setting forth such conditions may be filed in the court which entered the decree of adoption, and if such conditions are proved to the satisfaction of the court, such adoption may be declared null and void. The court shall thereupon make proper disposition of such child by a commitment to an appropriate state institution as provided in the laws of Ohio or refer such child to the juvenile court. [109 v. 180.]

§ 1902. Heir at law, how designated, etc. "A person of sound mind and memory may appear before the probate judge of his county, and in the presence of such judge and two disinterested persons of his or her acquaintance, file a written declaration, subscribed by him, which must be attested by such persons, declaring that, as his or her free and voluntary act, he or she did designate and appoint another, naming and stating the place of residence of such person specifically, to stand toward him in the relation of an heir-at-law in the event of his

33 § 5.

34 §§ 11631-11645 G. C.

See Gray vs. Field, 19 Bull. 121, where it is held that neither party has a right of revocation on their own behalf, but that on a proper application, however, the court will have a regard for the natural rights of the parents, the rights of the foster parents arising out of their contract and actual custody, but will look chiefly to the best interests of the child, and if it be of years of discretion, will consult its wishes, in determining its future custody.

35 *In re* Bush, 47 Kan. 264.

or her death. If satisfied that such declarant is of sound mind and memory, and free from restraint, the judge thereupon shall enter that fact upon his journal, and make a complete record of such proceedings. Thenceforward the person thus designated will stand in the same relation, for all purposes, to such declarant as he or she could, if a child born in lawful wedlock. The rules of inheritance will be the same, between him and the relations by blood of the declarant, as if so born; and a certified copy of such record will be *prima facie* evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud, or undue influence." [R. S. § 4182.][36]

§ 1903. Nature of proceeding.

The proceeding is peculiar to this State, there not being, so far as we are aware, any similar statute elsewhere,[37] and it has been held in the only reported case of our State[38] that the act of the Probate Judge is rather of a ministerial character and only *quasi* judicial, and that the judge acts very much in the same capacity as he would in taking the acknowledgment of a deed, etc.; and that therefore it was not necessary for the person making the designation to appear before the Probate Judge in the judge's court room, but that the judge might go to the residence of the party, and there ascertain the facts required by the statute. That the entry made by the judge, if a judgment at all, is only a judgment *in rem,* and that the proceedings bear some resemblance in their character to the proceedings *in rem,* which fix the status of a person in lunacy or insolvency under our statute, or bankruptcy proceedings under the United States statute; and that the proceeding is *ex parte,* no notice being required to be given to any one. Indeed, the character of the act is such that it is necessarily presumed that the Legislature intended no one should have notice. In order to accomplish what the statute permits, it must be at least substantially complied with — that is, the declaration must be made in the presence of the judge and two disinterested per-

[36] § 8598 G. C.

[37] Bird vs. Young, 56 O. S. 218.

[38] Bird vs. Young, *Id.*

Authorizes an adopter to designate who shall be his heir, but not otherwise change the course of descent. Richardson vs. Stockyard Co. 8 N. P. (N.S.) 213; 11 Dec. 367. One who is not of the blood of the testator who has been designated as heir, is not of the issue of the body of the testator and can not take advantage of bequests void under § 10514 G. C. Theobald vs. Fugman, 64 O. S. 474. Naming persons in a will as daughters of testator will not make them his heirs. *In re* Williamson, 5 N. P. 1, 6 Dec. 505. However, they may be made such by will. Moon vs. Harness, 15 O. C. C. (N.S.) 139; 23 O. C. C. 337; affirmed, 87 O. S. 349.

sons, and it must be made in writing, subscribed by the party making the same, and attested by such disinterested persons as witnesses. It must name the person designated as heir and state his place of residence. The duty devolving upon the judge is to satisfy himself that the declarent is of sound mind and memory and free from any restraint. Evidence of this fact should be the same as would justify the Court in ordering the probate of a will.[39]

§ 1904. Form of designation.

Know all Men by these Presents:

That I, J. Y., of the township of Madison, in the county of Fairfield, and State of Ohio, being of sound mind and memory, and free from any restraint, do hereby publish and declare, that as my free and voluntary act, I have designated and appointed and do hereby designate and appoint J. L. Y., whose place of residence is in Hardin County, in the State of Iowa, to stand toward me in the relation of a son and heir-at-law, in the event of my death.

In testimony whereof I have, in the presence of J. A. and T. D., who are disinterested persons of my acquaintance, subscribed my name on this..... day of....., A. D. 190...

J. Y.

Attested by us, who are acquaintances of the said J. Y., and are persons disinterested in the above designated matter.

J. B.
T. D.[40]

§ 1905. Entry designating person at heir.

In the matter of the designation of J. Y. and J. L. Y. as a son and heir-at-law.

This day, being the.....day of....., A. D. 190.., appeared before me, the undersigned judge of the Probate Court in and for the county of Fairfield, Ohio, J. Y., residing in Madison township, in said county, and in my presence and in the presence of J. A. and T. D., who are disinterested persons and acquaintances of the said J. Y., he, the said J. Y., did file a written declaration subscribed by him and attested to by the said J. A. and T. D., declaring that he, as a free and voluntary act, did designate and appoint J. L. Y., of Hardin County, in the State of Iowa, to stand toward him in the relation of a son and heir-at-law, in the event of his death. And I, the said judge, being satisfied that such declarant, the said J. Y., is of sound mind and memory, and free from any restraint, do hereby order that such facts be entered upon the journal of said Probate Court, and that a complete record of such proceedings be made.

E. C. R., Probate Judge.[41]

§ 1906. Parent of vagrant or incorrigible child may be summoned to appear before Probate Court. "When through vagrancy, negligence, or misconduct, the parent or parents of

39 § 1106.

40 Bird vs. Young, 56 O. S. 212.

41 Bird vs. Young, 56 O. S. 211.

Merely naming persons in a will as daughters will not make them heirs. *In re* Williams, 5 N. P. 1; 6 Dec. 507.

A person designated heir would be liable to inheritance tax. See Haggerty vs. State, 55 O. S. 613.

A person designated under this section is not issue of the body of person designating, etc. Theobold vs. Fugman, 64 O. S. 473.

any minor child or children are unable to support such child or children, or, if able, neglect or refuse support therefor, or when such parent or parents unlawfully beat, injure, or otherwise habitually ill-treat such child or children or cause or allow them to engage in common begging, upon complaint by affidavit of some reputable citizen of the county in behalf of such child or children, setting forth facts bringing the case within this statute, the probate court of the proper county may issue a summons requiring such parent, or parents, to appear and answer such complaint. If, upon the hearing of the matters complained of, the court finds them to be true, and that it is for the best interest of such child or children to be taken from such parent or parents, it may make an order to that effect, and direct the placing of such child or children in any suitable orphan asylum or children's home or with some other benevolent society, to be taken and cared for and placed in homes found for them by adoption or otherwise by such asylum, home or society, upon the terms and conditions required in case of other children given to such asylum, home or society. The proper officers of such asylum, home or society are authorized to give the necessary consent in placing such children." [R. S. § 3140a.][42]

§ 1907. Proceedings under 8031, G. C.

The proceedings are commenced by the filing of an affidavit which should allege the grounds of the statute, and summons must then be issued, and the case heard as ordinary judicial proceedings are conducted. The parents must be notified. The word "summons" hereby probably does not indicate a summons as provided for in the Code, but is rather used as being synonymous with notice. The proceedings should be titled "In the Matter of A. B., Child of C. D." The affidavit may be as follows:

[42] § 8031 G. C.

(See §§ 8032-3-4-5 G. C., as to rights of child, when brought before a court of competent jurisdiction.

These proceedings are advisory, the parent being given the right to appear and answer. Stormer vs. Lucas Co., 8 N. P. (N.S.) 110; 11 Dec. 49.

See State vs. Mezgar, 59 Bull. 45; Arfban Asylum vs. Loule, 24 C. C. (N.S.) 157; 36 C. D. 135; *In re* Baer, 8 N. P. 107; 11 Dec. 47.

vagrancy, negligence and misconduct in the following manner, to-wit: (here set out facts (is unable or neglects and refuses to support such child) (or allege that said C. D. has unlawfully beaten, injured and ill-treated said child in the following manner, to-wit:) (or that said C. D. has caused and allowed said A. B. to engage in common begging in the following places, to-wit:).

Wherefore said E. F. asks that proceedings may be had in the Probate Court of.....coun*ty*, in order to determine the fact, whether or not said child should be placed in a suitable orphan asylum, childrens' home, or other benevolent society, as the statute in such case makes and provides.

.....

Sworn to before me and subscribed in my presence this.....day of ....., 190..

§ 1908. Entry, on filing of affidavit.

On the filing of the above affidavit, the Court should make an entry of such fact and set the case for hearing, and order the parents to be notified [43] of the charges in said affidavit contained, and the time when the same will be heard. The form of entry may be as follows:

(*Title.*)

This day came E. F. and filed herein an affidavit, alleging (here set out charge made in the affidavit). Wherefore said matter is set for hearing on the.....day of....., at.....o'clock, and it is ordered that summons be issued for C. D. and I. F., the parents of said child, to appear and answer such complaint, which summons shall be served upon said parents, at least.....days before the time of said hearing.

§ 1909. Entry, ordering child committed.

(*Title.*)

This day this matter came on further to be heard and was submitted to the Court, upon the testimony of witnesses, and the affidavit and the return of summons herein. Whereupon the Court finds that C. D. and I. J., parents of A. B., have been duly and legally notified of the time and hearing as required by law; and the charges of said affidavit are true, and that said parents of said A. B. are incapable (here set out in the language of the statute the charge which is found to be true); and the Court further finds that it will be to the best interest of such child, that it be taken from its parents; and therefore an order is hereby made, directing that said A. B. be placed in....., a suitable orphan asylum (or childrens' home) in this county, to be taken, and there cared for as authorized by § 3104a R. S.

[43] If parent is non-resident, etc., service should be made in such manner as the Court might determine. Some sufficient notice, however, should be given.

CHAPTER CII.

PROCEEDINGS IN AID OF EXECUTION.

§ 1910 Nature of proceedings.
§ 1911 Examination of debtor after return of execution.
§ 1912 When and where can be brought.
§ 1913 Who can bring.
§ 1914 Application.
§ 1915 Motion.
§ 1916 Hearing for order of examination.
§ 1917 Order.
§ 1918 Notice.
§ 1919 Examination of party.
§ 1920 Examination of debtor before return of execution.
§ 1921 Proceedings under Section 11769 G. C.
§ 1922 When order of arrest may issue, and proceedings thereon.
§ 1922a Examination of debtor and bond.
§ 1923 Proceedings under Section 11770 G. C.
§ 1924 Warrant to arrest.
§ 1925 Proceedings for arrest.
§ 1926 Examination of debtor of judgment debtor, etc.
§ 1926a When the order may issue, notice.
§ 1927 Proceedings under Section 11772 G. C.
§ 1928 Notice to judgment debtor.
§ 1929 Existence of fraud not to excuse examination.
§ 1930 Reference by judge.
§ 1931 Proceedings may be continued.
§ 1932 How attendance of parties and witnesses compelled.
§ 1933 Examination before referee to be certified. Oath of witness.
§ 1934 How disobedience of order punished.
§ 1935 Power to enforce by contempt proceedings.
§ 1936 Debtor may pay execution against creditor.
§ 1937 Judge may order property to be applied on execution.
§ 1938 Order to apply property or money on judgment.
§ 1939 Property that may be reached.
§ 1940 Property that can not be reached.
§ 1941 Order to apply property or money, on judgment.
§ 1942 Judge may appoint receiver, and prohibit transfer, etc., of property.
§ 1943 Appointment of receiver.
§ 1944 Injunction.
§ 1945 Liability of Sheriff on official bond; undertaking by receiver.
§ 1946 Proceedings when indebtedness denied, or another claims the property.
§ 1947 Proceedings under Section 11784 G. C.
§ 1948 Pleadings to be reduced to writing, and filed with clerk.
§ 1949 Dismissal and second proceedings.
§ 1950 Appeal and review.

§ 1910. Nature of proceedings.

Neither the statute nor the Courts of our State have defined the nature and character of proceedings in aid of execution. In

one case it was said that it is a proceeding summary in its character, in the nature of a proceeding *in rem*, designed to appropriate the property of a judgment debtor, in the hands of a third person to the payment of a judgment, where the person having possession of the property asserts no claim to it and voluntarily assents to such appropriation.[1]

In an earlier case an able judge of the Court of Common Pleas[2] discussed the character of the proceeding and comes to the conclusion that the judge in such a case does not sit as a Court, but merely as a judge, having no authority but what the statute gives. Our statutes were framed as a part of the Civil Code, and remain with but very little change. As is well known, the Civil Code was taken from the Code of New York, and the proceedings in our State are very much similar to the proceedings in that State. In New York the proceeding is classed as a special proceeding, and no doubt is such in our State.[3]

These proceedings are supplementary to some principal case. Before they can be called into action a judgment must have been obtained. It has been said that their purpose is to furnish a simple and inexpensive substitute for the old equity proceedings in discovery and applying the property of a debtor, which cannot otherwise be reached, to the payment of his debts. There seem to be four kinds of proceedings, all very much akin to each other, provided by our statute. The first[4] provides the method of procedure where an execution has been issued and a return made that there are no goods, etc. The second provides[5] for an examination after the execution has been issued, but before it is returned. These two sections relate to the examination of the debtor. The third provides that in certain cases the judg-

[1] White vs. Gates, 42 O. S. 109.

[2] Lawrence, J., in Welch vs. Ry. Co., 1 W. L. M. 87.

[3] Under the head of supplementary proceedings, for which the New York Code is taken as a basis, this matter is very thoroughly discussed in 24 Am. & Eng. Ency. of Law, 600, and will be frequently referred to in this chapter.

[4] § 11768 G. C., § 1911.

[5] § 11769 G. C., § 1920.

ment debtor may be arrested, etc.[6] The fourth provides [7] for an examination of a debtor of the judgment debtor after execution has been levied, etc. In addition to these, there is another section which provides how an interest in real estate may be subjected to a judgment.[8] But it is generally conceded that if real estate is to be affected, it had better be done by a proceeding in equity. Recently the statutory law has been amended so as to give a justice of the peace jurisdiction in proceedings in aid of execution where the judgment has been rendered in his Court.[9]

It is generally held that these various proceedings could be had at the same time,[10] but no doubt if one were carried to termination it would be *res judicata* as to the property of the judgment debtor at the time the order was granted.[11] The Court, however, ought not to entertain these several proceedings at the same time, unless there is manifestly a good cause for so doing. Some question has arisen whether or not the Court ought to keep a record of the proceedings. The practice in some Courts has been to do so, and it seems to be a commendable one.

§ 1911. **Examination of debtor after return of execution.** "When an execution against the property of a judgment debtor, or of one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied, in whole or part, the judgment creditor shall be entitled to an order from a probate judge, or a judge of the common pleas court in the county to which the execution was issued, requiring such debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place within the county to be specified in the order." [R. S. § 5472.] [12]

[6] §§ 11770-1 G. C., § 1922.
[7] §§ 11772-3 G. C., § 1925.
[8] § 11784 G. C., § 1946.
[9] § 10436 G. C.
[10] This is denied in N. Y. See § 1949.
[11] McCullough vs. Clark, 41 Cal. 298.
[12] § 11768 G. C.
Witness other than the defendant may be examined. Manning vs. Manning, 9 Dec. Rep. 176; 11 Bull. 144.
Neither Superior nor Supreme Court has power to hear proceedings supplemental to execution. Amlingmeier vs. Amlingmeier, 8 Dec. Rep. 713; 9 Bull. 241.
Witness not ordered to appear cannot be attacked for contempt. Harman vs. Weller, 4 Dec. Rep. 97; 1 Clev. L. Rep. 26.
Questions and answers can be used

§ 1912. When and where can be brought.

The statute relating to examination of debtors after the return of an execution,[13] and the one before return of execution,[14] both specifically provide that the action may be maintained before a Probate Judge or a judge of the Court of Common Pleas. The section relating to an examination of a debtor of the judgment debtor[16] merely uses the word judge, and there might be some question whether under that section proceedings might be maintained before any judge other than that of the Court in which the judgment was rendered. In several of the succeeding sections, however, the word *judge* is used alone, and must necessarily be applied to the judge of either the Probate or the Common Pleas Court. The proceedings can only be brought when the statutory requirements are fulfilled. The first essential being that a judgment has been rendered and an execution issued thereon. In such a proceeding the regularity of the judgment cannot be attacked.[17] It has also been held that the judgment must be one that is not dormant.[18]

It is also held that a judgment obtained in a United States Court cannot be the basis of proceeding in the State Court.[19]

The action must be brought in the county in which the debtor resides, or if he is a non-resident of the State, then in the county where the judgment was rendered. It is also essential that the execution has been returned, showing that it has not been fully satisfied.

in suit between same parties subsequently. Goode vs. Patterson, 40 O. S. 345.

[13] § 11768 G. C., § 1911.

[14] § 11769 G. C., § 1920.

[15] If brought in the Probate Court it is an independent action, and should be so titled, but if in the Common Pleas it may be a part of the original action.

[16] §§ 11772-3 G. C., § 1926.

[17] It might, however, be shown to be dormant or perhaps absolutely void.

[18] Simpson vs. Hoek, 6 C. C. 27; 3 C. D. 333.

[19] But no proceedings supplementary to execution can be taken in a State Court on the judgment of a Federal Court, even though the docketing of the judgment of the Federal Court in the State Court is provided for. Davis vs. Bruns, 11 N. Y. Wkly. Dig. 436; Thompkins vs. Purcell, 12 Hun (N. Y.) 662; 24 Am. & Eng. Ency. of Law, 611

§ 1913. Who can bring.

The judgment creditor is the person specified by statute as the one to bring the proceeding. Therefore it has been held that an agent having authority might bring such action, and an assignee, or a receiver, or an attorney who has authority to collect a claim.[20] This no doubt would include an administrator of a deceased person or guardian of an infant.

§ 1914. Application.

The proceedings are started in motion by a formal application or motion for that purpose. This application should set forth all the jurisdictional facts — that is, it should state that a judgment was rendered, that the judgment is still alive, that an execution was issued, and has been returned as unsatisfied in whole or in part. As the Probate Judge usually acts upon the facts set forth in this application, it should be sworn to, the amount of the judgment should be stated, the time when it was rendered, as well as the date of the execution and its return. It should also state the name of the Court, as well as its location, where the judgment was rendered.

§ 1915. Motion.

In the Probate Court of.....County, Ohio.
....., Plaintiff..
vs.
....., Defendant..
No.....
Proceedings in Aid of Execution.
Motion.

And now comes the said....., plaintiff, by....., his attorney, and represents to the Hon....., Probate Judge of said county, that the said.....did on the.....day of....., 190.., before [1].....within and for said county, recover a judgment against the said.....for the sum of..... .....dollars, [2].....and.....dollars, cost of suit, and that he caused [3].....an execution to be issued on said judgment dated the.....day of.....190.., and delivered to the sheriff of said county; [4].....

Wherefore the said.....moves the said judge for [5].....

By....., his Attorney.

[20] 24 Am. & Eng. Ency. of Law, 606.

The State of Ohio,.....County, ss.
....., being duly sworn, says that the facts stated in the foregoing motion are true as he verily believes.

.....

Sworn to before me and signed in my presence this.....day of ....., 190..

....., Probate Judge.

1 "the Court of Common Pleas," or, "..... a Justice of the Peace."
2 "debt," or, "damages."
3 "to be filed in the office of the Clerk of the Court of Common Pleas of said county, a transcript thereof, and"
4 § 5472 or § 5475, which execution was on the.....day of....., 190..., duly returned and filed in said Clerk's office, by said Sheriff, with the following return endorsed thereon," (copy return).
§ 5473, "that said.....judgment debtor, has property which he unjustly refuses to apply toward the satisfaction of the judgment." § 5474, either or both of the foregoing statements may be made as the case may be; also, "that there is danger of the debtor leaving the State," or "concealing himself, to avoid examination concerning his property."
§ 5475, also, "That..... has property of said judgment debtor, to-wit: (describe it) or, "is indebted to said judgment debtor in the sum of .....dollars."
5 §§ 5472, 5473 or 5475, "an order requiring said.....to appear and answer concerning the same," or "his property," "before said Judge," or "a referee appointed by said Judge, at a time and place within the county specified in the order."
§ 5474, "a warrant to issue requiring the Sheriff to arrest and bring before said Judge, said..... for examination."

§ 1916. Hearing for order of examination.

When an application has been filed and properly sworn to, the Court should carefully examine the same to see that all the jurisdictional facts are set forth, and should satisfy itself that the object and purpose of the proceeding is within that contemplated by the statute. If it appears to the Court that the proceeding is merely begun for the purpose of ascertaining facts that might be used in some other proceeding, then the order should not be allowed. Such proceeding should be entitled as a special proceeding, with the name of the judgment creditor or of the owner as plaintiff and the judgment debtor as defendant.[21]

[21] 24 Am. & Eng. Ency. of Law, 621.

N. Y. Code Civ. Proc., § 2436. In 3 Rumsey on Prac., p. 412, it is said: "These proceedings are rather in aid of an execution, than supplementary thereto. They enable the plaintiff to discover the property of the judgment debtor who is concealing it. Where the property is beyond the reach of an execution, or is, for some reason, not subject to levy, it enables the Court or judge at once to appoint a receiver, in order to reach it by that remedy. The facts entitling the judgment creditor to this remedy, should be clear; and he is required to comply closely with the requirements of the section, and to show to the satisfaction of the judge that the judgment debtor not only has property, but

The order is to be served as a summons.[22]

§ 1917. Order.

In the Probate Court of.....County, Ohio.

....., A. D. 190...

....., Plaintiff..

vs.

....., Defendant..

No.....

Proceedings in Aid of Execution.

Order.

And now came the said.....by....., his attorney, and thereupon his motion for the [1].....examination of..... .....concerning [2].....came on to be heard; and it appearing that said.....did obtain judgment, and that an execution duly issued against the property of said defendant..... .....[3].....as set forth in said motion; and it further appearing [4].....to the satisfaction of the Probate Judge that [5]..... It is hereby ordered that [6]..... the said.....[7].....before..... [8].....at.....on the.....day of....., 190.., at.....o'clock...M., to answer under oath concerning [9]..... .....

And the said.....is hereby enjoined and restrained from transferring, or in any way disposing of such property, money or credits, until further order in the premises.

....., Probate Judge.

1 § 5474, "arrest and"

2 "his property," ("and intentions,") or § 5475, "his indebtedness to said....." or "the property which he has belonging to the said..... ....."

3 §§5472-5, "which execution was returned unsatisfied."

4 §§ 5473-4-5, "upon proof in writing," or "from the affidavits filed," (or otherwise).

5 § 5473, "the said.....has property which he unjustly refuses to apply toward the satisfaction of the judgment in the above entitled case," or (§ 5474,) "there is danger of the said.....leaving the State, or "concealing himself to avoid examination," or (§ 5475,) "said..... .....has in his hands property of" ("or is indebted to") "the said....."

6 § 5474, "a warrant issue requiring the Sheriff to arrest."

7 "appear," or "and bring him."

8 "Probate Judge," or "who is hereby appointed referee to take the evidence herein, and report the same to said Judge."

9 "his property," or "the same," or "and his intentions." § 5475, "And it is further ordered that the plaintiff notify the said defendant..... of the matters herein, so as to give him sufficient time to be present at such examination."

§ 1918. Notice.

The State of Ohio,

.....County, ss.

In Probate Court.

To the Sheriff of said County, Greeting:

You are hereby commanded to notify.....that the following order has been made by me, to-wit:

that he unjustly refuses to apply it to the payment of the judgment. Where, however, the affidavit shows such facts, the order may be granted, and the examination may be as complete as in a case where the order is granted after the return of an execution." 24 Am. & Eng. evil.

22 § 11785 G. C., § 1984.

In the Probate Court of.....County, Ohio.

....., 190..

....., Plaintiff..

vs.

....., Defendant..

No.....

Proceedings in Aid of Execution.

Order.

And now comes the said.....by....., his attorney, and thereupon his motion for the examination of.....concerning [1].....came on to be heard; and it appearing that said..... .....did obtain judgment, and that an execution duly issued against the property of said defendant.....[2].....as set forth in said motion; and it further appearing [3].....to the satisfaction of the Probate Judge, that [4].....

It is hereby ordered that the said.....appear before..... .....[5].....at.....on the.....day of..... .....,190..,at.....o'clock...M., to answer under oath concerning [6].....

And the said.....is hereby enjoined and restrained from transferring, or in any way disposing of any such property, moneys or credits, until further order in the premises.

....., Probate Judge.

And that the said.....in all things observe and obey the same.

And at said time you will make due return of this writ.

In witness whereof, I have hereunto set my hand and caused the seal of said Court to be affixed at.....this.....day of..... .....,190...

....., Probate Judge.

1 §§ 5472-3, "his property." § 5475, "his indebtedness to said....." or "the property which he has belonging to said....."

2 §§ 5472-5, "which execution was returned unsatisfied."

3 § 5474, "upon proof in writing," §§ 5473-5, "from the affidavits filed," (or otherwise).

4 § 5473, "that the said.....has property which he unjustly refuses to apply toward the satisfaction of the judgment in the above entitled case. § 5474, "there is danger of the said .....leaving the State," (or "concealing himself,") "to avoid examination." § 5475, "that said.... .....has in his hands property of" ("or is indebted to") "the said ....."

5 "Probate Judge," or "who is hereby appointed referee to take the evidence herein, and report the same to said Judge."

6 "His property," or "the same," "and" or "his intentions." Under § 5475, may also add "And it is further ordered that the plaintiff notify the said defendant.....of the matters herein, so as to give him sufficient time to be present" at such examination.

§ 1919. Examination of party.

In such cases the object of the proceeding should be borne in mind, and generally all questions are competent which may relate to or in any way throw light upon the property of the judgment debtor; such examination is conducted in the method usually followed in judicial proceedings. Witnesses may be summoned,[23] and books and records produced by a subpœna *duces tecum*. It has been held, however, that the deposition of a witness without the State cannot be taken by commission to

23 §§ 11770-71 G. C., § 1932.

be used in such proceedings.[24] Probably the testimony should be reduced to writing. As to the scope of examination in the work already before referred to, it is said: "It is impossible to lay down any particular rules on this subject, which shall be universally applicable, further than this, that the whole examination must have for its single object to ascertain whether there is any property of the debtor which ought to be applied to the payment of the plaintiff's claim; and the extent of the inquiry in each particular case must be left to the good sense of the judge or referee under whose direction it takes place, having in view this general object." [25]

The same rule would apply as to privileged communication, except as provided in a subsequent section.[26] Corporations, as well as individuals, are bound to answer.[27]

§ 1920. Examination of debtor before return of execution. "After the issue of an execution against property, and on proof by the affidavit of the judgment creditor, or otherwise, to the satisfaction of the court of common pleas, or a judge thereof, or a probate judge, of the county in which the debtor is found, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge, by order, may require the debtor to appear at a time and place, in such county, to answer concerning it. Such proceedings thereupon may be had, for the application of the property of the debtor toward the satisfaction of the judgment, as herein are prescribed." [R. S. § 5473.] [28]

§ 1921. Proceedings under § 11769, G. C.

Proceedings under the previous section are similar to those under previous sections of the General Code, except that they may be commenced after the issue of an execution and before the execution has been returned unsatisfied for the want of goods, etc. The Court must be satisfied that the debtor has property which he unjustly refuses to apply toward the satis-

[24] 24 Am. & Eng. Ency. of Law, 637.

[25] *Id.* 638.

[26] § 11774 G. C., § 1929.

[27] City of Newark vs. Funk Bros., 15 O. S. 462.

[28] § 11769 G. C.

Judgment creditor need not make previous demand or show refusal before proceedings to subject. Edgarton vs. Hanna, 11 O. S. 323.

faction of the judgment, and it seems that the proceeding can be brought in any county in which the debtor is found. No demand is required of the debtor before proceedings may be had.[29] If the application is sworn to, it would be an affidavit upon which the Court might rest its action. Forms given in the previous sections may easily be adopted for proceedings under the above section.

§ 1922. When order of arrest may issue, and proceedings thereon. "Instead of the order requiring the attendance of the judgment debtor, upon proof in writing to his satisfaction, by affidavit of the judgment creditor, or otherwise, that there is danger of the debtor leaving the state, or concealing himself, to avoid such examination, the judge may issue a warrant requiring the sheriff to arrest and bring such debtor before him. Such warrant can be issued only by a judge of the court of common pleas, or the probate judge, of a county in which the debtor is found, and the sheriff can execute it only within that county. In executing the warrant the sheriff shall deliver to the debtor a copy thereof and of the testimony on which it issued." [R. S. § 5474.] [30]

§ 1922a. Examination of debtor and bond. "When brought before the judge, such debtor shall be examined on oath, and other witnesses may be examined on either side. In the examination if it appears that there is danger of the debtor leaving the state, or that he has property which he unjustly refuses to apply to the judgment, he may be ordered to enter into a bond, with surety, in such sum as the judge prescribes that he will attend before the judge or referee for examination, from time to time, as directed. In default of entering into such bond, he may be committed to the jail of a county, by warrant of the judge, as for contempt." [R. S. § 5474.] [30*]

§ 1923. Proceedings under § 11770, G. C.

The proceedings provided for by the previous section are intended not only to be summary in its character, but to prevent a dishonest debtor from taking such action as might defeat the claim of the judgment creditor, and therefore, if the Court is

[29] Edgarton & Wilcox vs. Hanna, etc., Co., 11 O. S. 323.

[30] § 11770 G. C.

[30*] § 11771 G. C.

satisfied that there is danger of the debtor leaving the State or concealing himself to avoid the examination, a warrant of arrest may be issued. This fact may be brought to the attention of the Court by an allegation in the original application or by a separate affidavit. The Court having arrived at a satisfactory conclusion, an order for arrest should be made, which may be in the following form:[31]

§ 1924. Warrant to arrest.

The State of Ohio,
.....County, ss.
Probate Court.
To the Sheriff of said County, Greeting:
Whereas, the following order was this day made by me, to-wit:
Probate Court,.....County, Ohio.
....., 190..
....., Plaintiff..
vs.
....., Defendant..
No.....
Proceedings in Aid of Execution.
Order.

And now came the said.....by....., his attorney, and thereupon his motion for the arrest and examination of..... concerning his property and intentions, came on to be heard; and it appearing that said.....did obtain judgment, and that an execution duly issued against the property of said defendant,.....as set forth in said motion; and it further appearing upon proof in writing to the satisfaction of the Probate Judge, that there is danger of the said..... .....leaving the State or concealing himself, to avoid examination. It is hereby ordered that a warrant issue requiring the sheriff to arrest the said.....and bring him before....., Probate Judge, at .....on the.....day of....., 190.., at.....o'clock ...M., to answer under oath, concerning his property and his intentions. And the said.....is hereby enjoined and restrained from transferring, or in any way disposing of any of such property, money or credits, until further order in the premises.

....., Probate Judge.

You are therefore commanded to take the said.....if he may be found in your bailiwick, and him safely keep, so that you have his body before me at the time and place mentioned in said order; and have you then and there this writ.

A copy of the testimony on which this warrant is issued is hereto attached.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at.....this.....day of....., 190...

....., Probate Judge.

[31] It shall be observed that when the Sheriff serves the order, he must deliver a copy of the same and the testimony upon which it is issued. This would usually mean a copy of the application and whatever affidavits were filed. The entry made on the Journal would be the same as that contained in the following form of order to arrest.

§§ 11770-1 G. C.

....., 190..

According to the command of the within warrant, I have arrested the within named.....and have him now before the Hon..... ....., Probate Judge, to answer according to law.

....., Sheriff.

§ 1925. Proceedings for arrest.

When the debtor is brought before the Court by the sheriff, then the Court might proceed to at once make a final hearing of the matter, or it might proceed to hear the question whether or not the debtor was about to leave the State or was concealing himself. If the latter be found to be true, then the following order may be made:

ORDER AFTER ARREST.

Probate Court,.....County, Ohio.

....., 190..

....., Plaintiff..

vs.

....., Defendant..

No.....

Proceedings in Aid of Execution.

Order.

This day came before....., Probate Judge, the said..... .....in the custody of the sheriff, on the warrant of arrest heretofore issued; and the said Judge being satisfied that there is [1].....danger that the said..... will [2].....to avoid examination as judgment debtor in this case [3].....

It is therefore hereby ordered that the said [4].....from time to time, as directed, attend before.....[5].....for examination; and that [6].....said.....be discharged from the custody of the sheriff [7].....

And the said.....is hereby enjoined and restrained from transferring, or in any way disposing of any of his property, money or credits, until further order in the premises.

...., Probate Judge.

1 "No" (if such is the case).
2 "Leave the State," or "conceal himself."
3 "and," or "that he has property which he unjustly refuses to apply to the judgment herein."
4 "enter into an undertaking in the sum of.....dollars, with sureties to the approval of said Judge, that he will."
5 "Probate Judge," or "Referee."
6 "such undertaking being given."
7 "and in default thereof, the said..... .....shall be committed to the jail of the county, as for contempt."

§ 1926. Examination of debtor of judgment debtor, etc.; effect of such order. "After the return of an execution against the property of a judgment debtor, or of one of several debtors in the same judgment, and upon proof in writing, by affidavit or otherwise, to the satisfaction of the judge, that a person or corporation has property of such judgment debtor, or is indebted to him, the judge, by an order, may require such person or corporation, or any officer or member of the corporation to appear at a specified time and place, in the county wherein such

person or corporation is served with the order, and answer concerning it. From the time of its service, property, money, or credits in the hands, or under the control of the person or corporation so served, belonging to the judgment debtor, or due from him to such person or corporation, shall be bound, and he or it, as the case may be, thereby made liable to the judgment creditor therefor." [R. S. § 5475.] [32]

§ 1926a. **When the order may issue, notice.** "On the filing of the affidavit of the judgment creditor, his agent or attorney, if the judge is satisfied of the existence of any of the grounds upon which an order of attachment may be issued, as provided by law, the order may issue before the issuance and return of execution. The judge also may require notice of such proceeding to be given to any party in the action, in such manner as seems to him proper." [R. S. § 5475.] [32*]

§ 1927. Proceedings under § 11772, G. C.

The proceedings under the previous section are somewhat similar to those provided for in the preceding sections, except that it is sought to examine a debtor of the judgment debtor. Forms previously given may be easily adopted. The statute further provides that from the time that service is made upon the debtor of the judgment debtor, that such debtor will be bound to keep the property. Under this section it has been held that he cannot, by payment to the execution debtor, discharge himself from liability to the judgment creditor.[33]

The statute provides that the proceedings may be had generally after the return of an execution as provided in a previous section.[34] But, if the Court is satisfied of the existence of the grounds upon which an order of attachment may be issued, then the order may be issued, even before the issue and return of execution.[35]

[32] § 11772 G. C.

[32*] § 11773 G. C.

[33] Union Bank vs. Union Bank, 6 O. S. 255.

[34] § 11768 G. C., § 1911.

[35] The grounds of attachment will be found in § 11879 G. C.

Ownership is the test as to the right to subject property. Kruse vs. Bader, 1 Dec. 383; 31 Bull. 112.

Stock in a corporation is bound, and a lien thereon is acquired from the time of service of the order on the corporation. Ball vs. Manuf. Co., 67 O. S. 306.

Payment to execution creditor after service will not discharge debtor, as it is a *lis pendens*. Union Bank 6 O. S. 255.

Unless exceptions are taken the action of the court can not be reversed. Welsh vs. Ry., 11 O. S. 255.

The judgment creditor acquires a lien from date of service of notice. Trust Co. vs. Burkhart, 17 N. P. 401; 26 Dec. 505.

§ 1928. Notice to judgment debtor.

The statute makes it discretionary whether or not any other party shall be given notice. In this respect following the New York statutes.[36] And it has also been held that if the judgment debtor is not notified of the proceeding, he has no right to appear by counsel in them, and his right to move to vacate the order under such circumstances is questionable.[37] It seems, however, that no such proceeding ought to be carried on without notice to the judgment debtor, for if he is not notified, very great injustice might be done.[38]

§ 1929. Existence of fraud not to excuse examination. "On such examination no person shall be excused from answering any question on the ground that his examination will tend to convict him of a fraud; but his answer shall not be used as evidence against him in a prosecution for such fraud." [R. S. § 5476.] [39]

§ 1930. Reference by judge. "The judge may order a reference to a referee agreed upon, or appointed by him, to report the evidence or the facts." [R. S. § 5477.] [40]

[36] 24 Am. & Eng. Ency. of Law, 631.

[37] Corning vs. Tooker, 5 How. Pr. 16; Lingsweiler vs. Lingsweiler, 57 N. Y. Super. Ct. 395.

[38] In 3 Rumsey's Pr. 414, it is said: "To allow the proceedings to be taken or continued without any notice to the judgment debtor would often open the door to injustice and fraud; and notice should in all cases be given, unless by giving notice there would be a failure of justice, as by giving a dishonest debtor an opportunity of removing his property from the jurisdiction of the Courts of this State. But sometimes it is impossible to give notice, as in cases where he has left the State or conceals himself. In all cases, however, the matter of giving notice is left to the discretion of the judge; and whether or not a notice should be given to the judgment debtor should be determined by the circumstances of each case." 24 Am. & Eng. Ency. of Law, 632.

[39] § 11774 G. C.

The latter part of the above section, to-wit: that his answer shall not be used as evidence against him in a prosecution for such fraud means, in a criminal action. In a civil action where the identical matter was in issue, in which the party was examined in the Probate Court, his testimony might be used. Goode vs. Patterson, 40 O. S. 345.

And likewise it was held that testimony before a referee might be used. Zimmerman vs. Grotenkemper, 8 Rec. 364.

[40] § 11775 G. C.

Does not apply to civil action based upon discoveries made in aid of execution. Goode vs. Patterson, 40 O. S. 345.

Action can be referred, but where referee finds that third party has money belonging to debtor, Court cannot order it paid into Court. Harman vs. Walter, 1 Dec. Rep. 455; 2 Clev. L. Rep. 185.

§ 1931. Proceedings may be continued. "Such judge or referee, may continue his proceedings from time to time, until they are completed." [R. S. § 5478.] [41]

§ 1932. How attendance of parties and witnesses compelled. "A party or witness may be compelled, by an order of the judge, or by a subpoena, to attend, before a judge or referee, to testify." [R. S. § 5479.] [42]

§ 1933. Examination before referee to be certified. Oath of witness. "If before a referee, the examination must be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee must be on oath. When a corporation answers, the answer must be on the oath of an officer thereof." [R. S. § 5480.] [43]

§ 1934. How disobedience of order punished. "If a person, party or witness, disobeys an order of the judge, court, or referee, duly served, he may be punshed as for contempt; and such referee may report the case to the court, or judge, and such court or judge may punish for contempt as provided in other similar cases." [R. S. § 5481.] [44]

§ 1935. Power to enforce by contempt proceedings.

The power of a judge to enforce a judgment debtor to deliver property in his hands for the purpose of having the same applied upon an execution, has been seriously doubted. It has been claimed that this, in effect, provides an imprisonment for

[41] § 11776 G. C.

[42] § 11777 G. C.

Under the above section, it is held that a referee has no authority to order a witness to attend before him for examination, the Court must make such an order. Harman vs. Walter, 1 Cleve. L. Rep. 26, 27.

This same rule was made in another Court. Manning vs. Manning, 11 Bull. 144.

See § 2011, attendance of witnesses.

[43] § 11778 G. C.

If the testimony is taken before a referee, then the same should be made in writing and certified to the judge, who is to make the order. Under the New York statute, it is held that the referee may issue summons, administer an oath, and conduct the examination, but that he has no control over the proceedings before the judge. 24 Am. & Eng. Ency. of Law, 634.

[44] § 11779 G. C.

debt, which the constitution forbids. This matter was very thoroughly discussed in a case arising in our Circuit Court,[45] and there the conclusion is reached, after an exhaustive examination of the authorities in our own and other States, that a judgment debtor who fails to deliver property or money to a receiver according to an order made in proceedings in aid of executions, when the judgment debtor by his own examination discloses that he has property or money under his control and in his possession which should be applied to the satisfaction of the judgment, may be punished as for a contempt. Such imprisonment is not in violation of sec. 15, Art. 1 of the Constitution, which provides: "No person shall be imprisoned for debt in any civil action, on *mesne* or final process, unless in case of fraud."

It has also been held that the order may be binding upon the person if made orally.[46] But a judgment debtor cannot be punished for failure to deliver the property if he claims that he owns it.[47] It has elsewhere been held that a payment of money can never be enforced by contempt proceedings.[48]

§ 1936. Debtor may pay execution against creditor. "After the issue of execution against property, a person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much as is necessary to satisfy the execution. The sheriff's receipt shall be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution." [R. S. § 5482.][49]

§ 1937. Judge may order property to be applied on execution. "The judge may order any property of the judgment debtor or money due to him, not exempt by law, in the hands either of himself or other person, or of a corporation, to be applied toward the satisfaction of the judgment, but the earn-

[45] *In re* Concklin, 5 C. C. 78; 3 C. D. 40.

[46] *In re* Lilliland, 4 Bull. 733; 24 Am. & Eng. Ency. of Law, 661.

[47] White vs. Gates, 42 O. S. 112.

[48] *In re* Rowekamp, 27 Bull. 289. See § 1976 *et seq.*, contempt proceedings.

[49] § 11780 G. C.

In the above section, it has been held, that if a judgment debtor be the constable where the judgment was taken from a justice of the peace's Court, the receipt of the constable would be sufficient. Hallanan vs. Crow, 15 O. S. 176.

See 24 Am. & Eng. Ency. of Law, 651.

The affidavit for arrest is insufficient if sworn to before a notary public. Williams vs. Roitze, 7 N. P. (N.S.) 614; 8 Dec. 695.

ings of the debtor for his personal services, within three months next preceding the order, cannot be applied when it is made to appear by the affidavit of the debtor or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor; except that, if the judgment is one for necessaries furnished to the debtor, his wife, or family, an amount equal to ten per cent. of such earnings may be ordered to be applied toward its satisfaction." [R. S. § 5483.] [50]

§ 1938. Order to apply property or money on judgment.

If the judge is satisfied from the examination held, under either of the previous sections, that the debtor has property either in his own possession, or in the possession of some one else, if he has control thereof, then an order should be made that such property be applied toward the satisfaction of the judgment. Only the judgment debtor bringing the proceeding is entitled to this order — other judgment creditors are not entitled to participate — and it is held that the rights of the creditors so acquired will not be affected by an assignment of the property or subsequent bankruptcy of the debtor. But the creditor must exercise due diligence in prosecuting his proceeding.[51] Of course, the death of the judgment debtor would not affect the judgment creditor's rights.

§ 1939. Property that may be reached.

As a general rule, it may be said that every species of property not exempt by law may be reached and appropriated by these proceedings. The term property includes money.[52]

[50] § 11781 G. C.

Court not authorized to settle disputes between judgment debtor and third persons. Firt Nat'l Bank vs. Clauss, 26 O. C. C. 107; Edgarton vs. Hanna, 11 O. S. 323.

When judge may order property applied on executions. Duffy vs. Reardon, 70 O. S. 334.

May not enforce by contempt, when? Union Bank vs. Bank, 6 O. S. 253; First Nat'l Bank vs. Clauss, 26 O. C. C. 107; Porrecamp, *In re*, 11 Dec. Rep. 289; 27 Bull. 289; Concklin, *In re* 3 C. D. 40; 5 O. C. C 78.

When exempt, see Riley vs. Hetzler, 49 O. S. 651; Esman vs. Roller, 3 O. L. R. 116; 17 Cir. D. 712; reversing 2 O. L. R. 448; 15 Low. D. 579; Esman vs. Roller, 27 O. C. C. 712; Nemit vs. Vargo, 28 O. C. C. 578; 8 C. C. (N.S.) 97.

[51] § 24 Am. & Eng. Ency. of Law, 657.

[52] Welch vs. P., F. W. & C. Ry. Co., 1 W. L. M. 47.

Only reaches property in existence at time of service of process. Kouns vs. Reiniger, 24 C. C. 116.

The income of a trust fund duly paid over to the beneficiary, and by him deposited in a bank to his own credit, can be reached by his creditors in proceedings in aid of execution, though the will provided that such funds shall be exempt from liability for the debts of the bene-

In a work already cited from [53] the following varieties of personal property have been held subject to these proceedings: A watch of the judgment debtor, unless necessary to be used in his business; a seat in the Board of Trade or a Stock Exchange; an interest in a patent; an interest in a partnership in dissolution; money due to a judgment debtor, or fraudulently withheld by him; alimony directed to be paid to a woman; money on a life insurance policy received and deposited; an annuity given to a judgment debtor and wife, but belonging solely to the judgment debtor during their joint lives; an equity of redemption in chattels which are mortgaged; an interest in a personal estate as next of kin; a chose in action on a contract or arising from a tort, which diminishes the debtor's estate; property held in trust for the judgment debtor's benefit, where the trust proceedings from the judgment debtor himself, or where the trust proceeds from another and the money is held only to be paid to the judgment debtor; money lost by the judgment debtor at gambling; funds of a private corporation in the hands of its stockholders, when such funds have not been declared a dividend. Also pension money after it leaves the government's possession.[54]

§ 1940. Property that cannot be reached.

The statute specifically provides that the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot so be applied, when it is made to appear, by the affidavit of the debtor, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.[55]

It is further held that only money actually due the judgment debtor, or property to which he was entitled at the time of

ficiary, 1894. Com. Kruse vs. Beader, 1 Dec. 283; 31 Bull. 112.

[53] 24 Am. & Eng. Ency. of Law, 642.

[54] Fulwiler vs. Infield, 6 C. C. 36; 3 C. D. 838.

[55] Under this provision, it was held, that where a person engaged in an independent business, his remuneration to be the profits of the business that such remuneration could not be held as his personal earnings, within the meaning of the statute. Clark, Common Pleas.

Corporate stock may be reached. Ball vs. Am. Ex., 18 Bull. 126.

the order for examination, can be reached. That moneys or earnings not due at the time of the service or subsequently acquired cannot be taken. It has also been held that property outside of the State cannot be reached.[56] If the judgment debtor was not the owner of a homestead and the head of a family, he can also claim as exempt any sum not exceeding five hundred dollars in lieu of an homestead exemption.[57]

§ 1941. Order to apply property or money, on judgment.

Probate Court,.....County, Ohio.

....., 190..

....., Plaintiff..

vs.

....., Defendant..

No.....

Proceedings in Aid of Execution.

Order.

It appearing from the examination of.....before..... [1].....; that [2].....; which is not exempt from execution.

It is therefore hereby ordered, that the same be [3].....to .....[4].....and to apply the [5]..... toward the satisfaction of the judgment rendered against the said..... .....in favor of the said.....; and that the costs of this proceeding [6].....taxed to $.....be first paid.

....., Probate Judge.

1 "Probate Judge" or "Referee who has
2 § 5475, "that there is certain property belonging to the said.....in the hands of....., to-wit:" (describe property) or, "that the..... filed the report of his proceedings." ....is indebted to the said..... in the sum of.....dollars."
3 "Delivered" or "paid."
4 "Judgment creditor;" or "who is hereby appointed receiver herein," and (if other person than the Sheriff is appointed, who before entering upon his duties, shall take an oath and give an undertaking to the State of Ohio in the sum of..... dollars, conditioned according to law, with sureties to the approval of said Judge."
5 "Same," or "proceeds thereof."
6 "Including a fee of $.....allowed as a reasonable fee to said receiver" (if such is the case).

§ 1942. Judge may appoint receiver, and prohibit transfer, etc., of property. "The judge by order, may appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor. He also, by order, may forbid a transfer, or other disposition of, or interference with, the property of the judgment debtor not exempt by law." [R. S. § 5484.] [58]

[56] See 24 Am. & Eng. Ency. of Law, 646, 647.

In re Concklin, 5 C. C. 78; 3 C. D. 40. It is held that an order would be enforced, although the property was not in the State, provided the judgment debtor testified that it was within his control.

[57] Snook vs. Snetzer, 25 O. S. 516.

See §§ 11725-6 G. C. as to special exemptions. § 1598.

[58] § 11782 G. C.

§ 1943. Appointment of receiver.

Whenever there is any controversy about the ownership of the property which has been disclosed, then it is necessary for the Court to appoint a receiver to collect the same, who, if payment is not made, can resort to the ordinary remedies,[59] and this applies also to a case where a debtor of a judgment debtor claims the property as his own.[60]

If it appears that a third person has a claim on the property, then the only order that can be made is for the appointment of a receiver.[61] In such cases it has been held that a receiver will be appointed where it is shown that the debtor has fraudulently or suspiciously fraudulently transferred his property to others, who hold and claim to own the same, when there is a strong possibility that if a receiver were appointed some of the property could be recovered and money realized therefrom applied on the creditor's judgment.[62]

A receiver appointed in such a case is an officer of the Court, and the law relating to receivers generally is applicable. If the receiver be a person other than the sheriff, he must give a bond.

§ 1944. Injunction.

The Court has the power at any time to forbid a transfer, disposition of, or interference with the property of the judgment debtor not exempt by law. Such an injunction is usually made where there is any property found belonging to the judgment debtor. It may be granted at any time during the proceedings, and takes effect at the time of the service upon the person to be restrained. It continues in force until the proceedings are dismissed. If the original proceedings are void, the injunction would be void.[63]

[59] Edgarton & Wilcox vs. Hanna, 11 O. S. 323.

[60] White vs. Cate, 42 O. S. 169.

[61] Stone vs. Smith, 4 Dec. [illegible], 68 Clev. L. Rec. 91.

[62] Hayes, Green & Co. vs. Moore, 5 N. P. 220; 5 Dec. 520.

See also 21 Am. & Eng. Ency. of Law, 687.

[63] See 24 Am. & Eng. Ency. of Law, 625, § 11782 G. C., § 1942.

§ 1945. Liability of sheriff on official bond; undertaking by receiver. "If the sheriff be appointed receiver, he and his sureties shall be liable on his official bond as such receiver. If another person be appointed, he must take an oath and give a bond as in other cases." [R. S. § 5485.][64]

§ 1946. Proceedings when indebtedness denied, or another claims the property. "If it appears that the judgment debtor has an interest in real estate, in the county in which proceedings are had, as mortgagor, mortgagee, or otherwise, and his interest can be ascertained as between himself and the person holding the legal estate, or the person having a lien on or interest in the property, without controversy as to the interest of the person holding such estate, or interest therein, or lien thereon, the receiver may be ordered to sell and convey such real estate, or the interest of the debtor therein. The sale shall be conducted as is provided for the sale of real estate upon execution; and the proceedings of sale before the execution of the deed shall be approved by the court in which the judgment was rendered, or the transcript filed." [R. S. § 5486.][65]

§ 1947. Proceedings under § 11784, G. C.

As a general rule, it will be a better practice where an interest in real estate is to be sold, for the execution creditor to commence a proceeding in chancery, to subject the property to sale and apply it on his judgment. The following interest in real estate, it is said, may be reached: A dower right; rents due to a tenant by the curtesy; the interest of a tenant by the curtesy initiate when the wife's property has been sold in partition; an annuity charged by devise on real estate for the judgment debtor's benefit; an interest in a contract for the purchase of real estate; the surplus from a sale in partition; the income of the judgment debtor's real estate during the period allowed by statute for redemption after a sale on execution.[66] The following may be used as a form for an order to sell interest in real estate:

Order to pay money to a receiver is a final order and may be reversed on error. First Nat'l Bank vs. Clauss, 26 O. C. C. 107.

See as to compensation of receiver where property goes into hands of a trustee in bankruptcy. Ridges vs. Forbes, 3 C. C. (N.S.) 525; 23 O. C. C. 438.

[64] § 11783 G. C.

[65] § 11784 G. C.

[66] 24 Am. & Eng. Ency. of Law, 642.

ORDER TO SELL INTEREST IN REAL ESTATE.

Probate Court,.....County, Ohio.

....., 190..

....., Plaintiff..

vs.

....., Defendant..

No.....

Proceedings in Aid of Execution.

Order to Sell Interest in Real Estate.

It appearing from the examination of.....before.....
.....[1].....that said.....has an interest as
[2].....in the following described real estate, to-wit:.....
.....

It is ordered that the receiver heretofore appointed in this case proceed to sell and convey [3].....such real estate, in all respects, in the same manner as is provided for the sale of real estate upon execution; and make return of his proceedings without unnecessary delay.

1 "Probate Judge" or "Referee who has filed the report of his proceedings."
2 "Mortgagor," "mortgagee" or otherwise.
3 "The interest of said.....in" (if such is the case).

§ 1948. Pleadings to be reduced to writing, and filed with clerk. "The order requiring a judgment debtor, or anyone indebted to him, to appear and submit to such examination, shall be in writing, signed by the judge who makes it, and be served as a summons. The judge shall reduce all his orders to writing, which, together with a minute of his proceedings, signed by himself, shall be filed with the clerk of the court of the county in which the judgment is rendered, or the transcript of the justice is filed, who shall enter on his execution docket the time of filing it." [R. S. § 5487.][67]

§ 1949. Dismissal and second proceedings.

The statute nowhere has any provision in reference to a dismissal of the proceedings, but as a matter of course, if no property is found, nothing can be done but dismiss the action, and the defendant not having any property, it would be an idle formality to tax the costs against him; and therefore it equally follows that the costs should be taxed against the plaintiff. Neither is there any statutory provision in reference to the granting of a second order. But no doubt, if the first order be dismissed by consent of parties, or for some irregularity, without entering into the merits of the controversy, then a

67 § 11785 G. C.

In an early case it was held, Welsh vs. Ry. Co., 1 W. L. M. 47, that the judge need not keep a record of his proceedings, but it seems that the better way to comply with the above statute and the one which will tend to regularity, is for the judge to docket the case like in ordinary proceedings, and enter his journal entries and orders, and then comply with the above section by filing a transcript of such journal entries with the clerk of the Court, etc., as above provided.

second order might be issued. But if the matter is entered into, then as to such property no second order can be made, and a future order could only reach property that was not in existence, or, if in existence, not known when the first order was heard.[68] And in New York it is held that two orders for the examination of the judgment debtor cannot exist and be enforced at the same time.[69]

§ 1950. Appeal and review.

The statute nowhere grants the right of appeal in proceedings in aid of execution, and therefore no such right exists; and it has been very seriously questioned in our State whether such proceedings can be reviewed on petition in error. In the Common Pleas Court, in a decision heretofore referred to,[70] the judge holds that it is not reviewable, and when this case was before the Supreme Court,[71] the Court made a query as to whether or not the action could be reviewed on error. The New York Code provides that an order made in the course of the proceeding may be vacated or modified by the judge who made it, and likewise gives the right of appeal. Neither of these rights are provided for in our State, and if there is no right to review the proceedings in error, then the parties may find themselves at the mercy of the Court hearing the action. It certainly seems that the order made in such cases is a final order affecting a substantial right to review which a petition in error might be prosecuted in a higher Court.[72]

[68] 24 Am. & Eng. Ency. 622. See § 1910.

[69] Gaylord vs. Jones, 7 Hun, 480.

[70] Welch vs. Ry. Co., 1 W. L. M. 47.

[71] 11 O. S. 569.

[72] Compensation of probate judge. § 11786. For his services herein required the probate judge shall be allowed the sum of three dollars in each case, and such fees as are allowed by law to clerks of the Common Pleas Court for similar services. (R. S. § 5488.)

Costs. § 11787. The judge shall allow to clerks, sheriffs, referees, receivers, and witnesses, such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and by order, shall enforce their collection from such party or parties as ought to pay them. (R. S. § 5489.)

When forced by attachment. § 11788. When the judgment is not for the recovery of money or real property it may be enforced by attachment, by the Court which rendered it, upon motion made, or by a rule of the Court upon the defendant; but in either case notice of the motion, or a service of a copy of the rule, must be made on the defendant a reasonable time before making the order of attachment. (R. S. § 5490.)

Now held to be a final order. First Nat'l Bank vs. Clauss, 26 O. C. C., 107.

CHAPTER CIII.

HABEAS CORPUS.

§ 1951 Definition, etc.
§ 1952 Jurisdiction of Probate Court.
§ 1953 Who entitled to writ.
§ 1954 Who may make application.
§ 1955 Requisites of application therefor.
§ 1956 Form of application.
§ 1957 When the writ will not be allowed.
§ 1958 When the writ must be granted.
§ 1959 Entry ordering writ.
§ 1960 Who to issue the writ, and when.
§ 1961 How prisoner may be designated.
§ 1962 Requisites of the writ in certain case.
§ 1963 Form of writ when prisoner not in custody of an officer.
§ 1964 Form of writ when defendant is an officer.
§ 1965 How and where writ may be served.
§ 1966 How executed and returned.
§ 1967 What shall be stated in the return of the writ.
§ 1968 Form of return, etc.
§ 1969 Adjournment of cause.
§ 1970 When prisoner shall be discharged on habeas corpus.
§ 1971 Hearing, etc.
§ 1972 Form of entry, discharging person.
§ 1973 Form of entry, remanding prisoner.
§ 1974 Second application.
§ 1975 Appeal and errors.

§ 1951. Definition, etc.

Proceedings in *habeas corpus* are of a summary character, to determine the question whether a person is unlawfully restrained of his liberty. It derives its name from the operative words of the common law Latin writ, "*habeas corpus*," meaning "that you may have the body." It is frequently referred to as the most famous writ in the law, and having been for many centuries employed to remove legal restraint upon personal liberty, no matter by what power imposed, and it is often called the "great writ of liberty." The privilege of appealing to the Courts for protection under this writ are guaranteed by

the Constitution of both the United States [1] and the Constitution of the State of Ohio.[2]

The language of both being the same, " that the privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion or invasion, the public safety requiring it." It is defined as a writ directed to the person detaining another, and commanding him to produce the body of the prisoner at a certain time and place, with the date and cause of his caption, and detention to do, submit it, and receive whatsoever the Court or judge warrant the writ shall consider in that behalf.[3]

The writ of *habeas corpus* is in this State not a common law right, but a statutory right; and as a statutory right it must be strictly construed and strictly confined to the cases for which it is authorized by the statute. While it is the great writ of liberty, and will be, as it ought to be, most favorably regarded by the Courts of the State, yet they must construe it and award it in the strict light of the statute.[4] While the proceeding is essentially a civil and not a criminal proceeding,[5] it is a special proceeding,[6] and not a civil action within the meaning of the Code.[7]

§ 1952. Jurisdiction of Probate Court.

By statute it is provided " that the Probate Court shall have concurrent jurisdiction in allowing and issuing writs of *habeas corpus,* and determining the validity of the caption and detention of the person brought before them on such writs." [8]

[1] Const. U. S. Art. 9, § 9, Clause 2.

[2] Bill of rights, § 8.

[3] Bouv. Law Dic.

See Blackstone's Com., § 135 *et seq.*

[4] In matter of Curd, 11 Bull. 186, 187.

[5] Henderson vs. James, 52 O. S. 242.

[6] Missionary Society vs. Ely, 56 O. S. 405, 407.

[7] *In re* Barney Miller, 19 C. C. 544.

To obtain a writ of *habeas corpus* a party does not prosecute another, but makes an original application to a Court for the enforcement of a right. The only pleading provided for is a petition, although the return of the writ is treated as an answer. The only process is the writ itself, no summons being required under chapter eight, division second, whereas, " a civil action must be commenced by filing in the office of the clerk of the proper Court a petition, and causing a summons to be issued thereon."

[8] § 10493 G. C., § 28.

From the reason that Probate Courts are open at all times, proceedings in *habeas corpus* are perhaps oftener brought in such Courts than in any other Courts. It is therefore proper that in a work of this character some little attention be devoted to this subject. It being sufficient to say that in a proceeding of this character, the jurisdiction of the Probate Court is as broad as that of any other State Court. Another section of the Revised Statutes provides as follows:

"The writ of *habeas corpus* may be granted by the supreme court, the court of appeals, the common pleas court, the probate court, or by a judge of either." [R. S. § 5727.][9]

The question sometimes arises as to the location of the Court in which the application should be filed. There is nothing so far as the author is aware, in the statutes indicating that the action must be brought in a certain county. A Common Pleas Court has recently held that in an action of *habeas corpus*, where it appears that neither the relator, nor the defendant, nor the person whose liberty is restrained, are residents of the county wherein the application is made, that the Court has no jurisdiction to allow or grant the writ; and further adds that such a proceeding is a civil action and must be brought in the county in which the defendant resides.[10]

In another case it was held [11] that the Court in which the detention exists is the one having jurisdiction, and further held in this case that if jurisdiction was unjustly obtained, that the proceedings would be dismissed.[12]

[9] § 12162 G. C.

As a general rule, the Supreme Court will refer parties desiring the aid of the writ of *habeas corpus*, to the inferior Courts of the State, and will take cognizance of such cases only when special circumstances render it necessary to settle some important question. *Ex parte* Shaw, 7 O. S. 81; *Ex parte* Shean, 25 O. S. 440. When a person is an inmate of a benevolent or penal institution, the petition must be filed in the county where such institution is located. § 12163 G. C.

If Common Pleas Court, in divorce proceedings, orders custody of children to one of parties, Probate Court cannot, while such decree remains in force, interfere with such custody. Hoffman vs. Hoffman, 15 O. S. 427.

The Supreme Court has no more jurisdiction than the Probate Court, as each are governed by the same rules. Bushnell, *Ex parte*, 9 O. S. 182.

[10] State vs. Speidel, 1 Dayton, 17.

[11] *Ex parte* Everets, 2 Diz. 33.

[12] In a case in another State, it was held, that the Probate Court or judge to whom the application should be made is not the one nearest the residence of the applicant, but the one nearest the applicant. Thompson vs. Oglesby, 12 Iowa, 598.

In the case of State vs. Speidel, above referred to, it was held, that

§ 1953. Who entitled to a writ.

Upon this question the statutory provision is as follows:

"A person unlawfully restrained of his liberty, or a person entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of *habeas corpus*, to inquire into the cause of such imprisonment, restraint, or deprivation." [13]

The writ of *habeas corpus*, however, cannot be used as a summary process to review or revise errors and irregularities in the sentence of a Court of competent jurisdiction. Imprisonment under a sentence cannot be unlawful, unless the sentence is an absolute nullity, and if it is clearly unauthorized and void, then relief from imprisonment may be obtained by *habeas corpus*, but if the sentence is not void absolutely, a petition in error is the proper remedy.[14]

In order to make a case for *habeas corpus* there must be act-

in divorce proceedings, where a father acquires the child, that jurisdiction in such cases might be obtained in the county in which the divorce proceedings were had, as being somewhat in the nature of an auxiliary proceeding to the divorce action.

In 9 Ency. of Plead. & Prac. 1015, the rule is laid down, that the application should be made to the local Court or judge in the county in which the applicant is restrained.

Citing *in re* White, 33 Neb. 812; *in re* Doll, 47 Minn. 518; *in re* Lyon, 19 Tex. App. 120.

If the local judge refuses, application may be made outside. Citing *ex parte* Ellis, 11 Cal. 223, and cases above cited.

From the fact that the Supreme, Circuit, Common Pleas, and the Probate Courts all have jurisdiction, there will be little cause for bringing an action in a county other than that in which the *detention exists*.

[13] § 12161 G. C.

[14] *Ex parte* Shaw, 7 O. S. 81; *ex parte* Van Hagan, 25 O. S. 426; *ex parte* McGehan, 22 O. S. 442; *ex parte* Virginia, 100 U. S. 339; *ex parte* Siebold, 100 U. S. 371.

After a person has been arrested and has waived examination, and been bound over no illegality or irregularity in or about his arrest or the proceedings before commitment will avail him on *habeas corpus*. Newberry vs. State, 7 C. D. 622; 15 C. C. 208.

Where a prisoner has served his time, and is only held for the fine and costs, and the sentence is illegal as to the terms of such part of the imprisonment, as reversal or error can not restore him, *habeas corpus* lies. Moore *in re*, 7 C. D. 575; 14 C. C. 237.

ual confinement or present means of enforcing it; mere moral restraint is not enough.[15]

§ 1954. Who may make application.

If the party himself is capable and not under such restraint that he is unable to make the application, he should make his own application. However, if by want of physical or mental capacity the party is unable to make the application himself, then it may be made by some one in his behalf. Generally, if a person is unlawfully imprisoned, the Courts will consider that he is in such a position that the application may be filed for him by another. An application may be filed by one to release another from unlawful restraint, when by reason of some particular relation between the parties the person making the application is entitled to the society or custody of the person restrained. Thus a husband might file an application to regain the custody of his wife where she is kept in custody away from him and against her will.[16]

And so a parent may file the application for the custody of his infant child.[17]

Likewise a grandparent might file such application,[18] and for the same reason the guardian might file an application to regain the custody of his ward. But it is held that a master could not file an application to secure the custody of an apprentice.[19]

[15] Wales vs. Whitney, 114 U. S. 564.

[16] 9 Am. & Eng. Ency. of Law, 176, citing *ex parte* Newton, 2 Smith, 617; Queen vs. Leggatt, 18 Ad. & El. Q. B. 781; *ex parte* Sandilands, 12 Eng. L. & Eq. 463; S. C., 21 L. J. Rep. N. S. Q. B. 342; Rex. vs. Clarkson, 1 Stra. 445; Schouler's Dom. Rel., 3rd ed. 61; Rex. vs. Mead, 1 Butt. 542; Sanders vs. Rodway, 13 Eng. L. & Eq., 463; S. C., 16 Jur. 1005; Rex vs. Gregory, 4 Burr 1991. So a wife may move for a *habeas corpus* on behalf of the husband. Cobbett vs. Hudson, 15 Ad. & El., Q. B. 988; Matter of Ferrens, 3 Ben. (U. S.) 445. It may also issue at the wife's instance, and against the husband when she is improperly restrained by him. Lister's Case, 8 Mod. 22.

[17] 9 Am. & Ency. of Law, 177; Clark vs. Bayer, 32 O. S. 299; Gishwiler vs. Dodez, 4 O. S. 615; State ex rel. Niles vs. Niles, 25 Bull. 327.

[18] Clark vs. Bayer, 32 O. S. 299.

[19] 9 Am. & Eng. Ency. of Law, 177.

§ 1955. Requisites of application therefor. "Application for the writ shall be by petition, signed and verified either by the party for whose relief it is intended, or by some person for him, and shall specify:

"1. That the person in whose behalf the application is made is imprisoned, or restrained of his liberty;

"2. The officer, or name of the person by whom he is so confined or restrained. If both are unknown or uncertain, he may be described by an assumed appellation. The person who is served with the writ shall be deemed the person intended;

"3. The place where he is so imprisoned or restrained, if known;

"4. A copy of the commitment or cause of detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy; or, if the imprisonment or detention, is without legal authority, such fact must appear." [R. S. § 5728.] [20]

§ 1956. Form of application.

State of Ohio, ex rel,
of.....
vs.
C. D., etc.

Probate Court.
.....County,

Petition for Writ of Habeas Corpus.

Your petitioner, A. B., respectfully represents that he is unlawfully restrained of his liberty (imprisoned), by.....(state the officer or the name of the person by whom) at.....(state the place where). The pretended cause of the imprisonment is as follows:..... ..... A copy of the commitment (or cause of detention) is hereto attached.

Wherefore your petitioner asks that a writ of habeas corpus may be granted, and that he may be discharged from such unlawful imprisonment.

(Verification.) A. B.

BY THIRD PERSON.

(*Title.*)

Your petitioner respectfully represents that one L. M. (if name is unknown describe him, § 5732 R. S.) is unlawfully restrained of his liberty (or imprisoned), by.....at.....

The cause of said imprisonment is as follows..... A copy of the commitment is hereto attached.

Wherefore your petitioner asks that a writ of *habeas corpus* may be granted, and that said L. M. may be discharged from such unlawful confinement.

A. B. in behalf of L. M.

(Verification.) [21]

[20] § 12164 G. C.

[21] In the petition in cases of restraint under R. S. § 5726, as distinguished from controverted custody, the allegation of unlawful restraint of liberty is essential to give

BY A PARENT FOR CHILD, ETC.

(*Title.*)

Your petitioner respectfully represents that he is the father (mother, or guardian appointed by the Probate Court of.....county on the .....day of....., a copy of whose letters of appointment are hereto attached, marked "Exhibit A,") and is entitled to the custody of A. B., an infant,.....years of age. That said A. B. is unlawfully restrained of his liberty by E. F. at (here state place where A. B. is kept in custody) and that the said E. F. unlawfully and illegally prevents the undersigned from procuring the custody of said A. B.

Wherefore your petitioner asks that a writ of *habeas corpus* may be granted and that the said A. B. may be discharged from such unlawful restraint and may be delivered from the unlawful custody of the said E. F.

(Verification.) G. H.[22]

§ 1957. When the writ will not be allowed. "If it appears that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any

jurisdiction, and its absence is not curable by amendment, nor waived by appearance and trial.

Hence, in *habeas corpus* for a child, if the relator does not claim the right of custody, but merely acts on its behalf, an averment that it is illegally restrained and possessed by respondent is fatally defective even after trial, for as a child must be in some one's custody; want of liberty is not necessarily alleged. *In re* Curd, 11 B. 186.

[22] It has been held that a guardian must make his letters a part of his petition. Gregg vs. Winn, 23 Ind. 373.

The first two forms above given are taken from Bates' Pleadings and Prac., and are criticised in Kinkead's Pleading and Practice 610, for the reason that they do not set up the facts upon which the unlawful restraint is founded. However, in a recent case in State of Ohio vs. Mullaney, 8 N. P. 165, the Court, after reviewing the matter very thoroughly, holds that the forms are sufficient, and that in *habeas corpus* proceedings, it is not necessary in a petition to set out fully the facts and circumstances of the imprisonment or restraint constituting the ground for the relief asked.

If the pleader has any doubts upon this subject, the above forms could very easily be changed, and before the prayer of the same, the facts and circumstances of the imprisonment might be inserted. Kinkead on Code Proceedings gives such a form, p. 609, and also gives a form for a petition by a father to regain the custody of a minor son in the United States army.

In the United States Court it is required that the facts be alleged, etc. Kohl vs. Lehlback, 160 U. S. 293; King vs. McLean, 64 Fed. Rep. 325. But under the Ohio statute, it seems to the author it would be sufficient without such allegations.

informality or defect in the process, judgment, or order." [R. S. § 5729.][23]

§ 1958. **When the writ must be granted.** "When a petition therefor is presented, if it appears that the writ ought to issue, a court or judge authorized to grant the writ, must grant it forthwith." [R. S. § 5730.] [24]

While sec. 12165, G. C., provides that if certain things appear then the writ shall not be allowed. As a matter of general practice, the general rule is that if the application shows a *prima facie* case of unlawful detention or imprisonment, then the Court issues the writ. Some of our Courts have said that it is the duty of the judge, upon a proper application being filed, to issue the writ and try the rights of the parties upon the issues made by the return.[25]

It would seem to be carrying out the idea of this great writ that it ought not to be left in the discretion of the judge as to the question of its issue. Of course, if the application fails to disclose an unlawful detention, then there would be no need for issuing the writ, and it very properly could be refused. But usually the question as to the applicant's discharge rests upon a condition of facts which are best determined from the issue made up by the return to the writ: and it has generally been held that if a judge would refuse to grant the writ, he might be compelled to do so by mandamus. The safer and better way would be for the judge in all cases to issue the writ.

§ 1959. Entry ordering writ.

Should it appear that the writ ought to be issued, the judge should make an entry ordering the same, which may be in the following form:

On application of A. B., it is ordered that a writ of *habeas corpus* to (S. S. of etc.; or describing the person as in the application), commanding him to have the body of the said (C. D.; or describing the person as in the application, together with the day and cause of his caption and detention), before this Court on the.....day of.....instant, at .....o'clock...M.

[23] § 12165 G. C.

[24] § 12166 G. C.

[25] *Ex parte* Earley, 1 W. L. M. 264.

Custody of children. *Habeas corpus* will not lie to recover possession of the minor who is over eighteen years of age, who has enlisted in the military service of the United States. Disinger, *In re*, 12 O. S. 256.

Children, where a father joins the Shakers and renounces the bonds of "natural affection," his children will not be given into their possession as against their maternal grandmother, State vs. Hand, 1 Dec. Rep. 238; 5 W. L. J. 361.

§ 1960. Who to issue the writ, and when. "Upon its allowance, the writ shall be issued forthwith, by the clerk of the court whereof the person who granted it is a judge, under the seal of such court. In case of emergency, such judge may issue the writ under his own hand, and depute any officer or person to serve it." [R. S. § 5731.] [26]

§ 1961. How prisoner may be designated. "The person to be produced shall be designated by his name, if known and if not known, or uncertain, he may be described in any other way so as to make known who is intended." [R. S. § 5732.] [27]

§ 1962. Requisites of the writ in certain case. "In case of confinement, imprisonment or detention by an officer, the writ shall be directed to him, and command him to have the body of such person before the court or judge designated in the writ, at a time and place therein specified." [R. S. § 5733.] [28]

§ 1963. Form of writ when prisoner not in custody of an officer. "In case of confinement, imprisonment or detention by a person not an officer, the writ shall be in the form following:

"The State of Ohio, ... County, ss.:

"To the sheriff of our several counties, greeting:

"We command you that the body of ..... of ....., by ....., of ....., imprisoned and restrained of his liberty, as it is said, you take and have before ....., a judge of our ..... court, or, in case of his absence or disability, before some other judge of the same court, at ....., forthwith to do and receive what our said judge shall then and there consider ..... concerning him in his behalf; and summon the said ..... then and there to appear before

If wife deserts her husband without just cause, she is not entitled to custody of their children. State vs. Nishwitz, 1 Dec. Rep. 370; 8 W. L. J. 396.

If the husband has possession of the child, although it is of tender years, if well cared for his possession will not be disturbed. State vs. Nishwitz, 1 Dec. Rep. 370; 8 W. L. J. 396.

In *habeas corpus* proceedings against father for custody of infant, other things being equal, it will be awarded to the mother. State vs. Niles, 11 Dec. Rep. 246; 25 Bull. 327.

The mother is entitled to the custody of children under ten years of age. Vincent vs. Vincent, 8 Dec. 160; 6 N. P. 474.

A mother's right to custody of child cannot be willed away if the child is really in the custody of the Court. Coons, *Ex parte*, 11 C. D. 208; 25 O. C. C. 47.

When custody of child is brought about by *habeas corpus* proceedings the Court is authorized to make such order as the best interests of the child demand. Barnes, *In re*, 11 Dec. Rep. 848; 30 Bull. 164.

Court will not change the custody of the child from one parent to another except where its necessities demand it, or its possessor has been guilty of fraud, force or stratagem in obtaining its possession. State vs. Nishwitz, 1 Dec. Rep. 370; 8 W. L. J. 396.

If the remedy, where a child is committed to prison, is not adequate, the right of detention may be inquired into by *habeas corpus*. Prescott vs. State, 19 O. S. 184, 187.

[26] § 12767 G. C.

[27] § 12768 G. C.

[28] § 12169 G. C.

our said judge, to show the cause of the taking and detention of the said .....

"(Seal) Witness ....., at ....., this ..... day of ....., in the year ....." [R. S. § 5734.] [29]

§ 1964. Form of writ when defendant is an officer.

States of Ohio,.....County, ss.
Probate Court.
To C. D., Sheriff of.....County, greeting:

You are hereby commanded to have the body of A. B., alleged to be restrained by you of his liberty (stating the facts as in the petition) in the jail of your county, before this Court on....., the..... day of 190.., at.....o'clock...M., and to show the date and the cause of the taking and detention of the said A. B. and have you then and there this writ, with your return of service indorsed thereon.

Witness my hand and the seal of said Court, at....., this .....day of....., 190...

(Seal.) ....., Probate Judge.

§ 1965. **How and where writ may be served.** "The writ may be served in any county, by the sheriff of that or any other county, or by a person deputed by the court or judge." [R. S. § 5735.] [30]

§ 1966. **How executed and returned.** "The officer or person to whom the writ is directed shall convey the person so imprisoned or detained, and named in the writ, before the judge allowing it or, in case of his absence or disability, before some other judge of the same court, on the day specified in the writ. He shall make due return of the writ, together with the day and the cause of the caption and detention of such person, according to its command." [R. S. § 5736.] [31]

§ 1967 **What shall be stated in the return of the writ.** "When the person to be produced is imprisoned or restrained by an officer, the person who makes the return shall state therein, and in other cases the person in whose custody the prisoner is found shall state, in writing, to the court or judge before whom the writ is returnable, plainly and unequivocally:

"1. Whether he has, or has not, the party in his custody or power, or under restraint;

"2. If he has the party in his custody or power, or under restraint, he shall set forth, at large, the authority, and the true and whole cause, of such imprisonment and restraint, with a copy of the writ, warrant, or other process, if any, upon which the party is detained;

"3. If he has had the party in his custody or power, or under restraint, and has transferred such custody or restraint to another, he shall state, particularly, to whom, at what time,

[29] § 12170 G. C.
[30] § 12171 G. C.
[31] § 12172 G. C.
The direction to a sheriff, to whom is issued a writ, should be not to produce the body, but to make return showing that the writ has been properly served on the officer delivering accused, whereupon the latter officer should produce prisoner as directed by the writ *Ex parte* Chas. Morris, 21 Dec. 104.

for what cause, and by what authority, such transfer was made." [R. S. § 5738.] [32]

§ 1968. Form of return, etc.

The statute provides:

"The return or statement shall be signed by the person who makes it. It shall also be sworn to by him, unless he is a sworn public officer, and makes the return in his official capacity." [R. S. § 5739.] [33]

It is the object and purpose of the statute in *habeas corpus* proceedings that the application shall perform the ordinary office of petition, and that the return shall serve the purpose of an answer, and in this way the issues are made up. If the petition does not state facts sufficient to constitute a cause of action, it might be dismissed on motion or demurrer.[34] If the return does state sufficient facts, it might also be disposed of by demurrer. The statute is specific as to what this return shall show. First, it must state whether the party has the person for whom the writ is sued out in custody; second, if he has the party in his custody, he must allege by what right or authority he claims detention of such person; third, if he has had the party in his custody and transferred such custody to another, he must state particularly to whom, at what time, for what cause, and by what authority such transfer was made. Whatever the facts may be which may be considered as a defense to the writ should be set forth in the return. The general form for which may be as follows:

To the Judge of the Court of.....(etc.):

I hereby return this writ and respectfully represent and show to the Court that I have the said.....in my custody and power; that he has been in such custody since on the.....day of....., upon the following authority, fully stated as follows: (Here state the true and whole cause of the detention, with copy of the writ, warrant or other process, if any.)

(Signed.) [35]

[32] § 12174 G. C.

§ 12173. When the writ is issued by a Court in session, if the Court has adjourned when the writ is returned, it shall be returned before any judge of the same Court. When the writ is returned before one judge, at a time when the Court is in session, he may adjourn the case into the Court, there to be heard and determined. (R. S. § 5737.)

[33] § 12175 G. C.

[34] It is said it should be done by motion.

[35] A return that the defendant has not had custody or control is equivalent to a denial of the allegation of the petition. Ammon vs. Johnson, 3 C. C. 263; 2 C. D. 149.

The above form would be sufficient where return is made by a public official and need not be sworn to. However, if the return is made by a private person, an affidavit must be attached. The following is given as a proper return by a private person where a writ has been granted for a child, etc.:

FORM OF RETURN AND ANSWER OF RESPONDENT.

(*Title.*)

This respondent, A. L. C., producing the body of T. C. in obedience to the writ of *habeas corpus* hereinbefore issued, says that he is the father of the said T. C., a minor of the age of ten years, and as such father entitled to the care and custody thereof. (Then given full statement of facts.)

Respondent denies that the said T. C. is unlawfully restrained of his liberty, and therefore prays that this Court will order his said child, T. C., to be remanded to his care, custody and control, and that the said writ herein issued may be quashed, and that the petition herein may be dismissed and the costs of this proceeding adjudged against the petitioner, and for such further relief as is proper.

.....

State of Ohio,.....County, ss.

A. B., being first duly sworn, says that he is the respondent in the above return and that the facts therein stated are true.

Sworn to before me and in my presence this.....day of..... ....., 190..[35*]

§ 1969. **Adjournment of cause.** "The court or judge to whom the writ is returned, or the court into which it is adjourned, for good cause shown, may continue the cause, and, in that event, shall make such order for the safekeeping of the person imprisoned or detained as the nature of the case requires." [R. S. § 5740.][36]

§ 1970. **When prisoner shall be discharged on habeas corpus.** "When the judge has examined into the cause of caption and detention of the person so brought before him, and is satisfied that he is unlawfully imprisoned or detained, he shall forthwith discharge him from confinement. On such examination, the judge may disregard matters of form or technicalities in any

A return to a writ directed to the U. S. Marshal that he holds the party by virtue of a warrant from the U. S. Commissioner is conclusive on a State Court. *Ex parte* Earley, 3 Gaz. 234; 1 W. L. M. 264.

Habeas corpus for a person held by the police and no warrant for the arrest having been sworn out until after this application, will be determined on the facts as existing at the hearing and not at the application. Hence the writ will be refused. *Ex parte* Healy, 8 Dec. 692; 38 Bull. 250.

[35*] Kinkead Code Pleadings, 615.

[36] § 12176 G. C.

mittimus or order of commitment by a court or officer, authorized by law to commit." [R. S. § 5741.] [37]

§ 1971. Hearing, etc.

Upon the return, or at such time to which the cause may be continued, the matter at issue is heard in the usual manner that trials before a judge are conducted. The defendant is not entitled to a jury trial. Under the general powers exercised by a Probate Judge, he might refer the matter to a jury to return a verdict upon the facts. The general practice in *habeas corpus* proceedings is for the judge to try the issues himself. The question at issue being whether the party is unlawfully restrained of his liberty, or perhaps, where a parent seeks to recover possession of his child, the additional question is tried, determining whether or not the parent is entitled to the custody of such child, and furthermore, what is to the best interest of such child.[38]

Subsequent sections provide when a person may be committed or let to bail,[39] and when he must be committed.[40] And fur-

[37] § 12177 G. C.

[38] The sufficiency of an indictment can not be questioned by *habeas corpus*. *Ex parte* Bushnell, 9 O. S. 77, 184.

The fact that an indictment charges no crime known to the law is not triable on *habeas corpus* from the Circuit Court, for a demurrer to the indictment would raise the question, and the decision is reviewable here. Hatch vs. St. Clair, 2 C. C. 163; 1 C. D. 421.

Denial of a jury on trial for violating a city ordinance does not give a right to *habeas corpus*, for the sentence is not void, but voidable. Madden vs. Smeltz, 2 C. C. 168; 1 C. D. 424.

Where the Court had no right to try the case — as where it tries an extradited person for an offense other than that for which he was surrendered — *habeas corpus* lies. This is not reviewing errors within the sphere of authority. *Ex parte* McKnight, 48 O. S. 588.

The constitutionality of a statute which is the sole authority for an imprisonment may be tested by *habeas corpus*. In matter of Kline, 6 C. C. 215; 3 C. D. 422.

Habeas corpus lies if the order to commit was for contempt in disobeying an order which the Court had no jurisdiction to make. *In re* George, 5 C. C. 207; 3 C. D. 104.

If a city ordinance is wholly void, a conviction under it may be declared void, and the prisoner released on *habeas corpus*. *Ex parte* Clamp, 16 B. 229.

[39] § 12178 G. C.

[40] § 12179 G. C.

ther, the distinction seems to be drawn [41] as to the manner in which a return shall be considered as evidence between cases in which the defendant is an officer and a private person. Where the defendant is an officer, the return is considered *prima facie* evidence of the cause of detention, and therefore it would seem that the burden of proof would be on the defendant to show to the contrary. Yet, in another reported case in the Supreme Court,[42] it seems to have been held that the burden of proof was on the petitioner, and that he could not compel a sheriff to introduce his testimony first. Where a person is restrained of his liberty by private authority, the return is only considered as a plea of the facts, and the party claiming the custody must prove them.[43]

§ 1972. Form of entry. Discharging person.

(No.....) In the Matter of C. D. upon *Habeas Corpus.*

This day S. S., to whom a writ of *habeas corpus* was directed on the..... day of....., upon the application of.....appeared in open Court, having with him the body of said C. D. together with said writ, and the day and cause of his, the said C. D.'s caption and detention, as by said writ is commanded; and thereupon the proof and allegations of the parties being heard and fully understood,* and it appearing to the Court that the said C. D. is illegally detained under the custody of said S. S.; therefore it is ordered, that the said C. D. be, and he hereby is discharged out of the custody of the said S. S., and that he go hence without day, and (as to costs, see § 5753 R. S.)[44]

§ 1973. Form of entry. Remanding prisoner.

(Follow previous form to *, and say:)

And it appearing to the Court that the said C. D. is lawfully detained under the custody of the said S. S., therefore it is ordered, that the said C. D., be, and he hereby is returned to the custody of the said S. S. (etc.), to be by him held and detained until discharged by due process of law.

(In cases of parents, guardians, etc., no specific directions are given by the Court, thus:)

And it appearing to the Court that said C. D. is not unlawfully detained (or unlawfully restrained of his liberty) under the custody of the said ....., therefore it is ordered that the said.....go hence thereof without day, and (as to costs see § 5753).[45]

[41] § 12180 G. C.

[42] *Ex parte* Larney, 1 unreported cases Supreme Ct., Ohio, 651.

[43] The hearing of an action of *habeas corpus* is not defeated by the fact that the person whose body is sought to be obtained is not found by the sheriff. Ammon vs. Johnson, 3 C. C. 263; 3 C. D. 149.

If it is shown, however, that the party has been relieved from illegal restrain there is nothing to try. The writ must be dismissed. 9 Ency. of Law and Prac., 1067, 1042.

[44] Yaple's Code practice, 1026.

[45] Yaple's Code practice, 1027.

§ 1974. Second application.

It is said that by a great preponderance of authority, the principle of *res adjudicata,* where not otherwise provided by statute, has no application to *habeas corpus* cases, and a decision in one case is no bar to the issues and proceeding of a subsequent *habeas corpus;* and therefore a party refused a discharge on one *habeas corpus,* may proceed by this writ on subsequent application, until perhaps he has exhausted the entire judiciary power of the State,[46] and such is the holding of our Courts.[47] It therefore follows that where the Court refuses to discharge a prisoner, he may either prosecute error or bring a new proceeding.[48] But it seems that this rule of allowing a second application, although the facts may be the same, does not apply to cases determining the right of the custody to children.[49]

§ 1975. Appeal and error.

It is provided by statute that:

"The proceedings upon a writ of *habeas corpus* must be re-

[46] 9 Ency. of Law and Prac., 1070.

[47] *In re* Smith vs. Perry, 9 C. D. 778; S. C. Leutzler vs. Perry, 18 C. C. 826.

It is said " But, however, this may be, it does not appear that the right to review the action of the judge in a case of *habeas corpus* upon refusal to issue the writ, or upon issue joined after the writ has been issued, is a full, complete and adequate remedy in all cases; for, while error may be prosecuted to such order in the last instance, there is no provision of law for the taking of a bill of exceptions upon a hearing before a judge, and therefore a party might be unable to bring to the attention of the reviewing Court the real facts upon which he claimed to be entitled to his discharge. We think, therefore, upon consideration of these authorities, that what has been set forth in the answers as *res judicata* does not amount to a good plea in bar, and does not stand in the way of our proceeding to act upon this application; neither does it afford us just ground for refusing to act.

[48] A recent example of a second application in Ohio Courts is that of *In re* Mullaney, 8 N. P. 49, 165.

[49] In such cases if the facts are the same the former adjudication may be pleaded. If the facts are different a second application might be granted. People vs. Cooper, 8 How. Pr. 288; 9 Ency. of Law & Prac., 1071.

corded by the clerks respectively, and may be reviewed on error as in other cases." [R. S. § 5751.] [50]

Under this statute it has been held that the way in which proceedings shall be reviewed must be by petition in error,[51] and that the order discharging the prisoner is the one that may be reviewed on error.[52]

It has, however, been held that a refusal to issue the writ is not reviewable.[53] This no doubt is meant to apply only to actions brought in behalf of a prisoner. If the proceeding was one for the custody of a child, and there is no right to a second application, as stated in a previous section, then undoubtedly the Court would hold that proceedings in error would lie from a refusal to grant a discharge. The right of appeal rests purely on statutory provisions, and there is no statute providing for appeal in *habeas corpus* proceedings. Therefore the action cannot be appealed.[54]

[50] § 12187 G. C.

[51] *Ex parte* Collier, 6 O. S. 55.

[52] Henderson vs. James, 52 O. S. 242.

[53] *In re* Smith vs. Perry, 9 C. D. 778; Leutzler vs. Perry, 18 C. C. 826.

[54] *In re* Miller, 19 C. C. 544; 10 C. D. 760.

Other sections of the General Code not herein inserted, are § 12178, When person may be committed or let to bail; § 12179, When prisoner must be committed; § 12180, When the return is evidence, and when only a plea; § 12181, Penalty upon a clerk refusing to issue writ; § 12182, Penalty for disobeying the writ; § 12183, Persons discharged once are not again to be imprisoned; § 12184, Person not to be removed from custody of one officer to another; § 12185, No person to be sent out of the State for crime committed; § 12186, Person so transported may have an action; § 12187, Actions for penalties, and limitations; § 12189, Fees and costs.

CHAPTER CIV.

CONTEMPT.

§ 1976 Jurisdiction of Probate Court.
§ 1977 Kinds of contempt, etc.
§ 1978 Proceedings for contempt in presence of judge, etc.
§ 1979 Contempts not committed in presence of judge.
§ 1980 Contempt.
§ 1981 Written charges, etc.
§ 1982 Entry appointing attorney to bring action.
§ 1983 Form of charge.
§ 1984 Entry ordering summons.
§ 1985 Form of summons and attachment.
§ 1986 Right of accused to bail.
§ 1986a Bail bond to be given to satisfaction of clerk.
§ 1987 Trial by the Court.
§ 1988 Punishment if found guilty.
§ 1989 Imprisonment till order obeyed.
§ 1990 Form of commitment for contempt.
§ 1991 Proceedings when party released on bail fails to appear.
§ 1992 Right of Court who committed prisoner to release him.
§ 1993 Judgment final.
§ 1994 Appeal and error.
§ 1995 When the provisions of this chapter apply.[1]

§ 1976. Jurisdiction of Probate Court.

Contempt is defined as being the use of disorderly, contemptuous or insolent language or behavior in the presence of a legislative or judicial body, tending to disturb its proceedings or impair the respect due to its authority, or a disobedience to the rules or order of such a body which interferes with the due administration of justice.[2]

The power to punish for contempt is inherent in Courts of general jurisdiction independent of legislations, and has always existed in the Courts of England and in this country.[3] This principle fixes the power of the Common Pleas Court, irrespective of legislation, but our Supreme Court has held that

[1] See § 1935, In proceedings in aid of execution.

[2] 3 Am. & Eng. Ency. of Law, 777.

[3] Post vs. State, 14 C. C. 111; 7 C. D. 257.

The legislature has not the power to abridge the Court's right. Hale vs. State, 55 O. S. 210.

And the power cannot be taken away by filing an affidavit of prejudice. State vs. Shay, 3 N. P. (N.S.) 557; 16 Dec. 448.

The inherent power of Courts is not abridged by the statutory provisions in relation thereto. Arbuckle vs. Spriee Co., 11 C. D. 726; 21 O. C. C. 356.

The power is both inherent and necessary. Hale vs. State, 55 O. S. 210.

The statutory remedy is cumulative. Collins vs. Ashley, 5 C. D. 6; 11 O. C. C. 47.

this power extends to all Courts created by the Constitution, and the Legislature has no right to abridge it.[4]

The Probate Court, being a Court created by the Constitution, would therefore have this power as complete as any other Court. But, possibly for fear that Courts of a higher jurisdiction might deny this power to the Probate Court, it has been especially conferred by statute as follows:

"The probate judge has power to keep order in his court, and punish any contempt of his authority, in like manner as such contempt might be punished in the court of common pleas." [R. S. § 538.][5]

§ 1977. Kinds of contempt, etc.

It will be observed in the definition above given that there are two kinds of contempt. One is where the misbehavior, etc., occurs in the presence of the judge; the other where the party refuses to perform an order, etc., made by the Court. These distinctions are recognized by our statutes relating to contempts, and while the punishment may be the same, the method of procedure is somewhat different. Under the first, the Court deals in a summary manner, no written charges are required, the proceedings merely being an order of the Court. Contempts of this kind are those which happen in the presence of or so near the Court as to obstruct the administration of justice. Thus an assault upon an attorney engaged in the prosecution of a criminal case by a witness, even though it was not made in the actual presence of Court, is a contempt of this character.[6] So likewise might be the publication of a libelous article in a newspaper.[7] So militia performing evolutions with music and firing so near as to suspend its business, and to refuse to

[4] Hale vs. State, 55 O. S. 210.

[5] § 10500 G. C.
See also § 543.
See § 25, Power to grant injunction, etc.

[6] Steube vs. State, 3 C. C. 383; 2 C. D. 216.

[7] *In re* Press Post, 3 N. P. 180; 6 Dec. 10; Myers vs. State, 46 O. S. 473.
See Racine Case, April 24, 1911; Cox, *In re* Proceedings, etc., 56 Bull. 125, for full discussion of what constitutes contempt of Court, etc., in reference to publication of matter reflecting on Court or jury.

desist on request, might be summarily punished.[8] The statute relating to contempts of this character is as follows:

"A court, or judge at chambers, summarily may punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." [R. S. § 5639.][9]

§ 1978. Proceedings for contempt in presence of judge, etc.

Two methods may be pursued in proceedings for contempt where the act is done in the presence of the Court, etc. One is that the Court, by an entry and order, summarily punish the party, and this is a course which is generally pursued where the act is done in the actual presence of the Court, such as an assault in the court room. The other method pursued is to appoint some one to bring the proceedings, and this is the course which is recommended in all contempt proceedings where the contempt has not come to the observation of the Court personally,[10] although proceedings are not fatally irregular if no written charges are filed. Where no charges are filed, the following might serve as an entry for punishing contempt:

(*Title.*)[11]

E. F., having been guilty of misbehavior in the presence of the Court, in this Court (here state matter charged), which the Court deems and considers contempt of this Court, it is considered that the said E. F. be and he is hereby assessed and ordered to pay fine in the sum of..... .....dollars and in default of the payment thereof that he stand committed to the jail of the county.[12]

[8] State vs. Coulter, State vs. Goff, Wright, 421, 78.

[9] § 12136 G. C.

[10] Post vs. State, 14 C. C. 111; 7 C. D. 257.

[11] As to proper title, see §§ 1981, 1982.

[12] Kinkead's Journal Entries, 641. The formality of a written charge is not required for summary verbal orders of arrest for misbehavior in the presence of the Court, or so near as to obstruct justice, nor to attachments for contempt in the nature of *mense* process to bring the accused into Court or to hold him until the preliminary formalities can be instituted. Lowe vs. State, 9 O. S. 337.

A witness' refusal to answer questions is punishable without written charges. G. C. § 11510 is independent of § 11493 and gives complete power.

The witness is not entitled to a jury. The contempt is not a crime. Ammon vs. Johnson, 3 C. C. 263; 2 C. D. 149.

No pleadings are necessary under this section. Steube vs. State, 2 C. D. 216; 3 O. C. C. 383.

The accused has a right to meet the witness face to face affidavits cannot be used. Ellinger vs. State, 5 C. D. 108; 11 O. C. C. 389; Post vs. State, 7 C. D. 257; 14 O. C. C. 111.

The act must be done in the

§ 1979. Contempts not committed in presence of judge.

The second kind of contempts for which the law provides punishment are those relating to a failure to perform the orders of the Court in relation to a matter pending therein. The general statute relating thereto being as follows:

"A person guilty of any of the following acts may be punished as for a contempt:

"1. Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;

"2. Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions;

"3. A failure to obey a subpœna duly served, or a refusal to be sworn, or to answer as a witness, when lawfully required;

"4. The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him;

"5. A failure upon the part of a person, recognized to appear as a witness in a court, to appear in compliance with the terms of his recognizance." [R. S. § 5640.][13]

Under the above section it has been held that procuring a false return to a subpœna is a contempt,[14] and that an attorney who signs an appeal bond in violation of the rule of Court might be punished;[15] so interfereing with a receiver.[16] While by a special provision of statute heretofore referred to[17] the provisions of the above section of the Revised Statutes are applicable to Probate Courts, yet there is a section specially applicable, which is as follows:

§ 1980. Contempt. "If a person neglects or refuses to perform an order or judgment of a probate court other than for the payment of money, he shall be guilty of a contempt of court, and the judge shall issue a summons directing him to appear before the court, within two days from the service thereof, and

actual or constructive presence of the Court. "Administration of Justice," "Obstruction of Justice" and "Dignity of Court" defined. State vs. Post, 4 N. P. (N.S.) 157; 6 Dec. 200.

For object of exercise of power, see State vs. Goff, Wright, 78.

[13] § 12137 G. C.

[14] Baldwin vs. State, 11 O. S. 681.

[15] Wallace vs. Scoles, 6 O. 428.

[16] Coe vs. Ry. Co., 10 O. S. 372.

[17] § 538 R. S. (§ 1976).

Attaching property in hands of administrator is. Seymour, *In re*, 3 N. P. (N.S.) 81; 4 Dec. 450; Besuden vs. Besuden, 3 N. P. (N.S.) 165; 4 Dec. 144.

Probate Court may enforce accounting, etc., by. Phillips vs. State, 5 O. S. 122.

show cause why he should not be punished for contempt. If it appears to the judge that he is secreting himself to avoid the process of the court, or is about to leave the county for that purpose, the judge may issue an attachment instead of the summons, commanding the officer, to whom it is directed, forthwith to bring such person before such judge to answer for contempt. If no sufficient excuse is shown, he shall be punished as provided for contempts in the court of common pleas." [R. S. § 543.][18]

The above section of the General Code seems to lay down the doctrine broadly, that whoever neglects or refuses to perform any order or judgment of the Court other than for the payment of money, is guilty of contempt. Under this provision it has been held that if a sheriff, or other officer, under attachment proceedings seize property in the hands of an administrator who has charge of them, under a special order of the Probate Court, he is guilty of contempt.[19]

§ 1981. Written charges, etc.

While the above section relating to contempts in Probate Court does not indicate that the charges must be in writing, yet the law relating to contempts in the Court of Common Pleas so states. Said section is as follows:

"In cases under the next preceding section, a charge in writing shall be filed with the clerk, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. But this section shall not prevent the court from issuing process to bring the accused party into court, or from holding him in custody, pending such proceedings." [R. S. § 5641.][21]

And it would be wise in all cases where the contempt charged does not happen in the actual presence of the judge, that written charges be filed. While no pleadings are required, this

[18] § 1598 G. C.

[19] *In re* Seymour. 3 N. P. 81; 4 Dec. 450.

See § 1935, In aid of execution.

[20] § 12138 G. C.

See § 1979.

Where the acts are not done in the presence of the Court, an information must be filed specifying the acts constituting the contempt. Post vs. State, 7 C. D. 257; 14 O. C. C. 111; Lowe vs. State, 9 O. S. 337; Hunt vs. State, 5 C. C. (N.S.) 621; 27 O. C. C. 17; affirmed, 72 O. S. 643.

written charge and answer thereto are subject to the ordinary rules of pleadings.[21]

The statute relating to contempts generally does not provide for the issue of summons or process against the defendant like the statute relating to the Probate Court. These written charges should be styled and brought in the name of the State of Ohio.[22] The general method of procedure being that some one calls the attention of the Court to the alleged contempt, and the Court makes an order appointing some attorney to formulate and prosecute the charges. Forms for the same may be as follows:

§ 1982. Entry appointing attorney to bring action.

State of Ohio vs. John Jones.	Probate Court, ...County, Ohio. Entry Appointing Attorney to Bring Action.

Information having been brought to the Court of an alleged (here set out the order of the Court that has been violated, being careful that some one of the violations should come within the provisions of § 5640) (if charges are filed for contempt in presence of Court the matter should be set out). It is therefore ordered that A. B., an attorney of this Court, be and he hereby is appointed and instructed to prepare in writing proper charges of contempt of this Court, claimed to have been committed by the said..... .....and file the same in this Court on or before the.....day of .....

§ 1983. Form of charge.

(*Title.*)

In obedience to the order of this Court, the State of Ohio, by L. M., specially appointed by the Court for that purpose, charges and states that on the:.....day of....., A. D. 190.., in the presence of the said Probate Court of said county and State of Ohio, A. B., an attorney of said Court, was guilty of misbehavior and contempt of said Court in this, to-wit: (here set out acts or misbehavior complained of), whereby said A. B. is guilty of contempt in said Court contrary to law, and he asks that he may be made to answer hereto and that summons may be issued hereon as provided by law.

(Verification.)[24] .....[23]

[21] Kinkead's Code Pleadings, 396.

[22] State vs. Clemants, 6 W. L. J. 538.

All power must be exercised in the name of the State whose authority is contemned.

[23] See Kinkead's Pleadings for form of charge of contempt for assaulting an officer, p. 396; and also form for charge of contempt for writing scurrilous writings in newspaper, 397.

[24] Need not be verified. Steube vs. State, 2 C. D. 216; 3 C. C. 383.

See form in this case for assaulting an officer. Also an answer is given.

An information should be filed and an attorney appointed, and the accused should be permitted to file

Upon the filing of the above charges, the Court should make a journal entry. In this entry it should be ordered that a summons issue directing the defendant to appear in Court within two days, and if it appear to the judge that the defendant is about to leave the county, an attachment may be issued.[25] The journal entry may be as follows:

§ 1984. Entry ordering summons.

(*Title.*)

....., having on the.....day of....., filed a written charge against....., alleging that he, the said..... ....., is guilty of contempt in this, to-wit: (here state charge as in the written charge). It is ordered that summons issue, directing said .....to apear before this Court on (within two days after service will be made or forthwith) to show cause why he should not be punished for contempt.[26]

ENTRY ORDERING ATTACHMENT.

(*Title.*)

....., having on the.....day of....., filed a written charge against....., alleging that he the said..... is guilty of contempt; and it being made to appear that the said..... is secreting himself (or is about to leave the county) to avoid the process of this Court, it is ordered that an attachment issue to the sheriff of said county commanding him to forthwith bring said.....before the judge of said Court, to answer for contempt as therein charged.

§ 1985. Form of summons and attachment.

The following may be used as a general form of summons:

State of Ohio,.....County, ss. Probate Court.

To the Sheriff of said County, greeting:

You are hereby commanded to summon.....to appear before this Court forthwith (or name day) to answer a charge (or charges) preferred against him by the judge of this Court (or by.....) in writing, and filed in the office of this Court, wherein it is alleged that he is guilty of contempt, in this, to-wit: (state charge as in entry), and show cause why he should not be punished for his said contempt. Make due return of this writ forthwith upon its execution.

Witness my hand, and the seal of said Court, this.....day of..... ....., 190...

(Seal.) ....., Probate Judge.

And the following as a form of attachment:

State of Ohio,.....County, ss. Probate Court.

To the Sheriff of said County, Greeting:

You are hereby commanded to take into your custody and bring..... .....before the judge of this Court forthwith, to answer a charge pre-

an answer. Post vs. State, 7 C. D. 257; 14 O. C. C. 111.

[25] § 1598 G. C. (§ 1980).

[26] If the party is hiding to avoid service of process or about to leave the county, the entry should be made ordering an attachment.

ferred against him by said judge (or by.....), in writing, and filed in the office of this Court, wherein it is alleged (state the charges as in the entry), and to answer for failing to obey the summons issued from this Court, and personally served upon him by the sheriff of..... county, on the.....day of....., 190.., and show cause why he should not be punished for his said contempt (several contempts).

Make due return of this writ forthwith upon its execution.

Witness my hand, and seal of said Court, this.....day of..... ....., A. D. 190...

(Seal.) ....., Probate Judge.[27]

§ 1986. **Right of accused to bail.** "In proceedings under the second preceding section, if the writ is not returnable forthwith, the court may fix the amount of a bond to be given by the accused, with surety to the satisfaction of the sheriff. Upon the return of a writ, when it is not convenient to hear the charge without delay, the court shall fix the amount of a bond to be given, with surety to the satisfaction of the clerk, for the appearance of the accused to answer the charge." [R. S. § 5642.][28]

§ 1986a. **Bail bond to be given to satisfaction of clerk.** On the execution of such bond, with surety to the satisfaction of the sheriff or clerk, the accused shall be released from custody." [R. S. § 5643.][29]

§ 1987. **Trial by the Court.** "Upon the day fixed for the trial the court shall proceed to investigate the charge, and shall hear any answer or testimony which the accused may make or offer." [R. S. § 5644.][30]

Previous sections provide that an opportunity must be given to the accused to be heard by himself of counsel, and generally the hearing of charges of contempt are conducted in the same manner as ordinary trials. The person charged, however, does not have the right to a trial by jury.[31] Neither can the trial be had upon affidavits. The party charged has a right to face the witnesses and cross-examine them.[32]

[27] Gilmore's Prob. Prac., 262.

[28] § 12139 G. C.

[29] § 12140 G. C.

[30] § 12141 G. C.

[31] Ammon vs. Johnson, 3 C. C. 263; 2 C. D. 149.

[32] Effinger vs. State, 11 C. C. 389; 5 C. D. 408.

In such proceedings under § 5644 R. S., the Court, before imprisoning for failure to perform, should find the accused capable of performing, unless the Court should find that accused fraudulently put it out of his power to perform. Effinger vs. State, 5 C. D. 408; 11 O. C. 389.

In such prosecution, the fullest opportunity should be given the accused to show cause why he should not be punished for contempt, and his guilt should not be determined before such opportunity is given him. Post vs. State, 7 C. D. 257; 14 C. C. 111.

§ 1988. Punishment if found guilty. "The court shall then determine whether the accused is guilty of the contempt charged. If it be adjudged that he is guilty, he may be fined not exceeding five hundred dollars, or imprisoned not more than ten days, or both." [R. S. § 5645.][33]

The following may serve as an entry:

(*Title.*)

This day this cause came on to be heard upon the charges preferred against .....by....., charging him as being guilty of contempt (here state charges stated in original application or entry) and the Court having heard evidence and arguments of counsel, and having fully investigated said charge, finds that the said.....is guilty of contempt as charged. (If not guilty so state.) It is therefore adjudged that the said.....pay a fine of.....dollars for the costs of this proceeding, taxed at.....for which execution is awarded; and that the said.....be imprisoned in county jail in.....county for the period of.....days and that a warrant issue for said commitment.

§ 1989. Imprisonment till order obeyed. "When the contempt consists in the omission to do an act which the accused yet can perform, he may be imprisoned until he performs it." [R. S. § 5646.][34]

§ 1990. Form of commitment for contempt.

The State of Ohio,.....County, ss.
.....Court.

To the Sheriff of said County, Greeting:

Whereas, in the action of.....against.....in cause No.....in said Court, a charge was duly made against.....as for contempt of Court, in this, to-wit:.....

And the Court having investigated said charge determined that said .....was guilty of the contempt charged and did adjudge

Where in a proceeding in contempt there was no sworn testimony introduced, but the Court heard the professional statements of counsel and acted upon them, such statements should appear as evidence and the parties are entitled to a bill of exceptions. State vs. Davis, 10 C. D. 203; 18 C. C. 479.

[33] § 12142 G. C.

It has been held that the limitation placed upon the punishment provided for in § 12142 G. C. does not apply to an offense that is committed in the presence of the Court, for such offense the punishment is within the sound and reasonable discretion of the Court. Myers vs. State, 46 O. S. 496.

[34] § 12143 G. C.

The evidence usually admissible in trials is admissible in contempt proceedings. Effinger vs. State, 5 C. D. 408; 11 O. C. C. 389.

The judge may take notice of facts coming within his own knowledge. Myers vs. State, 46 O. S. 473.

The Court, before imprisonment

a fine of.....dollars against him, for the use of said..... .....county; and the costs taxed to.....dollars; and did further order and sentence him to be imprisoned for the period of..... days, or until he complies with such requirement, or is otherwise legally discharged.

You are, therefore ordered to arrest and commit the body of the said .....to the jail of the said County of....., there to remain for the said period of.....days, or until he shall perform said judgment, as aforesaid, or he is otherwise legally discharged.

Witness my hand and the seal of said Court, at.....Ohio, this .....day of....., 190...

.....

By.....Deputy Clerk.

The State of Ohio,

.....County, ss.

Sheriff's Return.

Received this writ....., 190.., at.....o'clock...M., and pursuant to its command.....

.....

SHERIFF'S FEES.

Service.....$.....

Mileage.....

.....Cop.....

Return.....

.....

Total.....

....., Sheriff.[35]

§ 1991. Proceedings when party released on bail fails to appear. "If the party be released on bail, and fails to appear upon the day named, the court may issue another order of arrest, or order the bond for his appearanceto be prosecuted, or both. If the bond is prosecuted, the measure of damages, in the action shall be the extent of loss or injury sustained by the aggrieved party by reason of the misconduct for which the contempt was prosecuted, and the costs of the proceeding. Such recovery shall be for the benefit of the party injured." [R. S. § 5647.][36]

§ 1992. Right of Court who committed prisoner to release him. "When a person is committed to jail for contempt, the court or judge who made the order may discharge him from imprisonment when it appears that the public interest will not suffer thereby." [R. S. § 5648.][37]

for failure to perform, should first find that the defendant can perform. Effinger vs. State. 5 C. D. 408; 11 O. C. C. 389.

[35] A mittimus for contempt should contain a finding that the witness is guilty of contempt. 1893 Com. Woodworth *Ex par*, 6 Dec. 19, 29 Bull. 315.

A commitment for contempt in refusing to answer a question must state facts sufficient to show the pertinency and relevancy of the question. 1893. Com. Woodworth *Ex par*, 6 Dec. 19; 29 Bull. 315.

[36] § 12144 G. C.

[37] § 12145 G. C.

JOURNAL ENTRY, DISCHARGING PERSON FROM IMPRISONMENT.

(*Title.*)

.....County, Probate Court.

It appearing that the public interest will not suffer by the discharge of ....., hereinbefore committed to the county jail for contempt, from such imprisonment (or.....having been hereinbefore committed to the county jail until he should comply with the order of this Court (state the order which accused had refused to obey), and having complied therewith, and thereby purged himself of said contempt), it is ordered, that he be discharged from such confinement.

A copy of this entry, or the substance thereof, duly certified, will authorize the sheriff or jailer to discharge his prisoner.

§ 1993. Judgment final. "The judgment and orders of a court or officer made in cases of contempt may be reviewed on error. But proceedings in error therein shall not suspend execution of the order or judgment until the person in contempt files a bond in the court rendering the judgment, or in the court or before the officer making the order, payable to the state, with sureties to the acceptance of the clerk of that court, in an amount fixed by the reviewing court, or a judge thereof, conditioned that if judgment be given against him he will abide and perform the order or judgment." [R. S. § 5649.][38]

§ 1994. Appeal and error.

The statute provides no remedy by way of appeal, the only manner in which the decision of the Court can be reviewed is by a proceeding in error, and in such proceedings the question can be reviewed whether the Court exercised reasonable discretion in awarding punishment,[39] and it has been held that a supersedeas bond will not be fixed as to amount merely because a petition in error is pending to the sentence. Power to stay execution is discretionary, to be exercised only on good cause shown. If the judgment was clearly right, the Court will decline to fix the bond.[40]

§ 1995. When the provisions of this chapter apply. "This chapter is not cumulative to provisions of division three, chapter three of title four, nor of chapter six, title two, of this part,

[38] § 12146 G. C.

[39] Myers vs. State, 46 O. S. 473. Question on review is whether evidence sustained the judgment. Iron Moulders Union vs. Greenwald, 4 N. P. (N.S.) 161; 16 Dec 681.

[40] Steube vs. State, 3 C. C. 383; 2 C. D. 216.

but furnishes a remedy in cases not thereby provided for." [R. S. § 5650.][41]

And the judgment may be reviewed in the Supreme Court, although the sum involved is less than $300. Brenssen vs. State, 63 O. S. 347.

[41] § 12147 G. C.

Chapters referred to in the above section relate to evidence in Courts of record and justices of the peace, method of procuring witnesses, etc., and a query has been made, whether §§ 12136-12146 are applicable to a contempt under the other chapters. Ammon vs. Johnson, 3 C. C. 263; 2 C. D. 149.

See §§ 11570-11575 G. C

See §§ 10318, 10319 G. C

See § 2011, Attendance of witnesses.

CHAPTER CV.

APPEALS FROM ALLOWANCE ON SHEEP CLAIMS AND ORDERS OF STATE FIRE MARSHAL.

§ 1996 Claims for animals killed by dogs.
§ 1997 Owner may appeal to Probate Court.
§ 1998 Perfecting appeal.
§ 1999 Essentials of petition.
§ 2000 Petition form.
§ 2001 Journal entry.
§ 2002 Number of witnesses allowed.
§ 2003 Hearing.
§ 2004 Entry finding, etc.
§ 2005 Limit of amount allowed.
§ 2006 Orders of state fire marshal.
§ 2007 When and how owner may have hearing.
§ 2008 Notice to state fire marshal.
§ 2009 Right of appeal to Probate Court.
§ 2010 Perfection of appeal.
§ 2011 Journal entry approving bond and fixing time of hearing.
§ 2012 Hearing and finding, etc.

§ 1996. Claims for animals killed or injured by dogs.

The statute now provides that if any horses, sheep, cattle, swine, mules or goats are injured by dogs not harbored by him, the owner may within six months present his claim to the trustees,[1] and the trustees shall hear the matter and certify the same to the county commissioners,[2] and the county commissioners shall pass upon the claims, which is the final hearing. If any owner is dissatisfied he may appeal to the Probate Court as provided in the next section. It is the duty of the trustees to endorse on each claim the amount allowed, with their findings; it is upon this that the commissioners make what is considered a final order from which an appeal may be taken.

§ 1997. Owner of killed or injured animals may appeal to probate court, when. (§ 5848.) "An owner of horses, sheep, cattle, swine, mules and goats so killed or injured, not being satisfied with a final allowance made by the commissioners, as provided in section fifty-eight hundred and forty-six, within thirty days thereafter may take an appeal from such finding to the probate court of the county by filing, as party plaintiff, a petition in such court setting out the facts in the case as contended for by the owner. Proceedings shall be had thereon as provided by law in civil cases and the county commissioners shall be made party defendant." [107 v. 539.]

1 § 5840. 2 § 5844.

§ 1998. Perfecting appeal.

The appeal is perfected by the owner, within thirty days after the order of the commissioners is made, by filing a petition in the Probate Court of the county in which the order of the commissioners is made, setting out the facts as contended by the owner. In such a case the party filing the petition shall be designated as plaintiff and the county commissioners, defendant. No notice of appeal need be given nor need any bond be filed; neither is any transcript of the proceedings before the commissioners necessary to be filed. The proceeding in the Probate Court is practically a new action. The matter before the Probate Court rests practically upon the facts set out in the petition, and this petition must contain all jurisdictional facts.

§ 1999. Essentials of petition.

The petition must show:

First, the name of the parties.

Second, that the petitioner was the owner of certain stock as provided in § 5240, G. C.

Third, that such stock was injured by dogs not harbored by him.

Fourth, that within six months he presented a claim to the trustees.

Fifth, that the trustees passed on such claim and transmitted their finding to the county commissioners.

Sixth, that they examined such claims.

Seventh, that the commissioners at a certain date made a finding thereon, including a copy of such final order.

§ 2000. Petition—Form.

A. B., Plaintiff,
vs.
County Commissioners of ..... County, Ohio, Defendants.

Probate Court,
..... County, Ohio.

PETITION.

Plaintiff says that on the ..... day of ....., 19... he was the owner of [here describe animals for which injury is claimed]. That on ..... day of said month, said ..... were injured [*or* killed] by dogs not owned or harbored by him. That within six months thereafter he presented to the trustees of the township in which said loss occurred a detailed statement of such loss and injury with his affidavit thereto as provided by law.

That on the ..... day of ....., 19... the said trustees heard the testimony thereon, and thereafter, on the ..... day of ....., 19...,

the said trustees made their findings and endorsed the amount allowed thereon, and transmitted their findings and the testimony taken to the commissioners of ..... county, and thereafter, at the next regular meeting of the said county commissioners, the commissioners examined the same and made the following order in reference thereto [here put in copy of the final order appealed from]. That this plaintiff claims that the order so made by said commissioners is not in this, to-wit: [here set out in what respect it is unjust] and the petitioner appeals therefrom. Wherefore he prays that the court may proceed to hear the same and take such proceedings in reference thereto as by statute provided.

State of Ohio, ... County, ss.:

....., being first duly sworn, says he is the plaintiff in the above proceedings, and that the allegations in said petition contained are true as he verily believes.

.....

Sworn to and subscribed before me and in my presence this ..... day of ....., 19...

.....
Notary Public.

§ 2001. Journal entry.

[*Title.*]

This day came A. B. and filed his petition in this court against the commissioners of ..... County, Ohio, appealing from a decision and final order made by said commissioners on the ..... day of ....., 19..., in reference to amount allowed for injury to animals belonging to plaintiff, by dogs. Wherefore it is ordered that said cause be set for hearing on the ..... day of ....., 19..., at 10 a. m., that being the first day after answer day at which the same can be heard, and it is ordered that summons be issued for the defendants directed to the sheriff of ..... County, returnable according to law.

§ 2002. Number of witnesses allowed. (§ 5849.) The probate court shall hear such proceedings as in equity and determine the value of the horses, sheep, cattle, swine, mules and goats killed or injured, but not more than three witnesses shall be called by each party. The amount found by such court shall be final and the judge thereof shall certify it to the county commissioners when like proceedings shall be had as to payment thereof, as if such amount had been found by the commissioners in the first instance. If an increased allowance is made by such court, the costs shall be paid equally by the parties, and if no increase is made, the plaintiff shall pay all the costs. [107 v. 539.]

§ 2003. Hearing.

The proceedings are governed by the law applicable to civil cases generally. It would devolve upon the plaintiff to introduce testimony to support his claims. The court sits as a court of equity, and not more than three witnesses shall be heard for each party, that is the plaintiff and the defendant. While the matter is heard *de novo*, it is possible that a presumption arises

that the order made by the commissioners is just and proper, and the burden would be on the plaintiff to show that it is not, and that his contentions are true; while it would be perfectly proper for the defendants to file an answer or any other pleadings that they may deem proper, if this is not done, the court will consider an issue made the same as if a general denial had been filed, and proceed to try the issue thus made. The decision of the court is final, and the court certifies its findings back to the commissioners. If an increase is made, the plaintiff is required to pay one-half the costs, and the commissioners one-half. If no increase is made the plaintiff must pay all the costs. This latter fact as to costs, together with the fact that the trustees and commissioners are usually a fair tribunal, these proceedings will be rare.

§ 2004. Entry—Finding.

[*Title.*]

This day this cause came on to be heard upon the pleadings in the case and the testimony submitted. Wherefore after due consideration the court finds that the decision made by the county commissioners, defendants is [not] just, and the court finds that the said plaintiff was injured and suffered damages for his said ..... in the sum of $..... and the same being not more than was allowed by the commissioners, the costs of this action is assessed against the plaintiff [*or*, if more] one-half is assessed against the plaintiff and one-half against the defendant [the county commissioners], and it is ordered that this finding be certified back to the defendants [the county commissioners], for their further proceedings as provided by law.

.....

§ 2005. Limit of amount. (§ 5850.) No amount shall be so allowed by the county commissioners or probate court for a head of registered sheep or lambs, eligible to registry, in excess of thirty dollars. [R. S., § 4215.]

§ 2006. Orders of State Fire Marshal.

The statute gives to the state fire marshal wide powers as to what may be ordered by him, done to buildings or other property that he may consider dangerous; when he thinks that the buildings or structures are so situated as to endanger other buildings or property, he may order such buildings to be *repaired, torn down* or *demolished.* This power is justified under the general police power existing in the State, and as such would be held constitutional, so long as it was properly exercised. But the exercise must be *just* and *reasonable.*[3] Sometimes, public officials, in their zeal to discharge their official duties, disregard

[3] See Meaxedon vs. Rendigs, 9 O. App. 61.

the proper rights of the private citizen, and he is compelled to invoke the organic law to protect himself. A law that did not provide for a review by a court would be unconstitutional. In a recent case, H. V. Ry. Co. vs. Commission, 92 O. S. 15, involving the right to review the orders made by the public utilities commission, it was said:

"In order to give full validity to the proceedings and orders of the utilities commission, it was necessary that some adequate provision for their judicial review should be made; because if an administrative order results in the taking of property, such as the company claims results in this case, the defendant must not be denied the right to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the constitution. Chicago, M. & St. P. Ry. Co. vs. Minnesota, 134 U. S. 418."

Although in a previous case, State vs. French, O. S. 201, we find the following, quoted with approval:

"And in Lawton vs. Steele, 119 N. Y. 226, 237, Andrews, J., says: 'These authorities sufficiently establish the proposition that the constitutional guaranty does not take away the common law right of abatement of nuisances by summary proceedings, without judicial trial or process.' Again on page 238, he says: 'But as the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct its summary abatement by executive officers, without the intervention of judicial proceedings, in cases analogous to those where the remedy by summary abatement existed at common law.' "

And further along in the same case, we find the further quotation:

"To justify the state in thus interposing its authority in behalf of the public, it must appear, first that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The statute requires when such order is made, that the person affected must be notified (§ 835, G. C.), and then provides for a hearing.

§ 2007. When and how owner may have hearing. (§ 836.) "If the owner, lessee, agent or occupant deems himself ag-

grieved by an order of an officer under the preceding section and desires a hearing he may complain or appeal in writing to the state fire marshal within three days from the service of the order and the state fire marshal shall at once investigate said complaint and he shall fix a time and place not less than five days nor more than ten days thereafter, when and where said complaint will be heard by the state fire marshal. The state fire marshal at said hearing may affirm, modify, revoke or vacate said order. and unless said order is revoked or vacated by the state fire marshal it shall remain in force, and be complied with by such owner, lessee, agent or occupant and within the time fixed in said order or within such time as may be fixed by the state fire marshal at said hearing."

§ 2008. Notice to State Fire Marshal for hearing.

Within three days from the time of service of the order, if the owner wishes a rehearing, he must file a written complaint with the state fire marshal, and the state fire marshal must fix a time and place not less than five nor more than ten days thereafter when the matters complained of will be heard, and the state fire marshal makes such further order, affirming, modifying, revoking or vacating his former order as he deems proper, and from this order an appeal lies to the Probate Court as provided in the next section.

§ 2009. Right of appeal to probate court. (§ 836-1.) "If a person is aggrieved by the final order of the state fire marshal as made at the hearing provided for in the preceding section, such person may within five days thereafter, appeal to the probate court of the county in which the property is situate, notifying the state fire marshal in writing of such appeal within three days thereafter, which notice shall be in writing and delivered personally to the state fire marshal or left at his principal office in the city of Columbus. The party so appealing shall within two days thereafter, file with the probate court in which said appeal is made a bond in an amount to be fixed by the court but in no case less than one hundred dollars ($100) with at least sufficient sureties, to be approved by the court, conditioned to pay all the costs on the appeal in case the appellant fails to sustain the same or the appeal be dismissed for any cause. The probate court shall hear and determine said appeal within ten days from the date of the filing of the same and the state fire marshal shall make a complete transcript of the proceedings had before him and certify the same together with all the original papers filed in his office and transmit them to the probate court at least three days prior to the date of hearing as fixed by the court. The decision of the probate

court shall be final and in case the decision is against the appellant or for any cause the appeal be dismissed judgment for costs shall be entered against the appellant."

§ 2010. Perfection of appeal.

In the first place the person desiring to appeal from the order made on the hearing, must within three days from the date of such order notify the state fire marshal in writing of his intention to appeal. This notice must be served personally on the marshal, or left at his principal office in Columbus, Ohio. Second, within two days thereafter, and within five days from the time the order was made, the party appealing must file with the Probate Court of the county in which the property is located a bond in an amount fixed by the court in a penal sum of not less than $100, with sureties approved by the court. When these two conditions are performed, the court has jurisdiction. The party appealing should also file a copy of the notice given to the state fire marshal with proof of service. The court should approve and file the bond and set a day for hearing.

§ 2011. Journal entry—Approving bond and fixing time of hearing.

Probate Court, Clark County, Ohio.

In the Matter of A. B.'s Appeal from order of State Fire Marshal.

This day came A. B. and filed in this court proof of service of notice of his intention to appeal to this court from an order made by the state fire marshal on the ..... day of ....., 19..., and also filed in this court his bond for such appeal in the sum of $....., conditioned according to law, with ..... and ..... as sureties thereon, and on consideration thereof the court finds that notice of intention to appeal was served on the state fire marshal as provided by law, and that said bond is conditioned according to law and is proper and sufficient, and the same is approved by the court. The court further fixes the ..... day of ....., 19... at 10 o'clock a. m., as the time for hearing said appeal, and it is ordered that notice of such time of hearing be given to said state fire marshal by sending him by registered letter a copy of this order.

§ 2012. Hearing, etc.

At least three days prior to the time fixed for hearing, the state fire marshal must make a complete transcript of all the proceedings had before him, and file the same with all the papers, in the Probate Court.

The issue is thus made up, and is, shall the order of the state fire marshal stand or be set aside. I presume as an at-

tendant power of the court, it might modify the order. By implication, the rules applicable to the trial of cases to a court of equity should be followed, and the law applicable to the trial of the matter of an abatement of a public nuisance should be observed.

The decision of the Probate Court is final. This statute so far as I know has received no judicial construction. Considering the extent of the authority vesting in the legislature in the exercise of the police power, in the abatement of what might be termed public nuisance, the law is within its authority and valid. If the order of the state fire marshal is sustained, or the appeal is dismissed for any cause, the costs are to be assessed against the appellant. If the order of the state fire marshal is not sustained—that is, modified or set aside—the costs would be assessed against him. The following might serve as a form for a final entry:

ENTRY AND FINDING.

[*Title.*]

This cause came on to be heard pursuant to former order of the court and was submitted upon the evidence and argument of counsel; whereupon, after due consideration the court finds the final order made by the state fire marshal in the above matter, and which was appealed to this court is proper and reasonable, and the same is approved and confirmed and the costs of this proceeding taxed at $....., is assessed against the appellant and judgment therefore is rendered against him for the same.

CHAPTER CVI.

INHERITANCE TAX.[1]

§ 2013 Origin.
§ 2014 Ohio state, historical.
§ 2015 Constitutionality.
§ 2016 Not a tax on property, but right to receive.
§ 2017 Object and purpose.
§ 2018 When law takes effect.
§ 2019 Subsequent increase.
§ 2020 Definition of terms (§ 5331).
§ 2021 Property on which tax levied (§5332).
§ 2022 Conditions of transfer which create liability for tax.
§ 2023 Resident of state.
§ 2024 Non-resident.
§ 2025 Widows' year's allowance (§ 5332-1).
§ 2026 When subject to tax in another state (§ 5333).
§ 2027 Property in foreign jurisdiction.
§ 2028 Deduction for tax paid under U. S. law.
§ 2029 General deductions.
§ 2030 Situs of property.
§ 2031 Property not subject to tax (§ 5334).
§ 2032 Exemptions; public charities.
§ 2033 Institutions within the state.
§ 2034 Exemptions, personal.
§ 2035 Rates of tax on property (§ 5335).
§ 2036 Schedule of rates and exemptions.
§ 2037 Taxes when due and payable (§ 5336).
§ 2038 Time of payment of tax.
§ 2039 Personal liability of executor.
§ 2040 Personal liability of beneficiaries.
§ 2041 Tax on legacy retained (§ 5337).
§ 2042 When property is charged with payment of legacy, etc.
§ 2043 Tax, to whom paid, discount, etc. (§ 5338).
§ 2044 Time limit for payment of tax.
§ 2045 Petition to remit interest; form.
§ 2046 Notice of motion to remit; form.
§ 2047 Order remitting interest from 8 to 5 per cent. form.
§ 2048 When legatee entitled to refunder (§ 5339).
§ 2049 Refunder of tax.
§ 2050 Powers and duties of Probate Court (§ 5340).
§ 2051 Jurisdiction of Probate Court.
§ 2052 Essentials of application.
§ 2053 Filing and notice.
§ 2054 Application for determination of tax; form.
§ 2055 Application, etc., where no administration; form.
§ 2056 Application, etc., non-resident; form.
§ 2057 Application, etc., small estate; form.
§ 2058 Appraisement by county auditor (§ 5341).
§ 2059 Appraisal by auditor.
§ 2060 Entry; ordering auditor to appraise; form.

[1] For United States inheritance tax the internal revenue collector of the district will, on inquiry, furnish law and blanks, etc. It only applies to estates over $50,000.00.

§2061 Writ to auditor to appraise; form.
§2062 Duties of auditor.
§2063 Notice of hearing before auditor; form.
§2064 Fixing value of real estate.
§2065 Appraisal of personal property.
§2066 Value of future or limited estate (§5342).
§2067 Fixing value of future or contingent interest.
§2068 Application to superintendent of insurance; form.
§2069 Inheritance taxation table.
§2070 Computation, etc.
§2071 Taxation of estate dependent upon contingencies (§5343).
§2072 When contingencies exist; higher rate.
§2073 Estates held in abeyance (§5344).
§2074 When tax has not been paid, etc.
§2075 Report of auditor; form.
§2076 Findings of Probate Court (§5345).
§2077 Proceedings of court on report of auditor.
§2078 Journal entry; determining tax after auditor's appraisal; form.
§2079 Notice and how served.
§2080 Form of notice fixing tax.
§2081 Form order exempting from tax.
§2082 Who may file exceptions (§5346).
§2083 Filing exceptions.
§2084 Form of exceptions.
§2085 Order for hearing exceptions; form.
§2086 Notice of hearing exceptions; form.
§2087 Entry on hearing; form.
§2088 When certified to auditor (§5347).
§2089 Certifying finding to auditor.
§2090 Motion to modify findings, etc.
§2091 Appeal from final order (§5348).
§2092 Appeal; how perfected.
§2093 Who may prosecute appeal.
§2094 Tax receipt, etc. (§5348-1).
§2095 Transfer of securities (§5348-2).
§2096 Notice of transfer to auditor and tax comission; form.
§2097 Transfer without knowledge (§5348-2a).
§2098 Transfer of stocks in corporation, etc.
§2099 Application to transfer stock, etc.; form.
§2100 Delivery of custody of securities.
§2101 Application for consent to transfer; form.
§2102 Application for release when no administration; form.
§2103 Collection of tax after eighteen months (§5348-3).
§2104 Prosecuting attorney to represent county (§5348-4).
§2105 County auditor appoints deputies (§5348-5).
§2106 Tax commission may designate examiners (§5348-6).
§2107 Records to be made by Probate Judge (§5348-7).
§2108 Monthly reports to state auditor (§5348-8).
§2109 Reports by recorder (§5348-8a).
§2110 Accounts kept by county treasurer (§5348-9).
§2111 Fees, etc. (§5348-10).
§2111a Probate Judges' Fees (§5348-10a).
§2112 Division of tax (§5348-11).
§2113 Distribution of tax (§5348-12).
§2114 Where tax deemed to originate on property in state (§5348-13).
§2115 Where tax deemed to originate on property not in state (§5348-14).

§ 2013. Origin.

The raising of revenue by tax on inheritance for governmental support, is of very ancient origin. It was employed by the Ptolomies in Egypt, and introduced into Rome by Augustus. It first came into use in England in 1780 and now it exists in almost all civilized nations. The United States adopted this form of taxation, perhaps more as a war measure than anything else, in 1916. In the opinion of the writer, the United States statute should be repealed and this form of taxation left to the states at the very earliest time practicable, and then it should be made uniform in all the States. This form of taxation is now in force in most of the States.[2]

It first became a law in New York in 1885, and is of much more recent date in the other States. The first statutes generally only related to collaterals as distinguished from direct. The more recent, made no distinction, except as to the amount of tax. They vary considerably as to the amount of the exemptions allowed. The present Ohio statute seems to be taken largely from the New York statute.

§ 2014. Ohio statute—Historical.

The first law was passed in Ohio in 1893.[3] In 1894 the law of 1893 was amended, confining it to the collateral kindred,[4] and in the same year a separate act was passed imposing a direct inheritance tax.[5] The latter was declared unconstitutional,[6] on the ground that the exemptions allowed were not uniform. The former was declared valid and constitutional,[7] later. The law was later amended by including collateral kindred or persons in 1900,[8] and so remained until 1919,[9] when

2 Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. A synopsis of these statutes will be found in Gleason and Otis on Inheritance Taxation.

3 90 vs. 14.

4 91 vs. 169.

5 91 vs. 166.

6 State vs. Ferris, 53 O. S. 314.

7 Haggerty vs. State, 55 O. S. 214.

8 94 vs. 101.

9 108 vs. 566.

10 108 vs. —.

it was amended, and again in 1920[10] in its present form. In this law there is no distinction between direct and collateral persons except in the exemptions and the rate of the tax. Much of the law is similar to the present law of New York.

§ 2015. Constitutionality.

In order that all doubts as to the power of the legislature to pass laws of this character be dispelled, the constitutional convention of 1912 proposed the following amendment, which was adopted, and became Sec. 7 of Art. 12 of our State constitution.[11] Inheritance tax laws are not in violation of the fourteenth amendment of the United States constitution.[12] However, a statute that does not provide for a hearing is unconstitutional.[13] When the legislature adopts the statutory language of another State, it is ordinarily presumed to have in mind the existing decisions of such state defining the extent and purpose of the statute, and to have used the identical phraseology in the sense thus indicated.[14]

§ 2016. Not a tax on property, but on the right to receive it.

It is now held in practically all jurisdictions where the matter has been under consideration, that what is known as an inheritance tax, is not a tax on the property but on the right to receive it. The highest court in the land has said:

"Thus the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not

[11] § 7. Laws may be passed providing for the taxation of the right to receive, or to succeed to, estates, and such taxation may be uniform or it may be so graduated as to tax at a higher rate the right to receive, or to succeed to ,estates of receive, or to succeed to, estates of smaller value. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate not exceeding twenty thousand dollars may be exempt from such taxation. [Adopted Sept. 3, 1912.]

[12] Humphrey vs. State, 70 O. S. 67; Mungon vs. Ill. Trust, etc., 170 U. S. 283. This case is annotated in 42 Law Ed. 1037. It is not a taking without due process of law. Plummer vs. Coler, 178 U. S. 115; Keeney vs. New York, 222 U. S. 525.

[13] Ferry vs. Campbell, 110 Iowa, 290; Matter of McPherson, 104 N. Y. 306; Keeney vs. New York, 222 U. S. 525. The parties affected must have notice.

[14] Mann vs. Carter, 74 N. H. 345; People vs. Griffin, 245 Ill. 532.

until it has yielded its contribution to the state, that it becomes the property of the legatee."[15]

In our own court we have this:

"As the majority of the court are of the opinion that it is not a tax on property, but upon the right to receive property, the statute, must as to this point be sustained."[16]

"This court in the Ferris case reached the conclusion that the direct inheritance tax was intended by the legislature to be a tax upon the right or privilege to receive property and not a tax upon the property itself."[17]

§ 2017. Object and purpose.

The object and purpose of these statutes is to raise revenue to be used for public purposes. If used for private purposes, the law is invalid.[18] However, the mere fact that the revenue is to be applied to a public purpose, will not valididate a statute otherwise defective.[19]

There is no constitutional right to inherit, and therefore the matter as to the rates and amount charged, rests entirely in the legislature, unless it should be so large as to be confiscatory and beyond all reason.[20] The descent of property is founded on none other than a right given by statute.[21] Therefore the power that gives may withhold. The right to control the devolution rests in the States. The United States exercises its right to impose inheritance taxes under its power to levy excise duties and imports.[22]

§ 2018. When law takes effect.

The law being on the right to receive property, and not on the property itself, it can not take effect until after the death of the person from whom the property is received.[23] Such laws

15 United States vs. Perkins, 163 U. S. 625.

16 State vs. Ferris, 53 O. S. 314.

17 Haggerty vs. State, 55 O. S. 621.

18 State vs. Luitzler, 143 Mo. 285. The presumption is that the tax is levied for a public purpose. State vs. Mann, 76 Wis. 479; Union Trust Co. vs. Durfee, 125 Mich. 487.

19 Curry vs. Spencer, 61 N. H. 624.

20 See Knowlton vs. Moore, 178 U. S. 41. The fact that the rates are progressive and increase as the amount increases, does not affect the law. State vs. Mann, 76 Wis. 469; Posey vs. Com., 96 S. E. (Va.) 771.

21 2 Bl. Com., pp. 10-13.

22 Knowlton vs. Moore, 178 U. S. 41.

23 Estate of Bushnell, 2 N. P. (N.S.) 673.

See opinion of Atty. Gen'l, July 9, 1919, 64 Bull. 307, as to general application of law.

do not act retroactively.[24] When the law is repealed, however, the right to collect the tax ceases at the time such law goes into effect.[25] Neither can the rate be increased after the death of the person from whom the property is received.[26] For the purpose of the inheritance tax the property vests in the distributees at the death of decedent.[27]

§ 2019. Subsequent increase.

As the tax attaches at the time of the decedent's death, the value of the property at that time is the basis upon which the tax is assessed. If there is an increase before distribution, this can not be included.[28] As a corollary the conversely will follow, that the value of the property upon which the tax is to be calculated will not be reduced by reason of losses incurred before distribution.[29] As this rule sometimes may work an injustice, the law fixing the United States inheritance tax allows a deduction for certain losses that may result between the time of decedent's death and distribution. Rhode Island has a similar provision. "The justice and propriety of this is so apparent," says an authority, "that these statutes will doubtless be followed in other States." [30]

The Ohio statute makes provision for refunder of a tax where it has been paid in ordinary cases, and debts are proven against the estate which were not paid at the time the tax was paid.[31] Also when the actual value of the property or interest can not be fixed by reason of its not vesting at the time of decedent's death, it then becomes due and payable when the party becomes entitled to possession. In such a case earnings would probably be included.[32] In the usual administration of estates this will not work much difference, and generally the tax will be fixed on the amount the executor or administrator will have

[24] Eury vs. State, 72 O. S. 448.

[25] Friend vs. Levy, 76 O. S. 26. See Atty. Genl's op. 1920, p. 219.

[26] State vs. S. D. & T. Co. of Baltimore, 103 Atl. 435.

[27] See Atty. Genl's opinion July 9, 1919, 64 Bull. 307.

[28] *In re* Williamson, 153 Pa. 508. A penalty can not be added unless authorized by statute. Matter of Vassar, 127 N. Y. 1.

[29] Matter of Meyer, 209 N. Y. 386. The appraisal fixes the value. Matter of Penifield, 216 N. Y. 163; Hites' Estate, 159 Cal. 392.

[30] Gleason and Otis on Inheritance Taxation, 2nd ed. 38.

[31] See § 2048, § 5339 G. C.; § 2066, § 5342 G. C.

[32] See § 2037, § 5336 G. C.; § 2021, § 5332, par. 7, G. C.

when distribution is made in money, and on real estate, the value it had at the time of decedent's death.

§ 2020. Definition of terms. (§ 5331.) As used in this subdivision of this chapter:

1. **[Estate and property.]** The words "estate" and "property" include everything capable of ownership, or any interest therein or income therefrom, whether tangible or intangible, and, except as to real estate, whether within or without this state, which passe to any one person, institution or corporation, from any one person, whether by a single succession or not.

2. **[Succession.]** "Succession" means the passing of property in possession or enjoyment, present or future.

3. **[Within the state.]** "Within this state," when predicated of tangible property, means physically located within this state; when predicated of intangible property, that the succession thereto is, for any purpose, subject to, or governed by the law of this state.

4. **[Decedent.]** "Decedent" includes a testator, intestate, grantor, assignor, vendor or donor.

5. **[Contemplation of death.]** "Contemplation of death" means that expectation of death which actuates the mind of a person on the execution of his will. [108 v. 562.] [33]

§ 2021. Property on which tax is levied. § 5332. A tax is hereby levied upon the succession to any property passing, in trust or otherwise, to or for the use of a person, institution or corporation, in the following cases:

Resident. 1. When the succession is by will or by the intestate laws of this state from a person who was a resident of this state at the time of his death.

Non-Resident. 2. When the succession is by will or by the intestate laws of this state or another state or country, to property within this state, from a person who was not a resident of this state at the time of his death.

Deed, grant, gift, etc. 3. When the succession is to property from a resident, or to property within this state from a non-resident, by deed, grant, sale, assignment or gift, made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property:

(a) In contemplation of the death of the grantor, vendor, assignor, or donor, or [34]

(b) Intended to take effect in possession or enjoyment at or after such death.

[33] § 243 of the N. Y. inheritance tax defines terms, Gleason and Otis Inheritance Tax, 766. The present New York statute is given on pages 732 to 768 of Gleason and Otis on Inheritance Taxation.

[34] See Gleason and Otis on Inheritance Tax, 2nd ed., p. 115 *et seq.* See Atty. Gen'l's op. 1920, p. 737, when property was given in contemplation of death and other devised, both for inadequate consideration subject to tax.

By exercise of power. 4. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property heretofore or hereafter made, such appointment when made shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by said donee by will; and whenever any such person or corporation possessing such power of appointment shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a succession taxable under the provisions of this act shall be deemed to take place to the extent of such omission or failure, in the same manner as if the persons, institutions or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise the same, taking effect at the time of such omission or failure.

Survivorship. 5. Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor or survivors have a right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death of one of them shall be deemed a succession taxable under the provisions of this subdivision of this chapter in the same manner as if the enhanced value of the whole property belonged absolutely to the deceased person, and had been by him bequeathed to the survivor or survivors by will.

To executors. 6. When a decedent appoints one or more executors or trustees, and instead of their lawful allowance makes a bequeath or devise of property to them, which would otherwise be liable to such taxes, or appoints them as residuary legatees, and such bequest, devise or residuary legacy exceeds what would be a reasonable compensation for their services, such excess shall be a succession and liable to such tax, and the probate court having jurisdiction of their accounts shall fix such compensation.

Profits on property derived. 7. When any property shall pass subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person, institution or corporation, on the extinction and determination of such charge, estate or interest, shall be deemed a succession taxable under the provisions of this subdivision of this chapter, in the same manner as if the person, institution or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estates or interests is derived.

Rate of tax. Such tax shall be upon the excess of the actual market value of such property over and above the exemp-

tions made and at the rates prescribed in this subdivision of this chapter. [108 v. 563.][35]

§ 2022. Conditions of transfer which create liability for tax.

In applying the above statutory provisions it is well to bear in mind that the tax is not on the transfer of property of a living person in the ordinary conduct of business affairs; it only applies when the owner has ceased such conduct.

No. 1 applies when the transfer occurs by will or inheritance of a resident.[36]

No. 2 when the transfer occurs by will or inheritance of a non-resident, owning property in this state.[37]

No. 3 when the transfer occurs by deed, grant, sale, etc., of property in this state, by resident or non-resident, without receiving full value, and, provided it is done in contemplation of death or intended to take effect after death of the grantor.[38]

No. 4 applies when the owner gives to someone else the power to make the transfer after his death.[39]

No. 5 applies when the property passes by the right of survivorship.[40]

No. 6 applies when an executor takes under a will more than his statutory allowance.

No. 7 applies to the increase of property where it does not pass on death of the owner, but on the occurrence of some subsequent event.

§ 2023. Resident of state.

Residence is synonymous with domicile, and although the statute uses the word resident, the residence is determined by applying the law fixing the domicile of a person. Domicile is always a question of fact; while not conclusive, the decedent's own declaration is evidence of high character, and will determine the question, in the absence of more convincing proof to the contrary.[41] However, a mere expression, without some evidence of actual residence, might overcome his declarations.[42] The general rules for fixing domicile are given as follows:

[35] Somewhat similar provisions are found in N. Y. inheritance tax, §§ 220 to 226.

[36] See Gleason and Otis, Inheritance Tax, 2nd ed., p. 84.

[37] *Id.* Affecting gifts, etc., pp. 103-124.

[38] *Id.* Affecting testamentary transfers, pp. 136-154.

[39] *Id.* Transfer by probate, 173.

[40] *Id.* Joint tenancy, 197.

[41] Wilderming, Admr. vs. Miller, 90 O. S. 28; Moore vs. Prickgaber, 184 U. S. 593.

[42] See Gleason and Otis, Inheritance, 2nd ed. 215, for illustrations.

See Atty. Gen'l's op. 1920, p. 1229, as to deduction of value of dower when property given to wife in contemplation of death, holding it is not to be deducted.

1. That a person must have a domicile somewhere.
2. That he can have but one.
3. That the domicile of origin is presumed to continue until a new one is acquired.
4. That the burden of proof rests upon the party alleging a change of domicile.
5. That to maintain this burden, both a change of residence and intent to change the domicile must be shown.
6. That a married woman's domicile is that of her husband, unless she lives apart from him and acquires a separate residence.[43]

§ 2024. Non-resident.

The general rule is that the personal property is taxed at the domicile of the decedent,[44] and therefore as a general rule only real estate situate in this State, of a non-resident, will be subject to the tax. This is undoubtedly true where the personal property is not physically present in this State. When it is physically present in this State, then there may be exceptions to this general rule.[45] It is immaterial where the beneficiary may reside, as the tax is not on the person that receives, but upon the right to receive the property transmitted, and there is no discrimination as to rate, and the method of procedure is practically the same.[46]

§ 2025. Widow's years allowance. § 5332-1. The value of any property set off and allowed to a widow and children under the provisions of section ten thousand six hundred and fifty-six of the General Code in excess of three thousand dollars, shall be deemed a succession taxable under the provisions of this subdivision of this chapter. The widow, if any, shall be deemed the successor of such entire succession; but if there be no widow, each child shall be deemed a successor of his share thereof. [108 v. 1197.] [46a]

§ 2026. When subject to tax in another state. § 5333. If the succession to any property from a resident of this state is locally subject in another state or country to a tax of like character and amount to that hereby levied, and if such tax be actually paid or guaranteed or secured in accordance with law in such other state or country, such succession shall not be subject to the tax hereby levied; if locally subject in any state or

[43] Gleason and Otis, Inheritance, 2nd ed. 213.

[44] Snyder vs. Buttman, 190 U. S. 249.

[45] See § 2030, Situs of property.

[46] See § 2020, Definition of terms. A foreign executer may marshall the assets, etc. See Atty. Genl's op. 1920, p. 939.

[46a] The widow is also entitled to an exemption of $5000.00 as well as the minor child. § 2031.

See *In re* Ellerhorst, 65 Bull. 398, as to non-resident having securities, liberty bonds in safety boxes in bank in this state, subject to tax.

country to a tax of like character but of less amount than that hereby levied and such tax be actually paid or guaranteed or secured, as aforesaid, such succession shall be taxable under this subdivision of this chapter to the extent of the difference between the taxes actually paid, guaranteed or secured, and the amount for which such succession would otherwise be taxable hereunder. [108 v. 1193.]

§ 2027. Property in foreign jurisdiction.

This statute applies to the case of a transfer when the decedent was a resident, but the property is located in another jurisdiction, and is subject to a tax in that jurisdiction. In such cases if the tax in that jurisdiction is equal to or in excess of that in this State, *and the same is paid* or guaranteed, it is not liable to a tax here. If the tax of such jurisdiction is less than here, and is paid, the same may be deducted from the amount that is due under the laws of this State.

§ 2028. Deduction for tax paid under United States law.

There seems to be no special provision for the deduction of inheritance taxes paid the United States. In New York it is held that they can not be deducted,[47] and in Wisconsin, whose statute is somewhat similar, the same conclusion has been arrived at.[48] However, the general trend of authority seems to be the other way—and this seems to be more in accord with our ideas of justice, and we think, the spirit of our statute.[49]

§ 2029. General deductions.

As a general rule, it may be said that all debts of decedent that are properly chargeable against the property are to be deducted in fixing the amount of the tax to be paid. In general,

[47] Matter of Biestand, 178 App. Div. 836; 166 Supp. 168; Matter of Sherman, 179 App. Div. 497.

[48] State vs. Week, 172 N. W. 732; State vs. Eberling.

[48a] Atty. Genl's op. 1920, p. 698.

[49] Hooper vs. Shaw, 176 Mass. 190; Corbin vs. Townshend, 103 Att. (Conn.) 647; Corbin vs. Baldwin, 92 Conn. 834; *In re* Mackey's Est., 46 Col. 79; People vs. Passfield, 220 N. E. (Ill.) 286; *In re* Roebling Es., 104 Att. (N. J.) 295; People vs. Northern Trust Co., 125 N. E. (Ill.) 662; Smith vs. Hennepen, 139 Minn. 210; Knight's Estate, 104 Atl. (Penn.) 765. See 90 Cen. Law Journal (1920), 295, 115. Since the above was written Judge Hadden, Cleveland, has held the same way, 64 Bull. 113.

this would be those that are paid in the ordinary administration of the estate. This would include, in addition to ordinary debts, the costs of administration, attorney fees, burial expenses, cost of a monument, cemetery lot, commission of the executor, taxes due or payable, costs of litigation where incurred to preserve the estate.[50] But the costs of litigation between distributees as to the value of their interest is not subject to deduction.[51]

While as a general rule the personal estate is primarily liable for all these matters, yet where the real estate is specifically devised, and there were charges attaching to it, such should not be deducted from the personal estate; such as repairs made after the death of the decedent.[52]

Where land is devised, subject to a mortgage, and the mortgage is not paid from the personal estate, of course it should be deducted from the value of the land. When a debt is forgiven by will the transfer is taxable.[53] But a debt paid by a bequest is not taxable.[53a]

§ 2030. Situs of property.

When property is subject to a tax in two or more jurisdictions, it becomes very important to determine its situs. Of course this can not affect real estate; this is only taxable in the State where located, and the doctrine of equitable conversion is not applicable even though the testator directs the sale of foreign real estate, and the payment of money legacies out of the proceeds.[54] So it was also held that money due on land contracts to pay a resident decedent's estate the purchase price of land in a foreign jurisdiction, is not liable to the local tax.[55]

As a general rule the situs of personal property follows the domicile of the owner, but not absolutely, so far as the matter of inheritance taxes are concerned. Tangible personal property,

[50] Matter of Gihon, 169 N. Y. 443. Costs of contest of will allowed.

[51] *In re* Line Est., 155 Penn. St. 378; Matter of Thrall, 157 N. Y. 46.

[52] Matter of Kemp, 151 N. Y. 619; Matter of Baudouine, 39 Supp. (N. Y.) 1121.

See Atty. Genl's op. 1920, p. 1167, this applies to non-resident. § 2064, fixing value.

[53] Gleason and Otis, Inheritance, 2nd ed. 377.

Encumbrances for Inheritance Tax Purposes. Assessments for road improvements which are a charge upon the property of a decedent, but not a personal liability of his estate, are to be taken into consideration as encumbrances upon the land in valuing such land for inheritance tax purposes, in so far as they may affect the actual market value of the land itself. To Tax Commission of Ohio, Columbus. Atty. Genl's. op. 1921.

[53a] *In re* Will of Hooper, 4 N. P. (N.S.) 186; 6 Dec. 560.

[54] McCurdy vs. McCurdy, 197 Mass. 248. The only ground upon which the property can be taxed is that it is within the state. Gleason and Otis, Inheritance, 2nd ed. 308.

[55] Matter of Wolcott, 157 N. Y. Supp. 268.

will generally be held liable to the jurisdiction in which it is located;[56] and corporate stock in the State in which the company was incorporated.[57]

In cases where it is a consolidated company organized in this as well as in other States, the tax applies even though the principal officer is in another State and the stock is owned by a non-resident.[58] As a general rule it is said that the transfer of stock in a foreign corporation is not taxable against a non-resident decedent merely because the certificates are physically within the State.[59] Bank deposits in banks are taxable at the place of deposit.[60] This case holds that mortgages may be taxed in the state where the land is located, and there are instances where it could also be taxed at the domicile of decedent.[61]

As to the situs of a mortgage, according to a leading authority there are three theories: It may be held to have a situs at the domicile of the owner, or where the land is located, or where the mortgage documents happen to be found. It is possible under these conditions, that a mortgage held by a decedent's estate might pay taxes in three States.[62] The situs of bonds unless physically present, even though issued by a local corporation, have been held to be at the domicile of a non-resident.[63] Property "transiently" in the State has not its situs in that State.[64]

[56] See § 2020, § 5331 G. C., Definition of terms.

[57] McDougal vs. Low, 164 Cal. 107. Shares in a national bank where the bank is located. Atty. Genl's op. 1948, 1921.

[58] Attorney General's opinion, September 7, 1920, 65 Bull. 414.

[59] Gleason and Otis, Inheritance, 2nd ed. 322.

[60] *In re* Speers, 4 N. P. 238; *In re* Rogers' Estate, 149 Mich. 305. This case holds that mortgages may be taxed in the state where the land is located.

[61] Mann vs. Carter, 74 N. H. 345.

[62] Gleason and Otis, Inheritance, 2nd ed. 313. The case of Matter vs. Fearing, 200 N. Y. 340 is authority for fixing the domicile of the owner of the mortgage as the situs, and Kinney vs. Stevens, 207 Mass. 368, that the location of the land is the proper place.

[63] Walker vs. People, 171 Pac. (Colo.) 747, but see Bliss vs. Bliss, 221 Mass. 201, where the contrary seems to have been held.

[64] See People vs. Griffin, 245 Ill. 532. In this case it was held stocks and bonds of corporations of the state where found of a non-resident were subject to the tax, but stocks and bonds of foreign corporations, even though in the state, were not subject to the tax. Gleason and Otis, Inheritance, 2nd ed. 307 to 311 for further discussion. See § 2020, § 5331 G. C., for definition of "Within the State."

In the recent case of Anderson vs. Durr, 100 O. S. 257, it is held that membership in N. Y. stock exchange, owned by a resident of Ohio, is subject to tax in Ohio.

Tax on real estate in this state etc. Inheritance tax can not be assessed in this state on a succession to stock owned by a non-resident decedent in a corporation, organized and existing under the laws of another state but which does business and owns real estate in Ohio. Atty. Genl's op. (No. 2433) 1921.

§ 2031. **Property not subject to tax.** § 5334. The succession to any property passing to or for the use of the state of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes,

Public institutions. Or public institutions of learning, or to or for the use of an institution for purposes only of public charity, carried on in whole or in substantial part within this state, shall not be subject to the provisions of the preceding sections of this subdivision of this chapter. Successions passing to other persons shall be subject to the provisions of said sections to the extent only of the value of the property transferred above the following exemptions:

To wife or child. 1. When the property passes to or for the use of the wife or a child of the decedent who is a minor at the death of the decedent, the exemption shall be five thousand dollars.

To father, etc. 2. When the property passes to or for the use of the father, mother, husband, adult child or other lineal descendant of the decedent, or an adopted child, or person recognized by the decedent as an adopted child and made a legal heir under the provisions of a statute of this or any other state or country, or the lineal descendants thereof, or a lineal descendant of an adopted child, the exemption shall be three thousand five hundred dollars.

For brother, etc. 3. When the property passes to or for the use of a brother, or sister, niece, nephew, the wife or widow of a son, the husband of a daughter of the decedent, or to any child to whom the decedent, for not less than ten years prior to the succession stood in the mutually acknowledged relation of a parent, the exemption shall be five hundred dollars. [108 v. 1193.][65]

§ 2032. Exemption: Public charities, etc.

The *first* of the enumerated exemptions is where property passes to the State of Ohio.

Second, when it passes to any municipal corporation.

Third, when it passes to a political sub-division of the State to be used exclusively for public purposes.

Fourth, public institutions of learning.

Fifth, an institution for purposes only of public charity, carried on in whole or substantial part in the State.

[65] See § 221, N. Y. inheritance tax, for exemptions, etc. Also § 2025, § 5331-1 G. C., widows year's allowance.

"Brother" and "sister" includes half brother and sister. Atty. Genl's op. 1920, p. 177, 64 Bull. 124.

The first, second and third will present no difficulty in application; the fourth and fifth, may. In the first place we are confronted by a diversity of opinion as to whether the statute should be liberally construed in favor of the exemption, or strictly against it, the general rule being in favor of a strict construction, but it has been said the trend of recent authorities is for a liberal construction.[66]

The language should not be extended beyond the clear import of the words used to make property of a non-resident subject to the tax,[66a] and the latter is the rule the writer thinks will prevail in Ohio. If a strict rule were adopted perhaps a great number of institutions of learning might not come within the term "Public Institutions of Learning," which really ought to be exempt, and perhaps no religious organization would be "an institution for purposes only of public charity."[66b] The language

[66] Gleason and Otis, Inheritance, 2nd Ed. 55; Matter of Rockafeller Foundation, 165 N. Y. Supp. 154; Parkhurst vs. Burrill, 220 Mass. 196.

[66a] People vs. Griffin, 245 Ill. 532.

[66b] Since the text was written I have had placed in my possession an unreported decision of the Court of Appeals of the Fourth District. This was made on a like provision under the collateral inheritance tax, and holds that a bequest to a church is not exempt.

Opinion.

In the matter of the estate of Jane Poe.

Error to the Court of Common Pleas of Ross County, Ohio.

Merriman, J.: The sole question presented in this matter is: Are bequests to churches subject to the collateral inheritance tax?

Section 5331 G. C., provides for the tax, and § 5332 makes the following exemptions:

"The provisions of the next preceding section shall not apply to property, or interests in property, transmitted to the State of Ohio under the intestate laws of the state, or embraced in a bequest, devise, transfer or conveyance to, or for the use of the State of Ohio, or to or for the use of a municipal corporation or other political subdivision thereof for exclusively public purposes, or public institutions of learning, or to or for the use of an institution in this state for purpose only of public charity or other exclusively public purposes. The property, or interests in property so transmitted or embraced in such devise, bequest, transfer or conveyance, shall be exempt from all inheritance and other taxes while used exclusively for any of such purposes."

Exemptions from taxation are not favored; the general rule being, that exemptions will never be presumed or implied. There must be some express grant of immunity. Therefore, the statute must be strictly construed.

first appears in the act of 1900. Before that there were no specific exemptions, and it is difficult to say just what the legislature had in mind should be included in the language used.

No doubt the Universalist Church does much charity work; but its dispensation of charity is a mere incident to its real mission, which is teaching and preaching the Christian religion.

In *Watterson* v. *Halliday*, 77 O. S. 178, it is said:

" * * * the Catholic Church is not an institution of *purely* public charity. It teaches and practices charity; but that is not its whole mission in the world. Its character is defined by the third and fourth findings made by the Circuit Court. There it is said: 'The Roman Catholic Church is an institution which has for its chief and primary object and purpose the teaching and extending of its recognized form of religious belief and worship into all parts of the world, and was founded to continue the work of Christ on earth, and to teach, govern, sanctify and save all men.'

" 'Charity is included in its teachings, purposes and practices, as subordinate to its spiritual teaching and purpose, but is an essential part of its general scheme of church work * * * .'

"So it seems that, instead of * * * being an 'institution of purely public charity,' it is a religious institution primarily, and its charity is subordinate to its spiritual teachings * * * ."

While the Universalist Church differs from the Catholic in its creed and general management, yet the object for which it was founded is the same—the teaching of the Christian religion.

It can not be said, therefore, that the Universalist Church is an institution for the purpose only of charity; neither can it be said to be an institution for exclusively public purposes, though undoubtedly the general public would be welcome, yet the church was formed for the purpose of advancing certain religious ideas and the property of the church is used largely for the benefit of its members.

In giving the legislature power to exempt from taxation (Art. 12, § 2), the makers of the constitution expressly referred to "houses used exclusively for public worship" in contradiction to "institutions of purely public charity and public property used exclusively for any public purpose." The legislature, in exacting the exemption law, also used the words "houses used exclusively for public worship" in contradiction to "houses or halls used exclusively for public purposes." It would thus seem that the makers of the constitution, as well as the legislature, intended to distinguish between church property and property used for exclusively public purposes.

It is our opinion that the Universalist Church is not an institution "for the purpose only of public charity or other exclusively public purpose," and that the bequest thereto is subject to the collateral inheritance tax.

A bequest to the Bishop of a Catholic diocese to educate candidates for priesthood, and a bequest for masses for repose of testator's soul are subject to tax. Atty. Gen'l's op. 1920, p. 388.

While more than twenty years have elapsed we have no Supreme Court reported decision giving direct construction to these words.

Relying largely on what might properly be implied in the holdings of the Supreme Court of our State,[67] the inferior courts have followed the rule fixed by statute, exempting property generally from taxation. The inheritance tax statutes in some States prescribe that this rule shall be followed.[68] In the Humphreys case,[69] the testator, a resident of Cincinnati, made the following bequests:

1. "To the American Bible Society the sum of Five Thousand Dollars."

2. "To the American Tract Society the sum of Five Thousand Dollars."

3. "To the American Sunday School Union the sum of Two Thousand Dollars."

4. "To the Board of Foreign Missions of the Presbyterian Church in the United States the sum of Ten Thousand Dollars."

5. "To the Board of Home Missions of the Presbyterian Church in the United States the sum of Ten Thousand Dollars."

5. "To the Board of Church Erection Funds of the Presbyterian Church in the United States the sum of Five Thousand Dollars."

7. "To the Presbyterian Committee of Missions for Freedmen in the United States the sum of Five Thousand Dollars."

8. "To the Woman's Foreign Missionary Society of the Presbyterian Church of the United States the sum of Five Thousand Dollars."

9. "To the Woman's Home Missionary Society of the Presbyterian Church of the United States the sum of Five Thousand Dollars."

10. "To the Widow's Home on Walnut Hills, Cincinnati, Ohio, One Thousand Dollars."

11. "To the Ohio Hospital for Women and Children, One Thousand Dollars."

[67] Humphreys vs. State, 70 O. S. 67.

[68] Massachusetts, Rhode Island and California.

[69] 70 O. S. 67.

A. bequeaths to a sanitorium company $1,000 per annum in consideration of care to be furnished to B. the invalid sister of A. during the remainder of her life. *Held*, a taxable succession to the sanitorium company. No. 1971, Atty. Gen'l's op. 1921.

12. "To the Sunday School of the Fifth Presbyterian Church in Cincinnati, Ohio, the sum of Three Hundred Dollars to purchase books for its Sunday School Library."

13. "I give and devise my oil paintings and engravings to ....., should they desire to have them, and if they do not desire to have them, ... to the Women's Christian Home of Cincinnati. and the Young Men's Christian Association of Cincinnati, share and share alike."

14."All the rest and residue to the Board of Foreign Missions; to the Woman's Foreign Missionary Society, and the Board of Home Missions, all of the Presbyterian Church of the United States to be divided between the aforesaid Societies and Boards, share and share alike."

The Probate Court held that all these bequests were exempt. The case was appealed to the Common Pleas Court, and the question that was raised, there, was not that the bequests did not come within the terms "public institutions of learning, or to or for the use of an institution for purposes only of public charity," but that the devisee institutions were not "carried on in whole or in substantial part within the State," Judge Hollister of the Common Pleas, saying:[70]

"It is conceded by counsel for the state that these bequests are for the purpose of purely public charities, but it is claimed that none of the Boards of the Presbyterian Church, named in Mrs. Brown's will, are institutions in this state, within the meaning of the law."

Further along,

"The Presbyterian Church is undoubtedly an 'institution' as the word is usually understood."

After naming a number of authorities, the judge concludes:

"From these cases and from the language of the statute strictly construed, the deduction may be fairly made that the object of the law is to exempt from taxation charitable bequests and devises, when made to permanent organizations in this state.

[70] *In re* Estate of Brown, 13 Dec. 169.

corporate or otherwise, capable of holding property, and also to exempt charitable bequests or devises when the property so devised or bequeathed is actually located in this state and used here permanently for the charitable purpose for which it was given."

In the opinion in the case of Gerke vs. Purcell, 25 O. S. 229, where it was decided that property held by Archbishop Purcell for the uses of the parochial schools in Cincinnati, of the Catholic Church, was exempt from taxation as a purely public charity, it is said:

"A college consisting of a private corporation and having a private foundation, is devoted to a public use, yet the use is none the less public because tuition is charged."[71]

The Brown case was taken to the Circuit Court.[72] Here it is said:

"The bequests are to institutions organized for purely public charities, but in our opinion are not institutions in the state of Ohio."

The case next appears in the Supreme Court.[73] It is not clear from the case as reported whether all the bequests mentioned in the will were taken up or not, but the records show that all the bequests were not included.[74]

But it is clear that the question made in the Supreme Court was not that the bequests were to an institution of purely public charity or other exclusive public purpose, but that they were not institutions in the State of Ohio, and it can be fairly implied that if the institutions receiving the bequests had been within the State, the legacies would have been exempt.

71 Gerke vs. Purcell, 25 O. S. 241.

72 Humphreys vs. State, 1 C. C. (N.S.) 1; 24 C. C. 238.

73 Humphreys vs. State, 70 O. S. 67.

74 The records of the Common Pleas Court of Hamilton County, No. 122847, show the prosecuting attorney gives notice from so much of such order as finds that an inheritance tax is not payable upon the legacies to the following legatees, viz.: "American Bible Society; American Tract Society; American Presbyterian Church; Board of Home Missions of the Presbyterian Church; Board of Church Erection Funds of the Presbyterian Church; The Woman's Home Missionary Society of said Church."

We may then fairly come to the conclusion that as a general rule where the courts have not otherwise decided that if legacies are to institutions within this State, which are exempt from taxation under the general law, or our constitution, they will be exempt under the inheritance laws.[75]

The constitution provides that

"Burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, public property used exclusively for any public purpose * * * may by general laws be exempted."[76]

In other States the following have been held as exempt:

Y. M. C. A.;[77] W. C. T. U.;[78] New York Metropolitan Museum;[78a] an art galiery;[79] a library;[80] a university;[81] a drinking fountain for horses;[82] hospitals;[83] found a home for the aged;[84] public officers as trustees for charitable purposes;[85] a Masonic lodge;[86] a village in trust for indigent women;[87]

[75] Our statutes exempt: Burial lots and grounds, § 5350, § 10093 G. C.; Fire engines, § 10101 G. C.; Fraternal benefit societies, § 5365-1 G. C.; G. A. R. posts, § 5364 G. C.; Historic buildings, § 5363 G. C.; Indiana meeting of Friends, § 5365 G. C.; Law library assns., § 3055 G. C.; Masons, Odd Fellows, Knights of Pythias, § 5364 G. C.; Memorial assns., § 3410-7 G. C.; Municipal university, § 7915-1 G. C.; Monument sites of distinguished persons, § 5361 G. C.; Ohio university lands, §§ 7433-7435 G. C.; Pre-historic earthworks, § 5363 G. C.; Religious benevolent associations, § 5364 G. C.; Secret benevolent associations, § 5364 G. C.; Soldiers and sailors township memorial assns., § 3410-7 G. C.; Vault companies' property, § 10192 G. C.; Womens homes, § 5364 G. C.; Armory buildings, § 5354 G. C.; Grave yards, § 5350 G. C.; Public colleges, § 5349 G. C.; Churches, § 5349 G. C.; Monumental buildings, § 5359 G. C.

The fact that U. S. bonds are exempt from taxation will not exempt them from an inheritance tax. Plummer vs. Coler, 178 U. S. 117; 44 L. Ed. 1001.

A bequest to trustees for purpose of founding an industrial school open to all, exempt. Atty. Genl's op. 1920, p. 1233. So is a bequest to a public hospital. Id., p. 383. So also may a bequest to trustees for establishing a children's home. Id., p. 1048. Also a bequest to a religious order for relief of the poor. Id., p. 388.

[76] Art. XII, § 2. This provision is broader than that in the constitution of 1851.

[77] Matter of Moses, 123 N. Y. Supp. 443; Little vs. Newburyport, 210 Mass. 414.

[78] Matter of Field, 130 N. Y. Supp. 195.

[78a] Matter of Mergantine, 195 N. Y. 572.

[79] Matter of Arnot, 203 N. Y. 627; 145 N. Y. App. Div. 708.

[80] Essex vs. Brooks, 164 Mass. 79.

[81] Alfred Universi vs. Hancock, 69 N. J. Eq. 470.

[82] Matter of Graves, 242 Ill. 212.

[83] Matter of Higgins, 106 Supp. (N. Y.) 465.

[84] Matter of Graves, 171 N. Y. 40.

[85] *In re* Spangler, 148 Ia. 333.

[86] Morrow vs. Smith, 145 Ia. 514.

[87] Matter of Albright, 156 N. Y. Supp. 821.

Methodist church;[88] Congregational and Baptist churches;[89] first Universalist Society;[90] American Baptist Foreign Missionary Society;[91] a bishop;[92] property of the United States;[93] bequest to priest for masses to be said is not exempt.[94]

§ 2033. Institution in the state.

What will constitute an institution in the State was the question directly involved in the Humphreys case.[95] In this case none of the bequests were to bodies incorporated in this State; some were chartered under the laws of the State of New York and others under the laws of Pennsylvania. If the institution is incorporated, then the home of that institution is the State of its incorporation, and even if it is an auxiliary society in this State, or if it must account to a principal incorporated in another State, it is not an institution in this State, even though the work is done in this State.

If the institution is unincorporated, then the place where it has its principal place of business would determine whether it is an institution in this State or not. If it has its principal place of business in this State, or if all the bequest is to be used for the benefit of the people of this State, then it would be considered an inheritance in this State and be exempt.[96]

"It is the policy of society to encourage benevolence and charity; but it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education or missions for the benefit of mankind at large."[97]

In the Humphreys-Brown case it appeared that

"the bequests excepted to were to several of the Boards of the Presbyterian Church; that these Boards are incorporated under the supervision and control of the General Assembly of that church. The General Assembly is a representative body com-

88 Carter vs. Whitcomb, 74 N. H. 482.

89 Carter vs. Eaton, 75 N. H. 560.

90 First University Society vs. Bedsford, 185 Mass. 185.

91 Matter of Lyon, 121 N. Y. Supp. 1004.

92 Matter of Palmer, 53 N. Y. Supp. 847.

93 38 Bull. 281. § 5351 G. C.

94 38 Bull. 281.

95 Humphreys vs. State, 70 O. S. 67. The statute of the inheritance tax is a little broader than the collateral inheritance tax in that the institution will be exempt "if a substantial part is carried on in this state."

96 See *In re* Bivins, 13 Dec. 172.

97 Quoted from Matter of Estate of Prime, 136 N. Y. 347 in Humphreys vs. State, 70 O. S. 89. See § 18, Situs of property.

posed of delegates from Presbyterian churches in all parts of the United States, and meets annually. Generally speaking, the moneys disbursed by the Boards in carrying out the charitable work of the church is spent partly in Ohio, but the major part is used elsewhere. For instance, the Board of Foreign Missions of the Presbyterian Church maintains two Homes for education in Ohio, of the children of foreign missionaries; the Board of Church Erection Fund has erected churches in the state at a cost of $240,000; the Board of Home Missions assists in sustaining the preaching of the gospel in churches and congregations in Ohio. The membership of that church in this state is about 1/11 of the entire membership in the United States and contributes largely to the funds of the church." [98]

§ 2034. Exemption, personal.

The first personal exemption is that to a wife, or a minor child of the decedent; wife here means widow, and is the person who was legally married to decedent at the time of his death.[98a] There is more difficulty as to what may be included in the word child; it is decided that it does not include stepchildren.[99]

From the fact that the next exemption uses both the word *child* and *adopted* child, throws some doubt on whether the word *child* here includes an adopted child. But there is no good reason why a person who occupies the position of an adopted child should be entitled to the exemption under the second clause, and if a minor, excluded from the first; and I am therefore of the opinion that a minor adopted child is entitled to the exemption. Unless an illegitimate child would, under our law, be entitled to inherit from the decedent, such child would not be entitled to the exemption. The statute specifically exempts the widow's year's allowance to the extent of $3,000. This is in addition to the exemption here allowed.[1]

The second exemption is father, mother, husband, adult child, adopted child, or a person recognized as an adopted child and made a legal heir under the provisions of a statute, in this State or any other country. This latter clause evidently refers to instances where a person is declared heir under Sec. 8598, G. C. (§ 1902), and similar statutes. It would probably not include recognition as child in any other manner. As a general rule it may be said that adoption must always be pursuant to

[98] Humphreys vs. State, 1 C. C. (N.S.) 2; 24 C. C. 238.

[98a] The Atty. Genl. has held that if a wife takes under the will, she waives her dower right and is not entitled to a deduction of its value from what she receives under the will. Atty. Genl's op. 1920, p. 834. Value of the right to remain in mansion house not deducted. Id., p. 1044. Dower and curtesy deducted. Id., p. 961.

[99] *In re* Hooper, 4 N. P. 186; 6 Dec. 560.

[1] § 5332-1 G. C., § 2025.

some statute, and in the absence therefrom, a so-called adopted child is a stranger.[2] Except as it might come under the 3rd paragraph of Sec. 5334, G. C. (§ 2031). It has been held that children of an illegitimate daughter are not lineal descendants.[3] Whether this rule would be followed if they were capable of inheriting from their mother, I think is questionable.

The third provision is when it passes to a brother, sister, niece, the wife or widow of a son.[4] But a divorced wife is not a wife.[5] Brother and sister would probably include those of the half blood, the husband of a daughter of decedent, not so in the absence of statutes,[6] or to any child to whom the decedent, for not less than ten years prior to the succession, stood in the mutually acknowledged relation of parent. This language seems to have been taken from the New York law.[7] The fact that the decedent had thought enough of the parties to make them beneficiaries, would not be without weight in such cases.

§ 2035. Rates of tax on property. § 5335. The rates at which such tax is levied are as follows:

1. On successions passing to any person mentioned in the first and second sub-paragraphs of the preceding section:

(a) One per centum on the excess of the value of the property over the exemptions up to and including the sum of twenty-five thousand dollars.

(b) Two per centum on the next seventy-five thousand dollars, or any part thereof;

(c) Three per centum on the next one hundred thousand dollars, or any part thereof;

(d) Four per centum on the amount representing the balance of the value of each individual succession.

2. On successions passing to any person mentioned in the third sub-paragraph of the preceding section,

(a) Five per centum on the excess of the value of the property over the exemptions up to and including twenty-five thousand dollars;

(b) Six per centum on the next seventy-five thousand dollars, or any part thereof;

[2] See Commonwealth vs. Nancrede, 32 Pa. St. 289.

[3] Matter of Beach, 154 N. Y. 252.

[4] It has been held that a widow of an adopted son is a widow of a son. Matter of Duryea, 112 N. Supp. (N. Y.) 611.

[5] Matter of Merritt, 140 Supp. (N. Y.) 13.

[6] Matter of Edman, 128 Fed. 815.

[6a] Where a boy and girl were taken into the home of their aunt and remain with her and her husband during their entire childhood—receiving care and education, and return service and obedience, if the relation exists for more than ten year—they come within this provision. Atty. Genl's op. 1920, p. 1155.

[7] See Gleason and Otis, Inheritance, 2nd ed. 227, and it is said these statutes have occasioned much litigation. These authors give the following cases, and excerpts therefrom on the matter. Matter of Bolton, 210 N. Y. 618; Matter of Butler, 12 (N. Y.) Supp. 201; Matter of Nichol, 36 Supp. (N. Y.) 538; Matter of Capron, 10 Supp. (N. Y.) 23; Matter of Wheeler, 22 Supp. (N. Y.) 1075; Matter of Moulton, 33 Supp. (N. Y.) 578.

(c) Seven per centum on the next one hundred thousand dollars, or any part thereof;

(d) Eight per centum on the amount representing the balance of the value of each individual succession.

3. On all successions passing to persons other than those hereinbefore mentioned, or to institutions or corporations:

(a) Seven per centum on the value of the property up to and including the sum of twenty-five thousand dollars;

(b) Eight per centum on the next seventy-five thousand dollars, or any part thereof;

(c) Nine per centum on the next one hundred thousand dollars, or any part thereof;

(d) Ten per centum on the amount representing the balance of the value of each individual succession. [108 v. 565.][8]

§ 2036. Schedule of rates and exemptions under the Ohio Inheritance Tax Law.

Issued by the Tax Commission of Ohio

SUCCESSORS	Exemption	On $25,000 or part thereof over the exemption	On next $75,000 or part thereof	On next $100,000 or part thereof	On the balance
1st Class: To wife or minor child.	$5,000	1%	2%	3%	4%
2nd Class: To father, mother, husband, adult child, adopted child or person recognized as an adopted child and made a legal heir under the provisions of a statute of this or any other state or country, or the lineal descendants thereof, or a lineal descendant of an adopted child.	$3,500	1%	2%	3%	4%
3rd Class: To brother, sister, niece, nephew, wife or widow of a son, husband of a daughter of the decedent, or any child to whom the decedent, for not less than ten years prior to the succession stood in the mutual acknowledged relation relation of a parent.	$500	5%	6%	7%	8%
4th Class: To all persons, institutions, or corporations not named in the 1st, 2nd and 3rd classes above.	0	7%	8%	9%	10%

[8] See § 221a, N. Y. inheritance tax for rates fixed in the state. Gleason and Otis on Inheritance taxation, 2nd ed. 738.

The following is an illustration of the amount of tax due upon a succession, the total value of which is $250,000, as to each class of successors:

CLASS	Exemption	On $25,000 or part thereof over the exemption		On next $75,000 or part thereof		On next $100,000 or part thereof		On the balance			Total tax
		Rate	Amount of tax	Rate	Amount of tax	Rate	Amount of tax	Am't of balance	Rate	Amount of tax	
1st Class	$5,000	1%	$250	2%	$1,500	3%	$3,000	$45,000	4%	$1,800	$6,550
2nd Class	$3,500	1%	$250	2%	$1,500	3%	$3,000	$46,500	4%	$1,860	$6,610
3rd Class	$550	5%	$1,250	6%	$4,500	7%	$7,000	$49,500	8%	$3,960	$16,710
4th Class	0	7%	$1,750	8%	$6,000	9%	$9,000	$50,000	10%	$5,000	$21,750

§ 2037. Tax as when due and payable. § 5336. Taxes levied under this subdivision of this chapter shall be due and payable at the time of the succession, except as herein otherwise provided, but in no case prior to the death of the decedent.

When can not be determined. Taxes upon the succession to any estate or property, or interest therein limited, dependent or determinable upon the happening of any contingency or future event, and not vested at the death of the decedent, by reason of which the actual market value thereof can not be ascertained at the time of such death, as provided in this subdivision of this chapter, shall accrue and become due and payable when the persons or corporations then beneficially entitled thereto shall come into actual possession or enjoyment thereof.

Taxes a lien. Such taxes shall be and remain a lien upon the property passing until paid, and the successor and the executors or administrators of the general estate of the decedent, and the trustees of such property shall be personally liable for all such taxes, with interest as hereinafter provided, until they shall have been paid as hereinafter directed.

Executor, etc., to collect. Such an administrator, executor or trustee, having in charge or in trust for distribution any property the succession to which is subject to such taxes, shall deduct the taxes therefrom, or collect the same from the person entitled thereto.

Shall not deliver property until paid. He shall not deliver, or be compelled to deliver, any specific legacy or property, the succession to which is subject to said taxes, to any person, until he shall have collected the taxes thereon.

May sell estate to pay. He may sell so much of the estate of the decedent as will enable him to pay said taxes in like manner as he would be empowered to do for the payment of the debts of the decedent. [108 v. 1194.][9]

[9] See § 222, N. Y. inheritance tax, for persons of similar character. See Atty. Gen'l's. opinion July 9, 1919, 64 Bull. 307.

§ 2038. Time of payment of tax.

The tax is due and payable at the time succession takes place. This is usually at the time of death of decedent. There seems to be only one exception and that is when the property does not vest at decedent's death, and it is impossible to ascertain its market value; then it becomes due and payable when the beneficiary actually comes into possession. In the meantime the property remains charged with the payment of the tax. In such case the trustees are held responsible for the tax being finally paid.

As a matter of grace, no penalty is added if paid within one year from that time,[10] and to encourage an early settlement a discount of 1% per month is allowed for payment previous to the end of the year.

I apprehend the number of instances will not be large where the tax will not have to be paid within the year, unless by virtue of subsequent sections, an extension is granted. The trustee or executor is positively forbidden to deliver any property to an heir or beneficiary until the tax is paid. If the tax is not paid by the parties entitled to the property, he may sell it, or so much of the estate as may be necessary, to get the money with which to pay it.

§ 2039. Personal liability of executor, etc.

It is the duty of the administrator or executor in every case where a tax is due under this act, before paying over a legacy or distributive share, to exact from the person who is to receive it, or retain in his hands out of the legacy or distributive share, a sum sufficient to pay the tax. If he does not he runs the risk of paying it out of his own property.[11] But he is not liable if the property never comes into his hands,[12] or under the jurisdiction of the court making his appointment.[13] If he resigns without having paid the tax, the court will appoint an administrator *de bonis non* to collect it.[14]

[10] See § 362-10, § 5338 G. C.

[11] Hunter vs. Husted, 45 N. C. 141.

[12] Gallup's Appeal, 76 Conn. 617.

[13] Gleason and Otis, Inheritance tax, 2nd ed. 526.

[14] Chamberlain vs. Stecher, 78 O. S. 271.

§ 2040. Personal liabilities of beneficiaries.

Our statute does not seem to make the beneficiaries personally liable for the tax. The duty to pay the tax is either on the executors or the person who holds the property.

If a person receives property where the succession to which is rightfully subject to a tax, and the tax thereon has never been taken therefrom, such facts might create a personal liability upon the recipient, and the same might be recovered in a proper action. But that course will not generally be pursued. The property and not the person, the statute makes responsible for payment of the tax.[15]

§ 2041. Tax in legacy retained. § 5337. If a legacy subject to such taxes is charged upon or payable out of real estate, the heir or devisee, before paying it, shall deduct the taxes therefrom and pay such taxes to the executor, administrator or trustee, and the taxes shall remain a charge upon the real estate until it is paid; and the payment thereof shall be enforced by the executor, administrator or trustee, in like manner as the payment of the legacy itself may be enforced, or by the prosecuting attorney as provided in this subdivision of this chapter.

Executor, etc., to retain. If such legacy shall be given in money to a person for a limited period, such administrator, executor or trustee shall retain the tax on the whole amount;

Application to court, etc. And if it be not in money he shall make an application to the court having jurisdiction of his accounts to make an ascertainment, if the case require it, of the sum to be paid into his hands by such legatee on account of the taxes, and for such further order as the case may require. [108 v. 566.][16]

§ 2042. When property is charged with payment of legacy, etc.

If real estate is charged with payment of a legacy, the person entitled to the real estate, before he lifts the legacy, must deduct the tax, or see that it is paid. In the meantime it remains a charge and a lien on the real estate. The executor may collect the tax, even going so far as selling the real estate.

The second matter referred to in the previous section is where the legacy is of money for a limited period; that is, for life or a number of years. In such cases, the executor retains the tax

[15] See cases cited in Gleason and Otis, Inheritance taxation, 2nd ed. 527.

[16] § 222 N. Y. inheritance tax.

on the whole amount. If it is a legacy or other personal property, on application to the court, the tax shall be ascertained, of the sum of money fixed the legatee must pay. The intent of the statute undoubtedly is that someone must pay the tax on the actual value of the whole property and if possible within the year limit.

§ 2043. **Tax to whom paid—Discount.** § 5338. Taxes levied by this subdivision of this chapter shall be paid to the treasurer of the county in which the court having jurisdiction of proceedings under this subdivision of this chapter is held by the person or persons charged with the payment thereof.

Interest when not paid. If such taxes are not paid within one year after the accrual thereof, interest at the rate of eight per centum per annum shall thereafter be charged and collected thereon;

When for unavoidable cause. Unless by reason of claims made upon the estate, necessary litigation, or other unavoidable causes of delay, such taxes can not be determined and paid as hereinbefore provided, in which case interest at the rate of five per centum per annum shall be charged upon such taxes from the expiration of one year after the accrual thereof until the cause of such delay is removed, after which eight per centum shall be charged.

Discount when. If such taxes are paid before the expiration of one year after the accrual thereof, a discount of one per centum per month for each full month that payment has been made prior to the expiration of the year, shall be allowed on the amount of such taxes. [108 v. 1194.][17]

§ 2044. **Time limit for payment of tax.**

The tax must be paid within one year from accrual, that is, the death of decedent. If not paid within that time, interest thereon will be charged at 8% per annum. If in the ordinary and prudent administration of the estate, it can not be definitely known what the tax may be, then it will draw interest at 5% per annum, until the cause of delay is removed, and thereafter it will draw 8%.

As an inducement to pay the tax at the earliest possible moment, the law permits a discount of 1% per month, for each month of the time before the expiration of the year.

The Probate Court has no power to direct that no interest be charged; as the tax would be the same, whether the deceased

[17] See § 223 N. Y. inheritance tax. See Atty. Gen'l's op. 1920, p. 592, held that payment on April 30, 1920, is full four months prior to one year of accrual of taxs on Aug. 31, 1919, and 4% deducted.

died testate or intestate, it has been held that the mere contest of a will is not such unavoidable delay as will justify a reduction of interest.[18] The burden of proving unavoidable delay is upon the estate.[19]

Litigation to determine doubtful and perplexing questions as to the liability of transferees for inheritance tax and delays occasioned thereby constitute necessary litigation or other unavoidable delay.[20] A misnomer of a trustee named in the will, not discovered for some time, may constitute "unavoidable delay."[21]

Relief will not be granted merely because the executors were ignorant of the law, or that it will be a hardship to the legatee.[22] The order made on an application to remit interest is not subject to appeal.[23]

§ 2045. Form—Petition to remit interest.

[*Title.*]

To the Probate Court of the County of .....:

The petition of ..... respectfully shows:

That your petitioner is the ..... of the above named decedent, who died a resident of the county of ....., State of ....., on the ..... day of ....., 19...

That proceedings have been had before ..... herein for the determination of the tax upon the succession of the property of said decedent, which tax has been fixed and assessed, by order entered herein on the ..... day of ....., 19..., at the sum of $....., as by reference to the order aforesaid, will more fully appear.

That the succession tax assessed herein has not been paid, although more than one year has elapsed since the accrual thereof, and by reason of such nonpayment, interest thereon at the rate of eight per centum per annum has been incurred as provided by statute.

That by reason of ..... [here state the facts, showing the statutory reasons entitling the persons liable to pay the tax to have the interest thereon remitted to five per cent.] your petitioner believes that the interest upon said tax should be remitted from eight per cent. to five per cent. as provided by statute.

That your petitioner is desirous of paying the tax as fixed by said order herein, as soon as his claim for the remission of interest, based upon the foregoing reasons, can be passed upon by the court.

Wherefore your petitioner prays that an order be made and entered herein remitting the interest upon the tax assessed to five per cent., to be charged upon said tax from the accrual thereof until the cause of such delay was removed, after which eight per cent. is to be charged, and that your petitioner may have such other and further relief as to the court may seem just.

Dated ....., 19...

.....
Petitioner.

[Add verification.]

[18] Shelton vs. Campbell, 109 Tenn. 690.

[19] People vs. Prout, 6 N. Y. Supp. 457.

[20] Steele vs. Pabst, 139 Wis. 561; Matter of Morse, 35 N. Y. Supp. 782.

[21] *In re* Banks, 5 Pa. County Ct. 614.

[22] Matter of Platt, 29 N. Y. Supp. 396.

[23] Matter of DeGraff, 153 N. Y. Supp. 591.

§ 2046. Notice of motion on application to remit interest.

[*Title.*]

Please take notice that on all the papers and proceedings herein, and the verified petition of ....., hereto annexed and bearing date the ..... day of ....., 19..., application will be made to the Probate Judge of the county of ..... at Probate Court to be held at ..... on the ..... day of ....., 19..., at ..... o'clock, for an order remitting the interest upon the tax heretofore assessed upon the estate of the above named decedent, by order of said Probate Judge made and entered the ..... day of ....., 19..., from eight per cent. to five per cent. per annum, to be computed from the accrual of said tax until the circumstances preventing the earlier payment of said tax were removed, and for such other and further relief as to the court may seem just.

Dated the ..... day of ....., 19...

.....
Attorney for Petitioner.

To Hon. ....., Tax Commission.

§ 2047. Order remitting interest from eight to five per cent.

[*Title.*]

On reading and filing the verified petition of ....., wherein it appears that payment of the succession tax upon the estate of the above named decedent, as determined, has been unavoidably delayed, by reason of .....

And due notice of this application and motion having been given to tax commission:

Now, on motion of ....., Esq., attorney for the petitioner herein, ... appearing [in opposition thereto or consenting thereto], it is

ORDERED, That interest at the rate of eight per cent. upon the tax heretofore assessed herein, be remitted to five per cent. per annum, to be computed from the accrual thereof until the ..... day of ....., 19..., after which date interest at the rate of eight per cent. is to be charged until said tax is paid, as provided by the statute.

.....
Probate Court.

§ 2048. When legatee entitled to refunder. § 5339. If any debts shall be proven against the general estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the probate court having jurisdiction, on notice of the tax commission of Ohio, to refund the amount of such debts, or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid to the county treasurer; or if such tax has been paid to the county treasurer, he shall, on the warrant of the county auditor, refund out of the funds in his hands or custody to the credit of inheritance taxes, such equitable proportion of the tax, without interest, and be credited therewith in his accounts.

Application to refund. If after the payment of any tax, in pursuance of an order fixing such tax, made by the probate court having jurisdiction, such order be modified or reversed on due

notice to the tax commission of Ohio, the said commission shall, unless further proceedings on appeal or in error are pending or contemplated by order direct the county auditor to refund such amount in the same manner; but no such application for such refunder shall be made after one year from such reversal or modification, by the highest court to which error may be prosecuted. The fees theretofore allowed upon such over-payment shall be adjusted in accordance with such refunder.

Court may add then. Where it shall be shown to the satisfaction of the probate court that deductions for debts were erroneously allowed, such probate court may enter an order assessing the taxes upon the amount wrongfully or erroneously deducted. [108 v. 567.][24]

§ 2049. Refunder of tax, etc.

While the law is very careful to provide that the succession of all property should bear, and a tax thereon be paid, yet it also provides where the same has been paid, when in justice it ought not, for its refunder. That is the purpose of the preceding section. The order to make such refunder rests in the sound discretion of the Probate Court having jurisdiction. The forms used to remit interest under the preceding sections, might be changed to be used when a refunder is asked. The order made by the court in such cases is probably not appealable. This is true where the former order was a final order. However, it would seem if the former order was of a temporary nature as provided in sections Nos. 5342, G. C. (§ 2066), 5343, G. C. (§ 2077) and 5344, G. C. (§ 2073), it would be appealable.

§ 2050. Powers and duties of probate court. § 5340. The probate court of any county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent, on the succession to whose property a tax is levied by this subdivision of this chapter, or to appoint a trustee of such estate, or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine the questions arising under the provisions of this subdivision of this chapter, and to do any act in relation thereto authorized by law to be done by a probate court in other matters or proceedings coming within its jurisdiction;

Jurisdiction. And if two or more probate courts shall be entitled to exercise such jurisdiction, the court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other probate court. Such jurisdiction shall exist not only with respect to successions in which the jurisdiction of

[24] See § 225 N. Y. inheritance tax.

such court would otherwise be invoked, but shall extend to all cases covered by this act, to the end that succession inter vivos, taxable under the provisions of this subdivision of this chapter, may be reached thereby. [108 v. 567.][25]

§ 2051. Jurisdiction of probate court.

The previous section makes the Probate Court the forum in which all matters pertaining to the inheritance tax are to be determined, and which particular court is to exercise jurisdiction is to be determined in the same manner as in the settlement of estates of deceased persons. This matter has been discussed in previous sections of this work.[26]

This matter may come before the court in the due administration of an estate, in which its jurisdiction has already been invoked by the appointment of an executor or administrator, and then it may be brought there when there has been no such appointment by an interested party, or the tax commission.

If the matters appearing in the due administration of an estate are such that the court knows that there is an inheritance tax to be paid, the court ought not to permit any estate to be settled without proceedings to fix such tax and have its payment made.

Some States have put all matters relating to an inheritance tax in the jurisdiction of a tax commission, but the method provided by our State is preferable. It properly belongs to the jurisdiction of the Probate Court. It will usually be brought to the court's attention by an application of the executor or administrator to fix the tax; or it may be brought by an heir or beneficiary, where the same is a charge on the transferment of property he is to receive, and then it may be, by the tax commission as representing the public. It seems from the wording of subsequent sections that if the application be made by the executor or administrator, the court may either proceed and fix the tax without further appraisement, or have the auditor to appraise the property. If the application be made by an interested party or the tax commission, it must direct the auditor to fix the value. But even in such cases if the prop-

[25] See § 228 N. Y. inheritance tax.

[26] Chapter 2, § 19-33. The Probate Court of the county in which the general office of a company in this state is located, or of any county in which the company has property in this state, has jurisdiction to determine the tax. Atty. Genl's. opinion Sept. 7, 1920, 65 Bull. 414.

Some Probate Courts now require that in all cases, before a final account is accepted that the question of inheritance tax be determined although it is evident there will be none, and county auditors will not transfer real estate of a decedent unless this is done.

erty passing is in money form, or if the court can fix a proper and satisfactory value, it is questionable whether a formal appraisement by the auditor is required.

By reason of the fact that a discount is allowed if paid before one year from decedent's death, and a penalty added thereafter, the tax should be fixed and paid at the earliest time possible.

§ 2052. Essentials of application.

There will not be much difference in the essentials required whether filed by an executor, an heir, legatee or the tax commission. In all cases it should show sufficient facts to enable the court to grant the relief desired. First it should allege facts sufficient to give the court jurisdiction. This would involve a showing that the party filing the application had capacity so to do, and the deceased either died a resident of the county in which the application is made, or had some property in such county. It should give, if an administrator or executor has been appointed, the name of the court, date of appointment; if a will has been probated, the name, date and court probating it. If this appears to have been done in another court a copy of the will should be attached.

Next in importance is to give the names, ages, relationship and address of all the persons who will receive any part of the estate.

Then a schedule or description of all the property the decedent owned. If any property is specifically devised this should be stated. If it is desired to have an appraisal by the auditor it might not be essential to put a value on it, but this might even in such cases be done, and always if the court is to fix the value. Such description of the real estate should be given, that will show the township or municipality of its location. If there are any mortgages or charges on the property, especially if specifically devised, these should be given. Then a statement of all the personal property should be given. If there has been an inventory filed, it may be taken from that. If a widow's allowance has been made this should be stated. If there is any property in a foreign jurisdiction, the fact should be stated. All the debts should be given. This would include costs of administration and funeral expenses. The name and amount of all specific bequests should be given.

[1] See § 2064. Fixing value of real estate.

See § 2065. Fixing value of personal property.

See § 2067. Fixing value of limited estate.

See § 2079. Notice fixing tax.

§ 2053. Filing and notice.

The above application is not an application to appraise the property, but to fix the tax, etc., and therefore the services of the auditor are not required, and it seems that the court may proceed to fix the value of the property and the various taxes without further notice. The notice that in such cases is required is the one that is to be given *after* the tax has been fixed, etc. However, if the questions involved are intricate or doubtful, notice should be given to the persons interested and the tax commission, and this notice might be given by mail, or the parties could enter their appearance.

There is no statutory requirement that the application be sworn to, but as this will be treated as evidence by the court, it should be. If the court thinks wise or if there be doubtful questions, a day should be set for hearing, and interested parties notified. The facts will be so diverse that it will be impossible to give a form, that will be more than in a general way, applicable.

Just when the application should be filed will depend on the size and the condition of the estate. Where the estate is small, and there may be some question whether there is any inheritance tax, it will no doubt be deferred until near the time when a first account is filed. When large it would best be attended to as soon as the same can be done. Where there is a general appraisement of the estate this may be done soon thereafter. The value to be fixed is the actual value at the time of decedent's death; a discount is allowed if paid before one year, and a penalty added thereafter.

The form of notice, if one is given before the court passes on the value, is the same as that where an auditor makes the appraisal.[1]

§ 2054. Form—Application for determination of inheritance tax.

In the Probate Court of ..... County, Ohio. No. .....

In the matter of the estate of ....., deceased.

The undersigned, as ..... of the estate of ....., deceased, hereby prays the court for an order of determination as to what inheritance tax, if any, is due upon the successions to such estate under the inheritance tax law of Ohio and in support of this application, being duly sworn, deposes and says:

1. That the said decedent died a resident of ..... county on the ..... day of ....., 19..., intestate—leaving a last will and testament, a copy of which is herewith submitted, which was duly admitted to probate

[1] See § 2063.

and record by the Probate Court of ..... county, on the ..... day of ....., 19... and that letters—of administration—testamentary—were duly issued by the said Probate Court on the ..... day of ....., 19..., to this deponent, whose post office address is .....

2. That as such—administrator—executor—deponent is personally familiar with the affairs of said estate, the property constituting the assets thereof and their fair market value, and with the debts, expenses and charges properly and legally allowable as deductions therefrom.

3. That schedule A-1* sets forth each and every parcel of real estate in the state of Ohio of which decedent died seized, or in which ..he had any right, title or interest, and the book and page of the record of the conveyance thereof. It also sets forth the fair value of such real estate together with a statement of the mortgages and other incumbrances thereon at the date of death, giving the amount and date of each incumbrance and the book and page of record thereon.

Schedule A-2 sets forth all of the moneys left by the decedent at the time of h.. death, whether in h.. immediate possession, standing to h.. credit or in which ..he had any right, title or interest, in banks or other institutions, whether individually or in trust for or jointly with any person, giving also separately the accrued interest thereon.

Schedule A-3 sets forth all other personal chattels of whatsoever kind or nature, left by the decedent, together with the fair market value thereon. It also contains a statement of all bonds and mortgages held by decedent and of all claims due and owing decedent at the time of death, and of all promissory notes or other instruments in writing for the payment of money of which ..he died possessed, with interest thereon [except such as are included in the statement of the decedent's interest in a co-partnership or business set forth in Schedule A-5], giving the face values and estimated fair market values thereof. Said schedule also contains a statement of any and all moneys payable to the estate from life insurance policies carried by decedent.

Schedule A-4 sets forth all the corporate stocks, bonds and accrued interest thereon to the date of decedent's death, or other invested securities owned by the decedent at the time of death, with the market value thereof at such time, and in the case of unlisted corporate securities giving the state of incorporation of the company issuing the same, its capitalization, the value and nature of its assets, its liabilities, and any other facts which may be pertinent affecting the value of said securities, also the amount of any dividends declared on such stocks but unpaid at date of death.

Schedule A-5 sets forth the interest of decedent at the time of death in any co-partnership or business, the nature and location of such business and any other facts pertaining thereto as may be pertinent to a fair and just appraisal of decedent's interest therein and the good will thereof.

Schedule A-6 sets forth in itemized form, together with the fair market value thereof, any other property owned or left by decedent at the time of death and not included in the preceding schedules, together with all property wheresoever situated of which decedent made any grant, bargain, sale or gift in contemplation of death or intended to take effect in possession or enjoyment at or after the death of decedent.

4. That schedule B-1 sets forth the funeral expenses together with the expenses of administration and counsel fees paid or estimated.

Schedule B-2 sets forth the valid debts due and owing by decedent at the time of death and allowed as just and fair by this deponent, together with a separate list of such claims as have been contested or rejected [except such as enter into the computation of decedent's interest in any co-partnership or business as set forth in Schedule A-5]. Schedule B-2 also sets forth all items claimed by deponent as proper deductions herein, and not included in the prior schedules.

5. Schedule C* contains a statement of the names of all persons beneficially interested in this estate at the time of decedent's death, the nature of their respective interests, their relationship, if any, to the decedent together with the ages at the time of decedent's death of all

minors, annuitants and beneficiaries for life under decedent's will, if any. It also contains a statement showing which of the beneficiaries named in such will, if any, died prior to decedent, the dates of their death, their survivors, and the relationship of each such survivor to decedent.

6. That deponent has made due and diligent search for property of every kind, nature and description left by the decedent, and has been able to discover only that set forth in Schedule A, and that no information of any other property of the decedent has come to h.. knowledge, and that ..he verily believes that decedent left no property except as therein set forth. That all sums claimed as deductions in Schedule B are lawful, just and fair, that to the best of deponent's knowledge, information and belief the decedent made no gift, grant or conveyance of any property, real or personal, in contemplation of death, or to take effect at or after death, except as is specifically set forth in the appropriate schedule.

Deponent further says that wherever in any of said schedules the word "none" has been written or wherever such schedule has been left blank, such word or omission is to be taken as equivalent to an affirmative allegation by deponent that the decedent left no property of the kind to which the schedule relates.

.....

Sworn to before me and in my presence subscribed this ..... day of ....., 19...

.....

* Schedules A and C must be filed in triplicate, one copy to be attached hereto, the other copies to be given to the auditor along with the order to appraise.

SCHEDULE A

A-1. *Real property.*

Estimated Market Value	Value as Appraised in This Proceeding

SCHEDULE A

A-2. *Cash on hand and on deposit.*

Amount	Value as Appraised in This Proceeding

SCHEDULE A

A-3. *Personal chattels—notes and mortgages, etc.*

Estimated Market Value	Value as Appraised in This Proceeding

SCHEDULE A

A-4. Stocks and bonds.

Estimated Market Value	Value as Appraised in This Proceeding

SCHEDULE A

A-5. Interest of decedent in any co-partnership.

Estimated Market Value	Value as Appraised in This Proceeding

SCHEDULE A

A-6. Property left by decedent not included in the foregoing sub-schedules but including property transferred by the decedent in contemplation of death or to take effect at death.

Estimated Market Value	Value as Appraised in This Proceeding

SCHEDULE B

B-1. Funeral expenses, costs of administration and attorney fees.

Claimed	Allowed

SCHEDULE B

B-2. Debts of decedent. Also deductions claimed and not included in the preceding sub-schedule.

Claimed	Allowed

SCHEDULE C

Beneficiaries, their interests, relationship to deceased, etc.

SCHEDULE "A."

In the Probate Court of ..... County, Ohio.

In the matter of the estate of ....., deceased.

The undersigned being all of the heirs at law of . . . . , deceased, hereby join in the prayer of the petition for determination as to inheritance tax herein.

. . . . . .

. . . . . .

§ 2055. Form—Application to fix inheritance tax (no administration).

In the Probate Court of ..... County, Ohio.

In the matter of the estate of . . . . , deceased.

PETITION.

Now comes ....., of lawful age, and for petition herein avers that ....., late of the ..... of ....., County, Ohio, died intestate on the . . day of . , 19 . . leaving h . . widow . , and the following named persons h . . only heirs at law who are entitled to share in the distribution of h . . estate:

Name	Age	Relationship	Address

The only property of which deceased was the owner, or in which he had any interest at the time of h . . death, is set forth in Schedule "A," hereto attached and made a part hereof.

The following is a description of all the property which the decedent in h . . lifetime conveyed, distributed, sold or gave away in contemplation of death or with intent to have such conveyance, distribution, sale or gift take effect in possession or enjoyment at or after death together with the name and relationship of each person to whom such conveyance, distribution, sale or gift was made, to-wit:

. . . . . .

. . . . . .

No administration is being had on the estate of decedent.

Petitioner therefore prays this court to ascertain and determine what inheritance tax, if any, is due from said estate and for such other order herein as is proper.

. . . . . .

The State of Ohio, ... County, ss.

....., being first duly sworn according to law, deposes and says that the facts stated in the foregoing petition are true.

. . . . . .

Sworn to before me and in my presence subscribed this . . . . day of ....., 19 . . .

. . . . . .

§ 2056. Form—Application to fix inheritance tax—Non-resident.

State of Ohio, Probate Court, ... County.

[Tax Commission will insert court having jurisdiction.]

In the matter of the inheritance tax on the succession to property in the State of Ohio.

Estate of ....., late of ....., deceased.

To the Probate Court of ..... County, Ohio.

The petition of ..... respectfully represents:

That he is ..... of the estate of ..... who died testate [*or*, intestate] on the ..... day of ....., 19..., being at the time a non-resident of the State of Ohio, but a resident of and domiciled at ..... in the state of .....

That at the time of his decease said decedent was possessed of certain property which is under the jurisdiction of the State of Ohio for inheritance tax purposes. That all the shares of stock in incorporations organized or existing under the laws of Ohio and a description of all other property subject to said tax, together with the estimated actual market value of the same at the time of decedent's death, at which value your petitioner consents that the same be appraised, is as follows, to-wit:

No. of Shares of Stock and Amount of Other Property	Name of Corporation and Description of Property	*Location of Principal Office of Corporation or Other Property	†Estimated Value at Date of Death

* NOTE: If property consists of real estate or tangible personal property give name of municipality or township in which it is situated. If property consists of securities or other assets in the possession or in control or custody, in whole or in part, of any corporation, bank, trust company or other institution, person or persons in Ohio, give the location of such corporation, bank, trust company or other institution, person or persons.

† NOTE: In case of mortgaged real estate give value of equity only.

That decedent was possessed of no other property of any kind, real, personal or mixed, or any interest in other property at the time of his death, which was situate in or which may be construed as an interest in such property in the State of Ohio.

That said property passes by will [*or*, under the intestate laws] in the proportions and amounts and to the persons and corporations designated, with the relationship of the persons as follows:

NAME	RESIDENCE	Age	Proportion	Relationship	Amount in Ohio Property

NOTE: Indicate life estates, terms of years, giving age of life beneficiary at the date of decedent's demise.

That the total of decedent's estate is the sum of $.....

That the amount of debts, exclusive of mortgages on real estate, is the sum of $.....

That the decedent during his lifetime transferred the following property within the State of Ohio by deed, grant, sale, assignment or gift made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property, in contemplation of his death or intended to take effect in possession or enjoyment at or after such death .....

That the principal administration of said estate is now pending in the ..... court, of ..... County, State of .....

That no administration has been had in the State of Ohio and that no reason or necessity exists for ancillary or special administration on said estate in Ohio.

WHEREFORE, your petitioner prays that summary proceedings be had in any Probate Court in the State of Ohio solely for the purpose of adjustment, determination and payment of the inheritance tax due the State of Ohio on the successions hereinbefore described.

Your petitioner further, for himself and on behalf of all the legatees and persons interested, hereby expressly waives all notices which otherwise would by law be required to be given and consents that said court may determine the inheritance tax on said successions forthwith on the presentation and filing of this petition, it being understood, however, that there shall be a just and fair appraisal, and that said tax shall be determined at the lowest lawful rate applicable thereto under the laws of the State of Ohio.

Dated ....., 19... ....., Petitioner.
P. O. Address .....

State of ....., County of ....., ss.

..... the above named petitioner, being duly sworn, on oath says that the foregoing petition by him subscribed, is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

.....

Subscribed and sworn to before me this ..... day of ....., 19...

.....
Notary Public, County of ....., State of .....

§ 2057. Form—Application to fix inheritance tax—Small estate.

State of Ohio, Probate Court, Clark County.

Case No. ....., Docket ....., Page .....

In the matter of the inheritance tax on the succession to property.

Estate of ..... late of Clark County, Ohio, deceased.

To the Probate Court of Clark County, Ohio.

Your petitioner respectfully represents:

That he is ..... of the estate of ..... who died ..... on the ..... day of ....., 19..., being at the time a resident of and domiciled at .....

That at the time of his decease said decedent was possessed of certain property which is under the jurisdiction of the State of Ohio for inheritance tax purposes. That a description of all property subject to determination of tax, together with the estimated actual market value, of the same at the time of decedent's death, at which value your petitioner consents that the same be appraised, if necessary, is as follows, to-wit:

Property (a) (b)	DESCRIPTION	Location	Estimated Value

That decedent was possessed of no other property of any kind, real, personal or mixed, or any interest in other property at the time of his death, which was situate in or which may be construed as an interest in such property in the State of Ohio.

That said property passes by will [*or*, under the intestate laws] in the proportions and amounts and to the persons and corporations designated, with the relationship of the persons as follows:

NAME (c)	RESIDENCE	Age	Property	Relationship	Amount in Ohio Property

That the total of decedent's estate is the sum of $.....

That the amount of debts, exclusive of mortgages on real estate, is the sum of $.....

WHEREFORE, your petitioner prays that summary proceedings be had for the purpose of adjustment, determination and payment of the inheritance tax due the State of Ohio on the successions hereinbefore described, or that this estate be certified as exempt if so found and determined.

Dated ....., 19... ....., Petitioner.

.....

State of Ohio, County of Clark, ss.

....., the above named petitioner, being duly sworn, on oath says that the foregoing petition by him subscribed, is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

.....

Subscribed and sworn to before me this ..... day of ....., 19...

.....

(a) NOTE: If property consists of real estate or tangible personal property give name of municipality or township in which it is situated. If property consists of securities or other assets in the possession or in control or custody, in whole or in part, of any corporation, bank, trust company or other institution, person or persons in Ohio, give location of such corporation, bank, trust company or other institution, person or persons.

(b) NOTE: In case of mortgaged real estate give value of equity only.

(c) NOTE: Indicate life estates, terms of years, giving age of life beneficiary at the date of decedent's demise.

§ 2058. Appraisement by county auditor. § 5341. The county auditor shall be the inheritance tax appraiser for his county. The probate court, upon its own motion may, or upon the application of any interested person, including the tax commission of Ohio, shall by order direct the county auditor to fix the actual market value of any property the succession to which is subject to the tax levied by this subdivision of this chapter.

Auditor to give notice. Such auditor shall forthwith give notice by mail to all persons known to him to have a claim or interest in the property to be appraised, including the tax commission of Ohio, and to such persons as the probate court may by order direct, of the time and place when he will appraise such property.

Appraised at market value. He shall at such time and place appraise the same at its actual market value as of the date of the accrual of the tax, except as hereinafter provided, and subject to the rules hereinafter prescibed.

May subpoena witnesses. Such county auditor for such purpose is hereby authorized to issue subpoenas and to compel the attendance of witnesses and the production of books and papers before him, and to examine such witnesses under oath concerning such property, the value thereof, and the nature and circumstances of the succession. Disobedience of such subpoena, or refusal to testify on such examination shall be punished as a contempt of the probate court.

Report of findings. The county auditor shall report his findings in writing, together with the depositions of the witnesses examined, and such other facts in relation thereto as the probate court may order. Such report shall be made in duplicate; one copy thereof shall be filed with the probate court, and the other with the tax commission of Ohio.

Fees of sheriff, etc. The fees of the sheriff or other officer, serving such subpoenas, and the actual and necessary traveling and other expenses incurred by the county auditor in making the appraisement shall be certified by the county auditor on such report. If the probate judge finds such fees and expenses to be correct, he shall allow such fees, and so much of such expenses as he may find to have been reasonable, having regard to the amount of the state's share of the taxes, and certify the amount so allowed for each on the order fixing the taxes.

Entire estate to be appraised. For the purpose of this and succeeding sections of this subdivision of this chapter relating to the assessment of the tax, the entire estate of a decedent, though passing to several persons, institutions or corporations, shall be the subject of inquiry in a single proceeding. [108 v. 568.][27]

§ 2059. Appraisal of property by auditor.

The court may of its own motion, direct the auditor in any case to make an appraisal. But in most cases the court will be able to fix the value just as well as the auditor, and unless especially asked for, the court might well proceed and fix the value and not refer the same to the auditor. Whether the court

[27] § 230 N. Y. inheritance tax.

could refuse to so refer, if requested, is doubtful. In New York the court appoints an appraiser; our statute practically permits the same thing, merely designating who should be the appraiser. The New York statute now designates the county treasurer to act where there is no salaried appraiser. When the matter is so referred to the auditor the court makes an order to that effect.

§ 2060. Form—Journal entry directing auditor to make appraisal.

In the Probate Court of ..... County, Ohio.

In the matter of the settlement of the estate of ....., deceased.

DETERMINATION OF INHERITANCE TAX.

This ..... day of ....., 19..., the matter of the determination of what inheritance tax, if any, is due in connection with the settlement of the estate of ....., deceased, came on to be heard.

And thereupon the court [on its own motion] [on the motion of .....] directed the auditor of ..... county to proceed according to law to fix the actual market value of each share of said estate the succession to which is subject to inheritance tax under the laws of Ohio.

It is further ordered that a writ of appraisal be issued forthwith to said auditor. Such writ shall contain a list of names of the persons entitled to succession to said estate or any part thereof, and a brief description of the property to which each is entitled to succeed.

Of his proceedings under such writ the said auditor is directed to make due return to this court without unnecessary delay.

§ 2061. Form—Writ to auditor to appraise.

In the Probate Court of ..... County, Ohio. No. .....

In the matter of the estate of ....., deceased.

ORDER TO APPRAISE.

To the Honorable ....., County Auditor and Inheritance Tax Appraiser for ..... County, Ohio:

Pursuant to an order of the Probate Court of ..... county, made and entered on the ..... day of ....., 19..., and under the provisions of Section 5341 *et seq.* of the General Code you are hereby directed to fix the actual market value, as of the date of death, of the property of the above named ....., who died on the ..... day of ....., 19..., and whose place of residence was ..... in ..... county. Duplicate itemized statements of the property to be appraised, marked Schedule A,* and a list of the names and addresses of all persons known to the court to have a claim or interest in such property, marked Schedule C, are herewith handed you for your use in making your report hereon.

Notice of the time and place of your appraisal must be given as prescribed by law to the tax commission of Ohio and to the persons named in Schedule C* and also to the following:

.....

.....

When completed you will report your findings in writing together with the depositions of the witnesses examined and a statement of the fees of

the officer who may serve any subpoenas issued by you and of your own necessary traveling and other expenses. Such report shall be in duplicate; one copy thereof shall be filed with this court, and the other with the tax commission of Ohio.

Witness my hand and the seal of said Probate Court at ....., Ohio, this ..... day of ....., 19...

....., Probate Judge.

[SEAL]

* Two copies of Schedule A and a copy of Schedule C, as contained in the application should be given to the auditor along with this order.

§ 2062. Duties of auditor.

The auditor should proceed to obey the orders of the court. He has power to subpoena witnesses, and compel them to disclose what they know concerning the property and its value. Disobedience is a contempt of the Probate Court.

When the auditor has fulfilled the commands of the court, he must make his report in duplicate; one copy he gives to the Probate Court, the other to the tax commission. Ordinarily this report will be a mere finding of facts, but the court may order the testimony of witnesses to be taken in writing and filed with the report. The report should show the costs and expenses of making the appraisement. This report must show that it includes all the property of the decedent and value at the time of his death. It must also show the township or municipality in which the tax originates.

Under the former New York statute the appraiser found not only the value of the property, but the assessments as well. The present New York statute is similar to ours.[28]

In that State it is held that his powers and duties are of a quasi judicial character, and call for the exercise of sound judgment, discretion and knowledge of legal principles.[29] That his functions are somewhat similar to those of a jury called by the court in an equity case to aid its conscience. The whole matter rests with the surrogate and continues with him until final determination after appeal.[30] His duties do not include the writing of legal opinions.[31] He can not determine questions of residence.[32] He can administer oaths and subpoena witnesses, but he can not issue a commission to take testimony

[28] § 230 N. Y. tax law.

[29] People vs. Glynn, 106 N. Y. Supp. 956.

[30] Matter of Thompson, 68 N. Y. Supp. 963.

[31] Matter of Von Bermuth, 171 N. Y. Supp. 704.

[32] Matter of Giant, 144 N. Y. Supp. 567.

in a foreign jurisdiction.[33] In such cases an expert's opinion would probably be the best evidence. The good will of a going concern is an asset but very difficult of ascertaining its value.[34] Unless of definite and satisfactory value, and probable large amount, it will generally not be taken into consideration. The value of partnership interests will generally be fixed in the same method that individual property is. The value of all property is to be fixed as of the date of death of decedent. Where life insurance is payable to the estate it is subject to tax; where not so payable, it is not.[35] It is said it is the only form in which property can pass from one who seeks to make provision for the object of his bounty at his death, without inheritance taxes at his death.[36]

§ 2063. Notice of hearing before auditor.

[*Title.*

To ....., you will please take notice that pursuant to an order from ..... Probate Judge of ..... County, Ohio, made and entered on the .....day of ....., 19... I will on the ..... day of ....., 19..., at ..... o'clock at the auditor's office in said county, proceed to appraise the property of ....., deceased, at its fair market value at the time of decedent's death, for the purpose of fixing the inheritance tax that may be due and payable thereon. Such of you as are minors or unsound mind or other disability will make the same known, that the court may act as provided in sections 11249 to 11253 of the General Code.

....., Auditor.

WAIVER.

We the undersigned, beneficiaries of the estate of ....., do hereby acknowledge service of the above notice.

.....
.....
.....
.....

RETURN.

State of Ohio, ... County, ss.

I ....., the auditor of Clark County, Ohio, being first duly sworn say that on the ..... day of ....., 19... I mailed a copy of the above notice to ....., addressed .....; to ....., addressed .....; to ....., addressed .....

....., Auditor.

Sworn to and subscribed before me and in my presence this ..... day of ....., 19...

.....
.....

[33] Matter of Grant, 151 N. Y. Supp. 1119. See Gleason and Otis, Inheritance taxation, 2nd ed. 449.

[34] See illustrations in Gleason and Otis, Inheritance tax, 2nd ed. 358-374.

[35] Gleason and Otis, Inheritance tax, 2nd ed. 162-165-173.

[36] Under the U. S. inheritance tax all above $40,000 is subject to tax.

§ 2064. Fixing value of real estate.

The assessed value of property for taxation, while not controlling,[37] is a matter for consideration in fixing the value of real estate. If it is not clearly wrong the auditor or the court as the case might be, would be justified in following it.

But it is said the best evidence is the price obtained for *bona fide* sales of property in the vicinity within a short time prior to decedent's death.[38] The price realized at a forced sale is no fair test of the market value.[39] Yet is is a matter to be considered where property is put up for public sale, freely advertised and sold for the highest bid among several bidders, this could be deemed to its value. The rental value is an important element to consider in fixing real estate values. While it is held that undivided interest is the full portion of the whole,[40] yet it is fair to assume that some deduction should be made because it is undivided. It is held in New York that where real estate is specifically devised, subject to mortgage indebtedness, such indebtedness should be deducted.[41] Real estate should never be appraised at a fancy or speculative price. The value of all property is its *actual value* at time of decedent's death. Estate of dower and tenancy by courtesy are not subject to taxation.[42]

§ 2065. Appraisal of personal property.

Perhaps the best rule to be applied in fixing the value of ordinary personal property is that which it will bring at public sale. When it is in the form of notes and accounts, that which can be collected thereon, less cost of sale and collection.

In the matter of stocks actually dealt with on the market, the average price a reasonable period before and after death of the decedent is the best measure of value.[43] When the stocks are not actually on the market, more difficulty is experienced. In such cases its intrinsic value must be ascertained by a determination of the value of the corporation that has issued it.[44]

[37] McGee vs. State, 105 Iowa 9; Wainer vs. Corbin, 91 Conn. 532.

[38] Matter of Arnold, 99 N. Y. (Supp.) 740. In this case it was held it was error for the appraising officer to fix a higher price.

[39] Matter of Patmo, 169 N. Y. Supp. 765.

[40] Wingert vs. State, 129 Md. 28.

[41] Matter of Murphy, 50 N. Y. Supp. 1110; Matter of Sutton, 38 N. Y. Supp. 227.

See note 2029.

[42] Gleason and Otis, Inheritance tax, 2nd ed. 185. From this it would probably follow that a bequest in lieu of dower or curtesy would be exempt to the extent of the value of the dower or curtesy interest.

If wife takes under will waives dower right. Op. Atty. Genl. 1920, p. 834.

See note 63, § 2029 encumbrances.

[43] Gleason and Otis, Inheritance taxation, 2nd ed. 343.

[44] Matter of Jones, 172 N. Y. 575 See illustration from N. Y. cases in

Great difficulty may be experienced in fixing a value to things that have no general market value, such as heirlooms, pictures, etc. Also where some portion is within the State and some without, thus when a non-resident died owning stock worth $50,000 in a consolidated corporation, organized under the laws of Ohio and other States, in such case the attorney general held such stock is subject to tax and should be appraised as such proportion of its market value as is determined by the proportion of the entire property of the company located in Ohio, due allowance being made for the location of particular property in this and other States.[45]

§ 2066. Value of future or limited estate determined. § 5342. The value of a future or limited estate, income, interest or annuity for any life or lives in being, or of any dower interest or other estate or interest upon which any estate or interest the succession to which is taxable under this chapter is limited, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except that the rate of interest shall be five per centum per annum.

Superintendent of insurance shall determine. The superintendent of insurance shall, without a fee, on the application of any probate court or of any county auditor, determine the value of any such estate, income, interest or annuity, upon the facts contained in any such application, and other facts to him submitted by such court or auditor and certify the same in duplicate to such court or auditor, and his certificate thereof shall be conclusive evidence that the method of computation therein is correct.

Whole estate to be valued. In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled, no allowance shall be made on account of any contingent encumbrance thereon, nor on account of any contingency upon the happening of which the estate, or some part thereof, or interest therein, may be abridged, defeated or diminished; but in the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgement, defeat, or diminution of such estate, or interest therein, as aforesaid,

Refunder. A refunder shall be made in the manner provided by section 5339 of the General Code, to the person properly entitled thereto of a proportionate amount of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed

Gleason and Otis, Inheritance tax., 2nd ed. 338-351.

[45] Atty. Genl's. op., Sept. 7, 1920. 65 Bull. 414.

on account of the actual duration or extent of the estate enjoyed. [108 v. 1195.][46]

§ 2067. Fixing value of future or contingent interests.

Section 2066 (§ 5342, G. C.), section 2071 (§ 5343, G. C.), and section 2073 (§ 5344, G. C.), provide for the fixing of future vested or contingent interests.

Two things should be borne in mind: *first,* the value is to be fixed as of the time of decedent's death; *second,* it is payable within a year of decedent's death, no matter when the party entitled gets possession. This no doubt will work a hardship in some instances.[47]

These interests are to be fixed by the rule, method and standard of mortality and value, employed by the superintendent of insurance of Ohio. The table he follows is that of the American experience at the rate of 5%. For all practical purposes there is not much difference between the various tables.

Unless the statute so states—and ours does not—estates of dower and courtesy are not subject to taxation.[46a] If there is a contingent incumbrance no allowance shall be made for this. When the incumbrance becomes a reality, the person paying the tax, may, by making a proper application, have a just proportion refunded. Of course if the incumbrance is such that its value can be determined, it should be deducted.

§ 2068. Application to superintendent of insurance.

["*Title.*] ....., 19...

Dear Sir:—In pursuance of section 5342 General Code, you are hereby requested to determine and ascertain the value of the following estate, annuities and interests:

Name	Age	Legacy or Estate	Value or Amount
.....	.....	.....	$.....
.....	.....	.....	.....

To superintendent of insurance department.

Respectfully,

....., Probate Judge."

[46] See §§ 231 and 230, N. Y. inheritance tax.

[46a] If widow took under will it would not be deducted. Atty. Genl's op. 1920, p. 834. Right to remain in mansion house not to be deducted. Id., § 1044.

[47] See § 2037 G. C., Tax; when to be paid.

(No. 1997.)

R. died testate. By his will he placed all his property in the hands of a trustee with authority to pay the entire income thereon to the son of the testator, or to expend the income for the benefit of such son during his, the son's, natural life. The trustee is clothed also with power to invade the principal in the event that it becomes necessary to do so for the support of the beneficiary. At the son's death his funeral expenses are to be paid out of the fund. The residue is then to be distributed to the heirs at law of the beneficiary, if he should leave any legitimate issue, but if no such issue is left then it is to pass to the next of kin of the testator.

Held:

(1) The beneficial interest of the

§ 2069. Inheritance taxation table.

AMERICAN EXPERIENCE TABLE—DISCOUNTED AT FIVE PER CENT. COMPOUND INTEREST.

Age	Expectation of Life in Years	Present Value of $1 per Annum	Age	Expectation of Life in Years	Present Value of $1 per Annum
0	41.45	$12.813	48	22.35	$12.133
1	47.94	14.922	49	21.63	11.901
2	50.16	15.731	50	20.91	11.662
3	50.91	16.125	51	20.20	11.416
4	51.23	16.346	52	19.49	11.164
5	51.13	16.472	53	18.79	10.905
6	50.83	16.535	54	13.00	10.640
7	50.41	16.561	55	17.40	10.370
8	49.90	16.560	56	16.72	10.095
9	49.33	16.540	57	16.05	9.8145
10	48.72	16.505	58	15.39	9.5299
11	48.09	16.461	59	14.74	9.2413
12	47.45	16.415	60	14.10	8.9493
13	46.80	16.366	61	13.47	8.6545
14	46.16	16.316	62	12.86	8.3574
15	45.51	16.263	63	12.26	8.0588
16	44.85	16.207	64	11.67	7.7590
17	44.19	16.149	65	11.10	7.4588
18	43.53	16.088	66	10.54	7.1592
19	42.87	16.024	67	10.00	6.8607
20	42.20	15.957	68	9.47	6.5642
21	41.53	15.886	69	8.97	6.2705
22	40.85	15.813	70	8.48	5.9801
23	40.17	15.736	71	8.00	5.6942
24	39.49	15.655	72	7.55	5.4129
25	38.81	15.570	73	7.11	5.1359
26	38.12	15.482	74	6.68	4.8628
27	37.43	15.389	75	6.27	4.5926
28	36.73	15.292	76	5.88	4.3248
29	36.03	15.191	77	5.49	4.0586
30	35.33	15.084	78	5.11	3.7939
31	34.63	14.973	79	4.75	3.5311
32	33.92	14.857	80	4.39	3.2702
33	33.21	14.735	81	4.05	3.0135
34	32.50	14.608	82	3.71	2.7606
35	31.78	14.475	83	3.39	2.5105
36	31.07	14.336	84	3.08	2.2607
37	30.35	14.191	85	2.77	2.0098
38	29.63	14.039	86	2.47	1.7606
39	28.90	13.881	87	2.18	1.5175
40	28.18	13.716	88	1.91	1.2861
41	27.45	13.544	89	1.66	1.0670
42	26.72	13.365	90	1.42	0.85453
43	25.99	13.179	91	1.19	0.64497
44	25.27	12.985	92	.98	0.44851
45	24.54	12.783	93	.80	0.28761
46	23.81	12.574	94	.64	0.13605
47	23.08	12.357	95	.50	

son is to be appraised as a life estate.

(2) The charge on account of funeral expenses is to be valued by setting aside a reasonable sum for that purpose at its present worth.

(3) The contingent remainder is to be immediately taxed in the seven per cent. class by virtue of § 5343 of the General Code. Atty. Genl's op. 1920, p. 660.

§ 2070. Computation.

Almost all the inheritance laws of the various States permit the matter of the computation of inheritance tax to be referred to a State official who is an expert along that line, and no doubt, practically in all cases where the matter is any way complicated, such reference will be made. But there will be a good many instances in ordinary practice where the matter is merely a life estate, or dower, or annunity, etc., and a reference to the state official will hardly be deemed necessary.

The Ohio State superintendent uses the American Experience Table. As this table is not given in the tables elsewhere given in this volume, we have deemed it wise to insert it here. The same method can be used as that described in Sec. 2136 *et sequor* at the end of the work.[48]

§ 2071. Taxation of estates dependent on contingencies. § 5343. When, upon any succession, the rights, interests, or estates of the successors are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged,

Tax at highest rate. A tax shall be imposed upon such successions at the highest rate which, on the happening of any such contingencies or conditions, would be possible under the provisions of this subdivision of this chapter,

Due at once. And such taxes shall be due and payable forthwith out of the property passing, and the probate court shall enter a temporary order determining the amount of such taxes in accordance with this section;

Refunder. But on the happening of any contingency whereby the said property, or any part thereof, passes so that such ultimate succession would be exempt from taxation under the provisions of this subdivision of this chapter, or taxable at a rate less than that so imposed and paid, the successor shall be entitled to a refunder of the difference between the amount so paid and the amount payable on the ultimate succession under the provisions of this chapter, without interest;

Executor to apply for. And the executor or trustee shall immediately upon the happening of such contingencies or conditions apply to the probate court of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested parties, for an order modifying the temporary order of said probate court so as to provide for a final assessment and determination of the taxes in accordance with such ultimate succession. Such refunder shall be made in the manner provided by section 5339 of the General Code. [108 v. 569.][49]

[48] See Gleason and Otis on Inheritance tax, 2nd ed., 298, etc.

When there is a devise to A. for life and at his death to the heirs of his body, the contingent remainder should be valued on the hypothesis that it will become vested in a single heir. Atty. Genl's op. 1920, p. 970.

Assessment of inheritance tax upon a devise of a life estate to a widow with power to consume the principal, remainder to children, requires the valuation of the life

§ 2072. When contingencies exist, tax to be at higher rate.

The provisions of the previous section may seem to work an injustice, in the collection of moneys that may never become due or payable, and was not found in the earlier statutory provisions of States, relating to the inheritance tax. But the State has assumed that the person receiving the property, should run the risk of the contingencies, and allow to such person the right to come into court, when the contingency has occurred, and have a refunder of the amount he has paid. Similar provisions have been declared constitutional.[50]

In a very interesting case—Matter of Parker, 226 N. Y. 261—this question is considered, and the court holds the statute should be followed to the letter.[51]

When the contingency happens the executor or trustee shall immediately apply to the Probate Court, by a verified petition setting up all the facts, and give notice by mail to all interested parties, to have a final assessment made.

If there were no executor or trustee I have no doubt a party in interest could make the application. It would seem that the order could be appealed from as a final order.

§ 2073. Estates held in abeyance or expectancy. § 5344. Estates in expectancy which are contingent or defeasible, and in which proceedings for the determination of the taxes have not been taken, or have been held in abeyance, shall be appraised at their full undiminished value, when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for the purpose of this subdivision of this chapter, upon which such estates in expectancy may have been limited.

Estate for life. An estate for life or for years which can be divested by the act or omission of the legatee, or devisee, shall be appraised and taxed as if there were no possibility of any such divesting. [108 v. 570.][52]

§ 2074. When tax not paid on estate held in abeyance.

If for any reason proceedings have not been taken—an estate in expectancy, etc.—such estate shall be appraised at its full

estate in the ordinary way without any additionals on account of her power to invade the principal, and the valuation of the remainders as ordinary vested remainder ignoring the power of consumption of the principal by the widow. If any encroachment on the principal is effected the remaindermen will be entitled to a refunder on final assessments and adjustments. Op. Atty. Genl. 1920, 65 Bull. 431.

[49] See § 230, N. Y. inheritance tax.

[50] Matter of Brez., 172 N. Y. 609; Matter of Vanderbilt, 172 N. Y. 69; People vs. Loueston, 284 Ill. 119.

[51] See Gleason and Otis, Inheritance tax, 2nd ed. 271, where the decision is quoted and matter fully described.

[52] See § 230, N. Y. inheritance tax.

value at the time the person entitled thereto is entitled to come into possession, without any diminution from the preceding estate. This does not apply, however, to estates in remainder, that vested prior to the passage of the law. The time always dates from the decedent's death. This is held to be true even though the remainder be defeasable.[53] This would seem to allow for increased or diminished valuation between the death of the decedent and the time the person is entitled to possession.

§ 2075. Form—Report of auditor.

In the Probate Court of ..... County, Ohio. No. .....

In the matter of the estate of ....., deceased.

DUPLICATE REPORT OF THE INHERITANCE TAX APPRAISER.

To Honorable ....., Probate Judge ..... County, Ohio, and to the Honorable Tax Commission of Ohio:

Said ..... having died on the ..... day of ....., 19..., I, the undersigned county auditor and inheritance tax appraiser, who was by an order of the Probate Court of ..... County, duly made and entered on the ..... day of ....., 19..., directed to fix the actual market value of all the property of said decedent the succession to which is subject to tax levied under the provisions of the Inheritance Tax Law of Ohio, do respectfully report:

First. That I received such order on the ..... day of ....., 19..., and on the ..... day of ....., 19..., I gave notice by mail, postage prepaid, to all persons, known to me to have a claim or interest in the property to be appraised, including the tax commission of Ohio, and to such other persons as said Probate Court did by its order direct, of the time and place at which I would appraise said property, a true copy of which notice is hereto attached.

That the names of those to whom I mailed such notice, properly addressed, are as follows:

The Tax Commission of Ohio, Columbus, Ohio:

.....

.....

.....

.....

Second. At the time and place in said notice stated, namely, on the ..... day of ....., 19... [and at other and subsequent times and divers places to which these proceedings were regularly adjourned], I appraised at its actual market value as of the date of death all the property, real and personal, of which the said decedent died seized, or which was in any way subject to the payment of said inheritance tax, and which was itemized in the statement, marked Schedule A, which accompanied the order to appraise. The value of each item has been inserted by me opposite the same where it appears on such schedule which is herewith returned as part of this report.

[53] Gleason and Otis, Inheritance tax, 2nd ed. 266.

RECAPITULATION.

Third. Total value of decedent's personal estate was $..... Total value of decedent's real estate was $..... Total $.....

Fourth. I further report that the following interested persons appeared before me in this proceeding:

.....

.....

Fifth. I do further report that in this proceeding on my own motion I issued subpoenas to the sheriff of said county for the following named persons as witnesses herein:

.....

.....

That at the request of ..... I issued subpoenas for the following named persons:

.....

.....

That the original subpoena so issued with the returns of said sheriff thereon showing his fees for service are hereto attached and filed herewith, that I incurred actual and necessary traveling and other expenses as follows:

Witness and mileage paid by me.....	$.....
Traveling expenses	.....
Other expenses	.....
Sheriff's fees as follows.....	.....

Sixth. I further report that attached hereto are all the depositions taken by me in this proceeding, to-wit:

Deposition of ....., marked Exhibit .....
Deposition of ....., marked Exhibit .....
Deposition of ....., marked Exhibit .....
Deposition of ....., marked Exhibit .....

Seventh. I do further report:

.....

.....

All of which is respectfully submitted at ..... this ..... day of ....., 19...

.....
County Auditor and Inheritance Tax Appraiser.

§ 2076. Probate court shall find actual value. § 5345. From the report of appraisal and other evidence relating to any such estate before the probate court, such court shall forthwith upon the filing of such report, by order entered upon the journal thereof, find and determine, as of course, the actual market value of all estates, the amount of taxes to which the succession or successions thereto are liable, the successors and legal representatives liable therefor; and the townships or municipal corporations in which the same originated.

May find where no application. Provided, however, that in case no application for appraisement is made the probate court may make and enter such findings and determinations without such appraisement.

Notice to be given. Thereupon the judge of such court shall immediately give notice of such order to all persons known to be interested therein, and shall immediately forward a copy thereof to the tax commission of Ohio, together with copies of all orders entered by him in relation to or affecting in any way the taxes on such estate, including orders of exemption.

When it appears, a minor, etc., is interested. If it shall appear at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or of unsound mind, the probate court may if the interest of such person is presently involved and is adverse to that of any of the other persons interested therein, exercise the powers provided for in sections 11249 and 11253, inclusive, of the General Code. [108 v. 570.][54]

§ 2077. Proceedings of court on filing report of auditor, etc.

On filing of the report of the auditor when appraisal is had, or on the petition of an interested person where no appraisal by the auditor is asked for, the court makes a finding of the value of the property and the amount of the tax that is due thereon, and the portion that is chargeable to the succession of the various portions of property, and that is charged to the parties interested. Where an appraisal by the auditor is had, the court accepts the value as found by the auditor. When there is no appraisal by the auditor, the court finds the value from such evidence as it may have before it, and the finding will be very much similar to that heretofore given.[55]

When this is done, notice must be given to all persons known to be interested therein, and a copy of this finding must be immediately sent to the tax commission. If it appears that a person under disability has an interest, then a guardian *ad litem*, should be appointed, and such guardian should file a general denial, etc.[56]

This matter of notice is a very important thing. It has been held that a statute that did not provide for notice was uncon-

[54] See § 231, N. Y. inheritance tax; § 11249 G. C., provides how the defense of an insane person shall be made and § 11253 G. C., how an infant.

[55] § 2053.

[56] See § 1384, § 845, § 1584, § 845, § 1417.

stitutional.[57] Likewise that if notice is not given the proceedings are invalid.[58] That no previous notice has been given, provided the one here provided for is given, will not invalidate the proceedings.

Parties upon whom notice has once been served, will be held to have notice of all subsequent proceedings.[59] In the absence of proof to the contrary, it will be presumed that the proper notice has been given.[60] And if in fact no notice has been given the matter may be opened up.[61] If it is impossible to give notice then it can be excused.[62]

If the proceedings showed that a certain person was interested, and no notice was given, I would be inclined to believe that on motion of an interested party the entire proceedings would be set aside. The court however might require before so doing, that the interested party first show that he is injuriously affected by the order made. If it does not appear that the court *knew* that the party had an interest, the proceedings will certainly not be set aside, unless a showing be made that the party is injuriously affected by the order. The court however should exercise great vigilance in finding out all parties that have an interest and then seeing that they have notice.

§ 2078. Journal entry—Determining tax after auditor's appraisal.

In the Probate Court of ..... County, Ohio.

In the matter of the settlement of the estate of ....., deceased.

DETERMINATION OF INHERITANCE TAX.

This ..... day of ....., 19..., the return on the writ of appraisal heretofore issued herein having been made by the auditor of ..... county, upon consideration of said return and the other evidence, the court does hereby find and determine that the gross value of said estate is ..... dollars, the debts and costs of administration are ..... dollars, and the net actual market value thereof is ..... dollars, and that the persons entitled to succeed thereto, their ages when material, their relationship, if any, to the decedent, the value of the succession to

[57] Keeney vs. N. Y., 222 U. S. 525; Matter of McPherson, 104 N. Y. 306; Ferry vs. Campbell, 110 Iowa 290.

[58] Union Trust Co. vs. Durfee, 125 Mich. 487; Matter of Wolfe, 137 N. Y. 306; Hostetter vs. State, 26 O. C. C. 702.

[59] Hanberg vs. Morgan, 263 Ill. 616.

[60] Matter of Miller, 110 N. Y. 216.

[61] Matter of Daly, 69 N. Y. Supp. 494. In this case the party was notified of the appraisement, but the court did not notify him of the order made by it fixing the value, etc.

[62] People vs. Kellog, 268 Ill. 489.

which each is entitled, the exemption allowed to each, the balance of each succession subject to tax, the amount of tax to which each succession is liable, the person by whom such tax should be paid, and the township or municipality in which such tax originates are as follows:

Name of Successor	Age	Relationship	Value	Exemptions	Subject to Tax	Amount of Tax	Date of Accrual	By whom should be Paid	Residence of Decedent	Township or Municipality in which Property Located
			$	$						

The court further finds that the fees of the sheriff or other officer, for serving subpoenas, and the actual and necessary traveling and other expenses incurred by the county auditor in making the said appraisal, as certified by such auditor are as follows:

....., sheriff, fees on subpoenas, $.....

....., auditor, actual and necessary traveling and other expenses, $.....

The court further finds that said fees and expenses are correct and should be, and they are hereby, allowed.

It is further ordered that such fees, together with the court cost on this proceeding taxed at $..... be certified to the county auditor at the time and in the manner required by law, to be paid and credited in the manner provided by law.

..It is further ordered that notice of this adjudication and determination be given to all persons known to be interested therein and that a copy of this entry, together with copies of all other entries in relation to or in any way affecting the inheritance taxes on the successions of said estate and the exemptions allowed be forwarded forthwith to the tax commission of Ohio.

The State of Ohio, ... County, ss.

I, ..., judge and ex-officio clerk of the Probate Court of said county, do hereby certify that the foregoing is a true copy of the journal entry containing the finding and order of the court as to the liability to inheritance tax of the estate of ....., deceased, or any of the successions therein, made and entered on the ..... day of ....., 19...

Witness my hand and the seal of said court this ..... day of ....., 19...

....., Judge.

§ 2079. Contents of notice and how served.

The statute does not say what this notice shall contain nor how it should be served. It ought to show sufficient to apprize the interested party of the manner and extent to which the order may affect him. The statute provides that the notice given by the auditor of appraisement may be by mail, and I am inclined to think that would be sufficient in this case. It could be made in any manner the court might direct. If there are a number of persons whose address is unknown, it could

be made by publication. There is a general statute that provides that when any notice is required by law and the manner of giving it is not directed by statute, it may be in such manner as the court may direct.[63]

§ 2080. Form of notice fixing of tax.

NOTICE OF ASSESSMENT OF TAX [§ 5345 G. C.].

[*Title.*]

To .....:

You are hereby notified that I have, by order made and entered the ..... day of ....., 19..., assessed and fixed the cash value of such interest, estate, legacy or property, as you are entitled to receive from the estate of the above named decedent, and the amount of tax to which the same is liable under the laws in reference to the taxable transfers of property as follows:

Estate, Interest or Property Transferred	Cash Value	Tax Assessed Thereon
.....	$.....	$.....
.....	.....	.....
.....	.....	.....
.....	.....	.....
.....	.....	.....

You will further take notice that if you wish to file exceptions you must do so within sixty days from the day this order of assessment was made by filing such exceptions in writing in this court.

..... Probate Judge.

§2081. Form order exempting estate from inheritance tax.

[*Title.*]

This day this matter came on to be heard in application of ....., to fix the inheritance tax on the property of .....; deceased, and the same was submitted to the court upon the evidence, and on due consideration thereof, the court finds that the transfer of the property of said decedent is exempt from tax under the law relating to taxable transfers, and there is no tax due thereon.[64]

§ 2082. Who may file exceptions. § 5346. The tax commission of Ohio, or any person dissatisfied with the appraisement and determination of taxes, may file exceptions thereto in writing with the probate court within sixty days from the entry of the order, stating the grounds upon which such exceptions are taken.

Court to fix time of hearing. The probate court shall thereupon by order fix a time not less than ten days thereafter for

[63] § 37, § 11205 G. C. If made by mail it should be by registered letter.

[64] This may be added: "It is further ordered that a copy of this entry, together with a copy of all entries in relation to or in any way affecting the inheritance tax of said estate be certified to the tax commission of Ohio.

the hearing of such exceptions, and shall give such notice thereof as it may deem necessary; provided,

Notice. That a copy of such notice and of such exceptions shall be forthwith mailed to the tax commission and the county auditor.

Finding. Upon the hearing of such exceptions, said court may make such order as to it may seem just and proper in the premises. No costs shall be allowed by the probate court on such exceptions. [108 v. 570.][65]

§ 2083. Filing exceptions, etc.

When the order is made under the above section a dissatisfied person has two remedies. He may have the matter re-heard before the Probate Court or he may appeal to the Court of Common Pleas. As the finding of the Probate Court may have been made without a full understanding of the matter it may be advisable to have the matter re-heard by the Probate Court, and then if relief is not granted, appeal to the Court of Common Pleas. These exceptions may be filed any time within sixty days from the date of the order. If no exceptions are filed within that time, nor appeal made, or proceedings in error commenced, the order is final, and could then only be set aside in the manner that findings of court are generally attacked or set aside. These exceptions must state the grounds upon which they are taken. When they are filed the court must fix a time not less than ten days thereafter, and must mail a copy of such notice and exceptions to the tax commission and the county auditor, and give such other notice as it may deem necessary. This probably would be all persons who might be affected by the matters raised in the exceptions.

It is not clear just what should be included in this hearing on exceptions. If the entire matter may be gone into—and it should be if it is necessary to do justice—the order might be such that the rights of others than the exceptors would be affected. In New York it is done under what is termed an appeal. Although the surrogate has made a finding, there may be an appeal to him from such finding, and then there is an appeal from this second hearing to the higher court.

§ 2084. Form of exceptions.

[*Title.*]

"The undersigned, a party interested in and order made by the Probate Court on the ..... day of ....., 19..., fixing the value and assessing

[65] See § 232, N. Y. inheritance tax.

the inheritance tax in respect to transfers of the property of ....., deceased, hereby excepts to the same upon the following grounds:

First. The value fixed on the real estate located in Bath Township; this value is not its actual cash value, but much more than the same.

Second. That the tax assessed against the undersigned is erroneous in that the same is exempted under the law.

Third. That an error was made in fixing the value of life estate of the undersigned in the above mentioned property.

Fourth. [Here set out any other ground claimed.]

Wherefore, the undersigned asks that the court fix a time when the same may be heard, and such other and further relief as he may under the statute be entitled to.

....."

§ 2085. Journal order for hearing on exceptions.

[*Title.*]

On this day came ..... and filed herein his exceptions to the order of the court made herein on the ..... day of ....., 19..., finding the value of certain property therein designated and fixing the inheritance tax on the transfers made on certain property of decedent. It is therefore ordered that the ..... day of ....., 19..., at 10 o'clock a. m. be fixed as the time for hearing the matters excepted to, and that notice thereof be given to A. B., executor of said estate, and C. D., widow of said decedent, and the tax commission of Ohio, and the auditor of this county, by mailing to each a copy of this notice and a copy of the exceptions filed.

§ 2086. Notice of hearing of exceptions.

[*Title.*]

You are hereby notified that on the ..... day of ....., 19..., A. B. filed in this court certain exceptions, a copy of which is hereto attached, to a finding made by the court, and assessments fixed in the matter of the inheritance tax on transfers of certain property of decedent. The court has fixed the ..... day of ....., 19..., at 10 a. m. for the hearing of the same.

....., Probate Judge.

§ 2087. Form of entry on hearing.

[*Title.*]

This day this matter came on to be heard on the exceptions filed herein by A. B. to the finding of the value and fixing the assessment and inheritance tax on the transfer of certain property of said decedent, and the court finds that the same should be changed and modified as follows: [here state specifically the finding, etc.]

....
....
.....

§ 2088. When certified to auditor. § 5347. At the expiration of such period of sixty days if no exceptions be filed, or at any time within such period, on the application of all parties, including the tax commission of Ohio, the probate judge shall make and certify to the county auditor a copy of the order provided for in section 5345 of the General Code. If such exceptions are filed within such period the probate judge shall, within five days after the entry of the final order, make and certify such copy of the original finding and determination, to-

gether with any modifications thereof ordered upon the hearing of such exceptions.

Duties of auditor. The county auditor shall thereupon, on a form to be prescribed for him by the auditor of state, make a charge based upon such order and certify a duplicate thereof to the county treasurer, who shall collect the taxes so charged. [108 v. 571.][66]

§ 2089. Certifying finding to auditor.

If no exceptions are filed within sixty days, or if exceptions are filed within five days after a finding is made on such exceptions, the probate judge makes and certifies a copy of his original finding, and where this has been modified by any subsequent order, as copy of the same showing modifications, to the auditor, who in turn certifies it to the treasurer for collection.

§ 2090. Motion to modify finding, etc.

If it should appear even after time for appeal on filing exceptions, that there has been a manifest error in the finding, it seems that on the discovery of such error the court should have power to correct the former finding to conform to the truth and justice.

In New York the surrogate on motion has generally made such correction. The corrections allowed, however, have been those that related to fact, and not questions of law. Thus when there was a mistake in a statement that stock worth $14,193 was appraised at $47,310.[67]

So where a debt was overlooked,[68] where notes were thought to be good but proved worthless.[69] So where the mistake was obvious,[70] as that of a mathematical calculation.[71] This has been done where there was a failure of jurisdiction such as the giving of an improper notice[72] or payment under an unconstitutional tax,[73] even after the time for appeal had expired.[74] However

[66] See § 231, N. Y. inheritance tax.

[67] Matter of Boyle, 156 N. Y. Supp. 173.

[68] Matter of Campbell, 50 miscel. N. Y. 485.

[69] Matter of Sherar, 54 N. Y. Supp. 930.

[70] Matter of Cameron, 89 N. Y. Supp. 977.

[71] Matter of Scott, 208 N. Y. 602.

[72] Matter of Bachouse, 96 N. Y. Supp. 466.

[73] Morton vs. Selby Co., 118 U. S. 425.

[74] Matter of Silliman, 80 N. Y. Supp. 336.

mere overvaluation will not be considered on such motion,[75] or, that since, they have sold for a larger sum,[76] or, if the person making the motion is guilty of [77] or if there is bad faith.[78]

In Ohio this finding of the Probate Court however would probably be treated like any other final order by it made and would be subject to correction in a like manner.[79]

§ 2091. Appeal from final order. § 5348. An appeal may be taken by any party, including the tax commission of Ohio, from the final order of the probate court under section 5346 of the General Code in the manner provided by law for appeals from orders of the probate court in other cases. An appeal by the tax commission of Ohio may be perfected in the manner provided by section 11209 of the General Code. [108 v. 571.]

§ 2092. Appeal; how perfected, etc.

The method of appeal is the same as applies generally from orders of the Probate Court, and as this has been discussed in other places in this work, it will not be further considered here.[80] But it is not clear what is the final order from which an appeal may be prosecuted. The preceding section provides that the final order made under § 5346, G. C. (§ 2082), is the one that may be appealed from, and if this be literally followed, there is no appeal from an order made on the finding made on exceptions that may be filed, although the order made in such cases is referred to as a final order.

And it may be necessary for one who is dissatisfied with the original finding to determine within the twenty-day limit relating to appeals, whether he will appeal or raise his questions by way of exceptions, and then if he wishes to go further, to prosecute error. If he wishes to pursue the latter course, it is important that he state all the grounds in his exceptions, upon which he may desire the opinion of the higher court, should he not be satisfied with the decision of the Probate Court on his exceptions.

[75] Matter of Johnson, 75 N. Y. Supp. 1046.

[76] Matter of Bruce, 59 N. Y. Supp. 1083.

[77] Matter of Townsend, 215 N. Y. 442.

[78] Gleason and Otis, Inheritance taxation, 2nd ed. 515.

[79] See § 5339 G. C., § 2048, provides that deductions may be allowed and refunder made in certain cases and where erroneous deductions were made.

[80] See § 39.

It may be that the order made on the exceptions is such that it is considered as a part of the original order, and an appeal might be perfected therefrom. But if it is, I apprehend it would only carry an appeal on the questions and grounds stated in the exceptions, and not all those contained in the original finding. There is no doubt but that proceedings in error may be prosecuted to the original order as well as to the one made on the exceptions.

§ 2093. Who may prosecute appeal.

The statute says any *party*, including the tax commission may appeal. Of course it must be a party having some interest. There has been some question whether the executor had such interest that he could appeal, where his interest was nothing more than to execute the trust. The general opinion, however, seems to be that he has such interest and can appeal.[81] Especially might this be true under the broad language of our statute:

"The true rule, propably is," say Gleason and Otis, "that an executor can appeal only so far as he protects himself from his personal liability; and beyond that, the expense of litigation should be borne by those duly interested."[82]

§ 2094. Tax receipts, etc. § 5348-1. Upon the payment to the county treasurer of any tax due under this subdivision of this chapter, such treasurer shall issue a receipt therefor in triplicate. One copy thereof he shall deliver to the person paying such taxes; and the original and one copy thereof he shall immediately send to the auditor of state who shall certify the original and immediately transmit it to the judge of the court fixing the tax. An executor, administrator or trustee shall not be entitled to credits in his accounts, nor be discharged from liability for such taxes, nor shall the estate under his control be distributed, unless such certified receipt shall have been filed with the court. Any person shall, upon the payment of ten cents to the county treasurer issuing such receipt, be entitled to a duplicate thereof, to be signed and certified in the same manner as the original. [108 v. 571]

§ 2095. Transfer of securities, etc. § 5348-2. No corporation organized or existing under the laws of this state, shall transfer on its books or issue a new certificate for any share or shares of its capital stock belonging to or standing in the name

[81] Matter of Cornell, 73 N. Y. Supp. 167; Matter of Dalsimer, 153 N. Y. Supp. 58.

[82] Gleason and Otis, Inheritance taxation, 2nd ed. 503.

of a decedent or in trust for a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, without the written consent of the tax commission of Ohio.

Delivery of securities, deposits, etc. No safe deposit company, trust company, corporation, bank or other institution, person or persons, having in possession or in control or custody, in whole or in part, securities, deposits, assets or property belonging to or standing in the name of a decedent, or belonging to or standing in the joint names of a decedent and one or more persons, including the shares of the capital stock of, or other interest in, such safe deposit company, trust company, corporation, bank or other institution, shall deliver or transfer the same to any person whatsoever whether in a representative capacity or not, or to the survivor or survivors when held in the joint names of a decedent and one or more persons, without retaining a sufficient portion or amount thereof to pay any taxes or interest which would thereafter be assessed thereon under this subdivision of this chapter,

Notice to tax commission. And unless notice of the time and place of such delivery or transfer be served upon the tax commission of Ohio and the county auditor at least ten days prior to such delivery or transfer;

Consent of tax commission. But the tax commission of Ohio may consent in writing to such delivery or transfer, and such consent shall relieve said safe deposit company, trust company, corporation, bank or other institution, person or persons, from the obligation to give such notice or to retain such portion.

County auditor may examine. The tax commission or the county auditor, personally or by representatives, may examine such securities, deposits or other assets at the time of such delivery or otherwise.

Failure to comply. Failure to comply with the provisions of this section shall render such safe deposit company, trust company, corporation, bank or other institution, person or persons, liable for the amount of the taxes and interest due under this subdivision of this chapter on the succession of such securities, deposits, assets or property. Such liability may be enforced by action brought by the county treasurer in the name of the state in any court of competent jurisdiction. [108 v. 572.] [1]

§ 2096. Notice of transfer to auditor and tax commission.

[Under the provisions of section 5348-2 G. C. as approved June 5, 1919.]

....., Ohio, ..., 19...

To the Tax Commission of Ohio; to the Auditor of ..... County, Ohio.

Notice is hereby given that the undersigned has in possession or in control or custody in whole or in part, securities, deposits, assets or property belonging to or standing in the name of ....., deceased, and the

[1] See Atty. Genl's op. 1920, p. 199 to partnerships and joint interests. and 203 for application of section

same will be transferred at ....., to ....., on the ..... day of ....., 19..., at ..... o'clock ..... m.

Respectfully,

.....

NOTE: This notice is required to be served before a bank, safe deposit company, trust company or other institution may turn over the contents of a safe deposit box to any person whatsoever, whether in a representative capacity or not. Such service must be made at least ten days prior to the date of such delivery or transfer on the auditor and tax commission.

§ 2097. Transfer without knowledge. § 5348-2a. In any action brought under the preceding section it shall be a sufficient defense that the transfer of shares of capital stock, or delivery or transfer of securities, deposits, assets or property, was made in good faith, without knowledge of the death of the decedent and without knowledge of circumstances sufficient to place the defendant on inquiry. [108 v. 1197.]

§ 2098. Transfer of stocks of corporation.

The object and purpose of the above section is to give the taxing authorities knowledge of the holdings of stock that a deceased person may have in corporations, and to prevent the same from being transferred, and defeat the inheritance tax. The State tax commission does not fix the tax, but if the tax is not paid it possesses the power to set the machinery in motion to collect the tax. In a great many States the tax commission or like bodies have the power to fix and collect such taxes. But in this State, the power to fix all inheritance tax is vested in the Probate Court; no such stock can be transferred without the written consent of the tax commission; if it is transferred without such consent, the corporation is liable to pay the tax that may be due thereon.

It applies to a corporation organized or existing under the laws of Ohio. I hardly know what is meant to be included by the word "*existing*," unless it might be to include a corporation that was organized in some other State and had its principal office and place of business in this state, and was in fact a local corporation.

The second matter is that the stock belongs to or is standing in the name of the decedent, or in trust for him or is jointly in his name and some other person. It may be doubted whether a transfer of such stock would be valid, unless the written consent of the tax commission was first obtained, or unless it was done without knowledge of the death of decedent and without

knowledge of circumstances sufficient to put the corporation, bank, etc., on inquiry.

§ 2099. Application to transfer shares of stock.

....., Ohio, ..., 19...

To the Tax Commission of Ohio:

Application is hereby made for the consent of your commission to transfer upon the books of the companies the following shares of stock of corporations organized under the laws of Ohio.

No. of Shares Com.	Pfd.	Name of Company	Par Value	Actual Market Value
*				

from ..... deceased, to ..... Deceased was a resident of the city [township] of ....., county of ....., state of Ohio, and his estate is in process of settlement in the Probate Court of ..... county, Ohio. The Ohio inheritance tax on the succession to the above shares of stock has ..... been paid. The name and address of the executor—administrator—of the estate is .....

.....

.....

The State of Ohio, ... County, ss.

....., the above named applicant, being duly sworn says that the statements contained in the foregoing application are true.

.....

Sworn to and subscribed before me this ..... day of ....., 19...

....., Notary Public.

*If the transfers are to be made to more than one person, then after describing those shares which go to one person, write "From Henry Smith, deceased, to Mary Smith," and draw a heavy line under. Then go on with the next person, and so on.

§ 2100. Delivery of custody of securities, deposits, etc.

The second matter provided by section 5348-2 G. C. relates to where intangible property is held in custody for a decedent. In such cases the bank, person or institution holding the same may deliver the same, provided sufficient is retained to pay the tax that may be due thereon, when the amount is not large, and the bank, institution or person holding the same can be satisfied that it is not subject to an inheritance tax; or where it is delivered over to an administrator or executor, it should be delivered without any written consent of the tax commission.

I do not think it is the purpose of the statute to require the written consent of the tax commission in every instance; but

it gives the party holding the property a way in which it may deliver the property and not be liable for any tax. The property intended to be included is of an intangible nature, such as notes, securities, mortgages, stocks, deposits, etc. The tax commission or county auditor may examine such securities at the time of delivery.

§ 2101. Application for consent to transfer assets in possession or control.

....., Ohio, ..., 19...

To the Tax Commission of Ohio:

Application is hereby made in accordance with section 5348-2 of the General Code for the written consent of your commission to deliver or transfer certain securities, deposits, assets or property of ....., deceased, now in possession or control or custody in whole or in part of .....

The description and value of such securities, etc., are as follows: [give full description of securities or assets. In case of stocks, bonds, certificates of deposit, or choses in action, give dates, rate of interest, accrued interest, par, book and market value. State the character of deposits, whether savings, checking or commercial, and give accrued interest, if any. Give number of safe deposit or storage and value or character of contents if known. If notes or choses in action, give date and name of maker or debtor, rate of interest and amount accrued. In case of other personal property describe fully and give value.]

DESCRIPTION	VALUE

Such delivery or transfer is proposed to be made to the following:
.....
.....

Decedent was a resident of city [township] of ....., county of ....., state of ....., and his estate is in process of settlement in the ..... court of ..... county, state of ..... The Ohio inheritance tax on the succession to the above described property has ..... been paid.

.....
.....
P. O. Address .....

The State of ....., ... County, ss.

....., the above named applicant, being duly sworn says that the statements contained in the foregoing application are true.

.....
Sworn to and subscribed before me this ..... day of ....., 19...
....., Notary Public.

§ 2102. Application for release of assets when no administration.

[Do not use this form when decedent left real estate.]

The State of Ohio, ... County, ss.

....., being first duly sworn, says that ....., late of the ..... of ....., ... County, Ohio, died on the ..... day of ....., 19..., leaving ..... h.. widow.., and the following persons h.. only heirs

at law who are entitled to share in the distribution of h.. estate and whose names, ages, relationship to the deceased and addresses are as follows:

Name	Age	Relationship	Address

The only property of which deceased was the owner, or in which ..he had any estate at the time of h.. death, and its value, is as follows:

.....

.....

The following is a description of all the property which the decedent in h.. lifetime conveyed, distributed or gave away in contemplation of death or with intent to have such conveyance, distribution or gift take effect in possession or enjoyment at or after the death of decedent, and the value of such property, together with the name or relationship of each person to whom such conveyance, distribution or gift was made, to-wit:

.....

.....

It is not intended to have any administration on the estate of said decedent.

Affiant asks for the written consent of the tax commission of Ohio to the payment or transfer by ..... to ..... of said item.. above mentioned, to-wit:

.....

.....

Further deponent saith not.

.....

Sworn to before me and in my presence subscribed this ..... day of ....., 19...

.....

Notary Public ..... County, Ohio.

§ 2103. Collection of tax after eighteen months. § 5348-3. If, after the expiration of eighteen months from the accrual of any tax under this subdivision of this chapter, such tax shall remain unpaid, the auditor of state shall notify the prosecuting attorney of the proper county, in writing, of such failure or neglect.

After delay of six months. If the determination of the tax has been delayed for more than one year after the accrual thereof such notice may be issued at any time after six months from the date of the order determining such tax.

Duty of prosecuting attorney. Such prosecuting attorney shall thereupon apply to the probate judge in the name of the county auditor on behalf of the state for a transcript of the

order fixing the tax. Such transcript shall be filed in the office of the clerk of the common pleas court of the county, and the same proceedings shall be had with respect thereto as are provided by section 11659 of the General Code with respect to transcripts of judgments rendered by justices of the peace and mayors, except that the prosecuting attorney shall not be required to pay the costs thereof accruing at the time of filing the same.

Lien, etc. Thereupon the same effect shall be given to such transcripts for all purposes as is given to such transcripts of judgments of justices of the peace or mayors filed in like manner.

Property subject to. Provided, however, that nothing in this section shall be construed to affect the date of the lien of such taxes on the property passing, nor to divest such lien before the payment of such tax in the event of failure to sue out execution within the period prescribed by section 11663 of the General Code. [108 v. 572.]

§ 2104. Prosecuting attorney represents county. § 5384-4. The prosecuting attorney shall represent the county auditor of his county in his capacity as inheritance tax appraiser when called upon by him for that purpose. He shall also represent the interests of the state in any and all proceedings under this subdivision of this chapter. The attorney general shall, when requested by the tax commission in writing, appear for the state in any such proceeding. [108 v. 573.]

§ 2105. County auditor appoints deputies. § 5348-5. The county auditor may, and when directed by the tax commission of Ohio, shall appoint such number of deputies as the tax commission of Ohio may prescribe for him, who shall be qualified to assist him in the performance of his duties as inheritance tax appraiser under the provisions of this subdivision of this chapter. [108 v. 573.]

§ 2106. Tax commission may designate examiners. § 5348-6. The tax commission of Ohio may designate such of its examiners, experts, accountants and other assistants as it may deem necessary for the purpose of aiding in the administration of the provisions of this subdivision of this chapter; and such provisions shall be deemed and held to be a law which the tax commission is required to administer for the purposes of sections 1465-9, and 1465-12 to 1465-30, inclusive, section 1465-32, and section 1465-34 of the General Code. It shall be the duty of the tax commission of Ohio in the administration of this subdivision of this chapter to see that the proceedings provided for herein shall be instituted and carried to determination in all cases in which a tax is due hereunder. [108 v. 573.]

§ 2107. Record made by probate judge. § 5348-7. In connection with the estates of decedents on the succession to which any inheritance tax is found to be due, each probate judge shall keep a docket, the form whereof shall be prescribed by the auditor of state, which shall be a public record, and in which such probate judge shall enter the name of every such decedent upon whose estate an application to him has been made for an issue of

letters of administration, or letters testamentary, or ancillary letters, the date and place of death of said decedent, the estimated value of his real and personal property, the names, places of residence and relationship to him of his heirs at law, the names and places of residence of the legatees or devisees in any will of any such decedent, the amount of each legacy, and the estimated value of any real property devised therein, and to whom devised. Such entry shall be made from the data contained in the papers filed on any such application, or in any proceeding relating to the estate of the decedent. The probate judge shall also enter in such docket the amount of the personal property of any such decedent, as shown by the inventory thereof when made and filed in his office, and the returns made by the county auditor under the subdivision of this chapter, and the value of annuities, life estates, terms of years and other property of said decedent, or given by him in his will or otherwise, as fixed by the probate court, and the taxes assessed thereon, and the township or municipal corporation in which the same originated, and the amounts of any receipts for payment of any taxes on the estate of such decedent under this subdivision of this chapter, filed with him. The auditor of state shall also prescribe forms for the reports to be made by each probate judge and county auditor, which shall correspond with the entries to be made in such docket. [108 v. 1195.]

§ 2108. Monthly reports to state auditor. §5348-8. Each probate judge shall make a report monthly to the auditor of state, upon a form prescribed by such auditor. Such report shall contain all the matters required to be entered on the docket provided for in the foregoing section and shall be filed at such date in each month as may be required by the auditor of state. The reports made in the months of February and August of each year shall be filed by each probate judge at the same time that the county auditor of his county makes his semi-annual settlement. [108 v. 1196.]

§ 2109. Reports by recorder. § 5348-8a. On the first day of January and first day of July annually the county recorder of each county in the state shall make report to the tax commission of Ohio, on a form prescribed by such commission, containing a statement of any deed or other conveyance of property filed in his office during the preceding six months, which appears to have been made in contemplation of death, or intended to take effect in possession or enjoyment after the death of the grantor or vendor, with the name and place of residence of such grantor or vendor, the name and place of residence of the grantee or vendee, and a description of the property transferred. [108 v. 1197.]

§ 2110. Accounts kept by county treasurer. § 5348-9. The county treasurer shall keep an account showing the amount of all taxes and interest by him received under the provisions of this subdivision of this chapter. On the twenty-fifth day of February and the twentieth day of August of each year he shall settle

with the county auditor for all such taxes and interest so received at the time of making such settlement, not included in any preceding settlement, showing for what estate, and by whom and when paid. At each such settlement the auditor shall allow to the treasurer and himself on the moneys so collected and accounted for by him, their respective fees, at the percentages allowed by law. The correctness thereof, together with a statement of the fees allowed at such settlement and the fees and expenses allowed to the probate judge and other officers under this subdivision of this chapter shall be certified by the county auditor. [108 v. 574.]

§ 2111. Fees, etc. § 5348-10. Such fees as are allowed by law to the probate judge for services performed under the provisions of this subdivision of this chapter, shall be fixed in each case and certified by him on the order fixing the taxes, together with the fees of the sheriff or other officers and the expenses of the county auditor. The county auditor shall pay such fees and expenses out of the state's share of the undivided inheritance taxes in the county treasury and draw his warrants on the treasurer in favor of the fee funds or officers personally entitled thereto, payable from such taxes, as the case may require. [108 v. 1196.]

§ 2111a. Probate judge's fees. § 5348-10a. For services performed by him under the provisions of this chapter each probate judge shall be allowed a fee of five dollars in each inheritance tax proceeding in his court in which tax is assessed and collected and a fee of three dollars in each such proceeding in which no tax is found, which fees shall be allowed and paid to such judges as the other costs in such proceedings are paid but are to be retained by them personally as compensation for the performance by them of the additional duties imposed on them by this chapter. Provided always, however, that the amount paid to any probate judge under this section shall in no case exceed the sum of three thousand dollars in any one year. [109 v. 531.]

§ 2112. Division of tax. § 5348-11. Fifty per centum of the gross amount of any taxes levied and paid under the provisions of this subdivision of this chapter shall be for the use of the municipal corporation or township in which the tax originates, and shall be credited, one-half to the sinking fund, if any, of such municipal corporation or township, and the residue to the general revenue fund thereof; the remainder of such taxes, after deducting the fees and costs charged against the proceeds thereof under this subdivision of this chapter, shall be for the use of the state, and shall be paid into the state treasury to the credit of the general revenue fund therein. [108 v. 575.]

§ 2113. Distribution of tax. § 5348-12. At each semi-annual settlement provided for under this subdivision of this chapter, the county auditor shall certify to the auditor of any other county in which may be located in whole or in part, any municipal corporation or township, to which any part of the taxes collected under this subdivision of this chapter, and not

previously accounted for, is due, a statement of the amount of such taxes due to each municipal corporation or township in such county entitled to share in the distribution thereof.

Amount due township, etc. The amount respectively due upon such settlement to each such municipal corporation or township, and to each municipality or township in the county in which the taxes are collected shall be paid upon the warrant of the county auditor to the treasurer or other proper officer of such municipal corporation or township.

Amount of refunder. The amount of any refunder chargeable against any such municipal corporation or township at the time of making such settlement, shall be adjusted in determining the amount due to such municipal corporation or township at such settlement; provided, however, that if the municipal corporation or township against which such refunder is chargeable is not entitled to share in the fund to be distributed at such settlement, the county auditor shall draw his warrant for the amount thereof in favor of the county treasurer payable from any undivided general taxes in the possession of such treasurer, unless such municipal corporation or township is located in another county, in which event the county auditor shall issue a certificate for such amount to the auditor of the proper county, who shall draw a like warrant therefor payable from any undivided general taxes in the possession of the treasurer of such county; and in either case at the next semi-annual settlement of such undivided general taxes, the amount of such warrant shall be deducted from the distribution of taxes of such municipal corporation or township and charged against the proceeds of levies for the general revenue fund of such municipal corporation or township. [108 v. 575.]

§ 2114. Where tax deemed to originate on property in this state. § 5348-13. When the property passing is real estate or tangible personal property within this state the tax on the succession thereto shall be deemed to have originated in the municipal corporation or township in which such property is physically located. In case of real estate located in more than one municipal corporation or township the tax on the succession thereto, or to any interest therein, shall be apportioned between the municipal corporation or townships in which it is located in the proportions in which the tract is assessed for general property taxaton in such townships or municipal corporations respectively. [108 v. 576.]

§ 2115. Where tax deemed to originate on property not within state. § 5348-14. The tax on the succession to intangible property or tangible personal property not within this state from a resident of this state shall be deemed to have originated in the municipal corporation or township in which the decedent resided.

The municipal corporation or township in which the tax on the succession to the intangible property of a non-resident accruing under the provisions of this subdivision of this chapter, shall be deemed to have originated, shall be determined as follows:

Stock of corporation. 1. In the case of shares of stock in a corporation organized or existing under the laws of this state, such taxes shall be deemed to have originated in the municipal corporation or township in which such corporation has its principal place of business in this state.

Bonds, notes, etc. 2. In case of bonds, notes, or other securities or assets, in the possession or in the control or custody of a corporation, institution or person in this state, such taxes shall be deemed to have originated in the municipal corporation or township in which such corporation, institution or person had the same in possession, control or custody at the time of the succession.

Moneys on deposit. 3. In case of moneys on deposit with any corporation, bank, or other institution, person or persons, such tax shall be deemed to have originated in the municipal corporation or township in which such corporation, bank or other institution had its principal place of business, or in which such person or persons resided at the time of such succession. [108 v. 576][83]

§ 2115a. Sale of Property under Section G. C. 5332. In giving a construction to Paragraph 4 of Sec. 5332 G. C., the Attorney General has paraphrased the same as follows:

"Whenever the owner of property by deed or will grants, bequeaths or devises it to another person for a limited period, and empowers such other person to appoint the ultimate successors to it, or whenever the original owner by will leaves the property to such person as may be selected by some designated person, the taxable succession for the purposes of the act shall be that which occurs when the selection is made by the person so empowered, rather than that which occurs when the estate passes out of the original owner; and if the person so empowered fails to exercise the power, so that the estates descend or are distributed according to law, yet such descent or distribution shall be regarded as taking place through the agency or will of the person who failed to exercise the power, so that the taxable succession shall be deemed to have taken place at the time such person should have exercised such power; and in order to bring about such result the succession shall be considered in the same light for the purpose of a tax as if the person, who exercised the power or failed to exercise it, as the case may be, had died on the date of such failure to exercise, leaving a will by which the estates ultimately vesting had been immediately created. This shall be the result whether the instrument of the original donor creating the original power was effective for that purpose before or after the taking effect of this act."[84]

[83] See Atty. Genl's op., Sept. 7, 1920, where it is a consolidated corporation and the property belongs to a non-resident, it will where a general office is located in this state, and it is the duty of the corporation to have a general office in this state. 65 Bull. 414.

[84] See opinion of Attorney General, 1919.

CHAPTER CVII

MISCELLANEOUS.

§ 2116 Introductory.
§ 2117 Marriage license.
§ 2118 Inquests of lunacy.
§ 2119 Removal of drifts.
§ 2120 Railroad drains.
§ 2121 Proceedings to oust municipal officer.
§ 2122 Same proceedings.
§ 2123 Same. Trial.
§ 2124 Removal of county auditor.
§ 2125 Examination of charges; removal; successor.
§ 2126 Amercement.
§ 2127 Attendance of witnesses.
§ 2128 Justices of the peace.
§ 2128a Miscellaneous.
§ 2129 Change of name, definition, etc.
§ 2130 Proceedings to change name of person.
§ 2131 Reissue of certificates lost or destroyed.
§ 2132 Parties and notice.
§ 2133 Finding and order of court.
§ 2134 Rights and liabilities under new certificate.
§ 2135 Proceedings may be had by administrators and executors.

§ 2116. Introductory.

In the previous parts of this work have been discussed somewhat in detail, the more important matters that come within the practice of the law in the Probate Courts of our State. Some matters coming within the jurisdiction of the Probate Court have thus far been omitted for the reason that they are either seldomly used or relate more particularly to duties enjoined upon the Probate Judge. The fact is that, seemingly from a want of a better forum, the Legislature is constantly placing upon the Probate Judge new duties, both of a judicial character and ministerial nature. It will be the province of this chapter to briefly refer to some of these omitted subjects.

§ 2117. Marriage license.

By the fifth paragraph of Sec. 10492, G. C., jurisdiction is conferred upon the Probate Judge to grant marriage licenses and licenses to a minister of the Gospel to solemnize marriages. The sections of the General Code defining the duties of the Probate Judge are contained in numbers from 11181-11198 G. C.

These sections define who may marry,[1] who may solemnize marriages,[2] how ministers may obtain license to perform marriage ceremony,[3] how marriages may be performed without a license,[4] how a license can be procured from the Probate Judge,[5] and the duty of the minister performing the marriage ceremony to transmit a certificate of the same, and penalty for failure to perform such duty.[6]

Age.— The questions that usually interest the Probate Judge in granting a license to marry are, first, as to the age of the parties; second, as to their residence, and, third, their relationship. In our State, males above twenty-one and females eighteen years of age are "of age,"[7] and may enter into any contract. In reference to the marriage contract, a male person above the age of eighteen years and a female above the age of sixteen years may enter into such contract, provided such persons in minority first obtain the consent of their fathers, or in case of the death or incapacity of their fathers, then their mothers or guardians. The Probate Judge has no right to issue a marriage license to a person in minority, although above the age of consent, unless the father if living, or mother if the father be dead, and if both be dead, the legal guardian gives consent as provided by statute. This consent must be given either personally to the judge or in writing, the signature of the parent or guardian attested by two witnesses, one of whom shall appear before said judge and make oath that he saw the parent subscribe his name. A difficulty sometimes occurs in these consents to secure a strict compliance with the statute, which often results from an impossibility, or if not an impossibility, a very great inconvenience. For instance, the parent may reside in a foreign State, and no witness can, without great cost and inconvenience, appear before the Probate Judge. In such cases the judge must exercise a reasonable discretion, and ought to require that if the consent is given in another.*

1 § 11181 G. C.
2 § 11182 G. C.
3 §§ 11183, 11184 G. C.
4 § 11186 G. C.
5 §§ 11188 to 11194 G. C.
6 §§ 11195, 11196 G. C.
7 § 8023 G. C., § 1020.

* Can not issue a license to a drunkard, epileptic or insane person. [97 vs. 83] (1904).

The judge of the Juvenile Court may, in cases where the female is approaching maternity, give consent. § 11181-1 G. C.

State, that the signatures be acknowledged before some official of such State.[8]

Residence.— The second matter is the residence of the party. There is no direct provision on this subject, except that before any one can perform the marriage ceremony the statute requires that a license shall be obtained for that purpose from the Probate Judge in *the county where such female resides.* This section is very much evaded; a person of age may at any time choose her residence, and consequently where the bride-to-be is of age, she can very easily go to some other county, and for the time being claim that as her residence. In case of minors, such would not be the case, and license could not be granted in any other county except the residence of the parent having control of the minor.[9]

Relationship.— The third matter that comes to the Probate Judge is the matter of relationship. Our statute provides[10] that the parties should not be nearer of kin than second cousins. There is a great deal of discussion in books as to what constitutes a cousin, etc., dependent somewhat upon whether the common or the civil law is followed. But for all practical purposes it may be said that the statute forbids the marriage of uncles and nieces, aunts and nephews, either of the whole or the half blood, and persons who are first cousins, that is, who have the same grand parents. Those not nearer related may legally marry.

Minister's License.— Another duty that the Probate Judge must perform is to grant licenses to solemnize marriages to any minister of the Gospel upon producing to the judge of his Court credentials of his being a regularly ordained minister of any religious society or congregation,[12] and the law intends that no minister shall perform a ceremony in any county until he has obtained such permit.[13]

[8] See § 11188 to 11194 G. C.

[9] It evidently, however, was the intention of the legislature that these licenses should only be granted in the county of the actual, commonly known and recognized residence of the bride to be.

[10] § 11181 G. C.

[12] § 11183 G. C.

The minister need not reside nor have a charge in the county in which he applies for a permit, etc. It is sufficient, if he intends to officiate therein and perform the marriage ceremony.

[13] As to what will constitute a re-

§ 2118. Inquests of lunacy.

Paragraph 6 of Sec. 10492, G. C., confers exclusive jurisdiction upon the Probate Court to make inquests respecting lunatics and insane persons, etc. A very interesting historical *resume* of this matter is found in a Supreme Court decision of our State.[22] These proceedings are analogous to proceedings *in*

ligious society or congregation is one upon which there may be a difference of opinion. Probate judges have construed this liberally and generally grant such permits where the person applying is recognized by any religious society or congregation as a minister. Salvation Army captains, Christian Scientists, Saints, Dunkards, etc., have been granted license. A marriage performed by a person without such a license if followed by cohabitation, would be a valid legal marriage, and the only effect would be that the party performing the same would be liable to a fine.

§ 11197 G. C.

The entire object of the law relating to licenses, etc., so far as the same may affect the legality of the marriage seems to be to put upon record the proof of such marriage, for our court has held that there may be a valid marriage without any license or ceremony whatever. Carmichael vs. The State, 12 O. S. 553.

See § 945, As to what will constitute valid marriage.

[22] In Wheeler vs. the State, 34 O. S. 395, Judge Okey gives the following: "Under the territorial government, jurisdiction to hold inquests concerning persons alleged to be insane was vested in the judge of Probate. 1 Chase, 127, 191, 339. By the act of 1805, the jurisdiction was vested in the Court of Common Pleas, 1 Chase 489. In 1815 it was transferred to justices of the peace (2 Chase, 869), where it remained except as to non-residents (2 Chase, 1009), until 1838, when it was vested in the associate judges. 1 Curwen, 407. In the proceeding under all these statutes, the question of sanity was tried by a jury, consisting, in some instances, of five men; in others of seven men; and in still others of twelve men. It was analogous to a commission in the English practice and the practice of many states.

In 1850 the ancient feature of the proceeding—the determination of the question by a jury—ceased to exist in this state; but the effect of the adjudication remained the same. By a statute passed in that year the power to hold such inquests was vested in two justices of the peace. They were required to hear evidence and set forth in writing whether the person complained of was sane or insane and the history of the case is developed in the evidence. 2 Curwen, 1554.

While the Act of 1850 was in force, jurisdiction was conferred by the Act of 1852 (3 Curwen, 1717) on the Probate Court to hold "inquests as to lunatics, insane persons, and idiots;" and by the Probate Code of 1853 (3 Curwen, 2041), reenacted in 1854 (4 Curwen, 2630) exclusive jurisdiction was conferred on that court "to make inquests respecting lunatics, insane persons, idiots, and deaf and dumb persons, subject by law to guardianship."

The Act of 1850 was repealed in 1856 (4 Curwen, 2740), and the lat-

rem, affecting the general and public interest, and no one can strictly be regarded as a stranger to them.[23] The law relating to such inquests will be found in sections of the General Code from 1947 to 2034. The statute points out[24] who may make the application and the form of the same, and unless some one disputes the insanity, it seems that the inquest may be held without any other than medical testimony.[25] The statute, however, is mandatory that if the judge deems the party to be unsuitable to appear in Court, that he must then personally visit such person and ascertain the condition by actual inspection. Further proceedings may then be had in the absence of the person charged t · · insane.[26] It is evidently the intention of the statute that the finding required to be made in inquests of lunacy is a judicial act, and cannot be performed by a deputy clerk.[27]

ter Act remained in force, except as modified by other Acts (see 67 Ohio Laws 43) until 1878, when it was repealed and re-enacted. 75 Ohio Laws 64.

The Act of 1856 provided that before any person can be admitted into an insane asylum, the judge of the Probate Court "shall proceed to examine the witness in attendance, and if, upon hearing of the testimony, such judge shall be satisfied that the person so charged is insane," proper steps shall be taken for his admission to such asylum. The finding, it will be seen, was in effect the same as where a guardian was appointed. §§ 41, 63. It was an adjudication concerning the status of a person by a Court clothed with jurisdiction, and, except as otherwise provided by statute, the record imported absolute verity that he was then a proper person to be confined in an insane asylum. Shroyer vs. Richmond, 16 O. S. 455. And, while the proceeding in this State differs from an inquisition of lunacy in the English practice and in the practice of many States (Shelford on Lunatics, ch. 4; 2 Barbour's Ch. Pr., book 5, ch. 6) the effect of the inquest, as to the matter now before us, is the same."

See Heckman vs. Adams, 50 O. S. 305, as to changes made by codifiers in 1880.

[23] Wheeler vs. The State, 34 O. S. 394.

[24] § 1953 G. C.

[25] § 1954 G. C.

[26] When the writer occupied the position of probate judge, he made it a rule of his Court that no person should be adjudged insane unless the facts were supported by the testimony of at least two disinterested witnesses who were not related to the person charged.

[27] The general practice, where for some reason the judge cannot personally hear such matters, is for him to make the finding and himself sign the journal entry. There ought to be some provision made for the judge of the Court of Common Pleas to try such cases in the absence or inability of the probate judge to act.

There is now such provision. See § 10a, § 1592 G. C.

Sec. 1956, G. C., provides that a physician shall make an examination and set forth in a certificate the condition of the patient; secs. 1958 to 1961, G. C., how application shall be made for admission and form of warrant; secs. 1962 to 1964, G. C., that the judge shall see that the patient has proper clothing. While it has been held by our Supreme Court [28] that when the jurisdiction once attaches it exists until the patient is discharged, yet the authorities in charge of the insane hospitals generally assume complete control over the patient after he has been admitted, and refuse to discharge even if the Probate Judge so orders if they think the interest of the patient demand his further detention; and the usual practice in such cases is to institute proceedings by writ of *habeas corpus* to test the insanity of the person after he has been admitted to an insane hospital.[29]

For other matters relating to such inquests, the reader is referred to the general statutes relating thereto.

§ 2119. Removal of drifts.

Jurisdiction is conferred upon the Probate Court by way of appeal in the matter of removal of drifts, a proceeding which is originally begun before the county commissioners.[30] The proceedings in appeal are very much similar to those in county ditch appeals, and while the statute relating thereto differs

[28] Heckman vs. Adams, 50 O. S. 305.

[29] The matter of adjudging a person to be insane is one of extreme delicacy; and often great difficulty is encountered in ascertaining whether or not the party really be insane. No physician or other person is wise enough to exactly understand and define with precision, the workings of the human mind. The experienced person, however, can generally tell when there is a mental derangement, but there are cases upon the border line when the judge hardly knows how to act. If he fails to find the person insane and turns him at large no one knows what injurious action may be done to society. If he finds the person insane when his faculties are not deranged great injustice and injury may be inflicted on the person by such action. The only thing that the judge can do in such cases is to exercise his very best judgment, *taking exceedingly great care* that neither the rights of society nor of the individual are unjustly imposed upon by his action.

[30] See §§ 6725 to 6727 G. C., now repealed.

somewhat in detail, yet the forms and suggestions given in the chapter relating to ditch appeals may be consulted with profit where an appeal is had in the matter of removal of drift; and as the proceeding is one of not very frequent occurrence, no further comments will be made thereon in this work, except to caution the practitioner to carefully consult the statutes in all his proceedings.[31]

§ 2120. Railroad drains.

Our statute provides that every railroad is required to construct and keep open along its road bed ditches or drains of sufficient depth, grade and width to conduct to some proper outlet the water which accumulates thereon,[39] and, if after ten days' notice or request to any person or ticket agent of the company, the person operating the company fails to provide such drain or ditch, the person interested may institute proceedings in the Probate Court to compel such clearing out of the ditch or drain.[40]

The statute further provides that upon receipt of the notice the Probate Judge shall appoint a commission of three disinterested free holders, who, with the county surveyor, shall view the ditch complained of; and subsequent sections provide[41] that the Probate Judge may let out the work, etc. Forms are given for proceedings under these sections in Whittaker's Probate Code, under Sec. 8912, G. C.[42]

31 See Gilmore's Prob. Prac., 198 for forms, etc.

39 § 8908 G. C.

40 § 8909 G. C., declared unconstitutional. C. & E. R. vs. Keith, 48 Bull. 118; 67 O. S. 279.

41 § 8910 G. C.

42 Gilmore's Prob. Practice, 229.

§ 2121. Proceedings to oust municipal officers.

Certain sections of the General Code[48] specifically provide that the commission of certain acts by municipal officers are forbidden,[49] and other sections[50] specifically point out that proceedings shall be brought in the Probate Court, making such Court one of original and exclusive jurisdiction to oust the offending official.[51] The action contemplated by secs. 4670 to 4680, G. C., is one of a *quasi* criminal character; and the statute must be strictly construed, and before a conviction can be had the jury must be satisfied beyond a reasonable doubt that the person charged has been guilty of malfeasance or misfeasance in his office as prescribed by the statute.[52] The section of the General Code conferring such jurisdiction is as follows:

"When complaint under oath is filed with the probate judge of the county in which the municipality, or the larger part thereof is situated, by any elector of the corporation, signed and approved by four other electors thereof, charging any one or more of the following: That a member of the council has received, directly or indirectly, compensation for his services as councilman, committeeman, or otherwise, contrary to law; or that a member of the council or an officer of the corporation is or has been interested, directly or indirectly, in the profits of a contract, job, work or service, or is or has been acting as commissioner, architect, superintendent or engineer in work under-

[48] § 12912 G. C.

[49] Other sections relate to other officers to-wit, §§ 2435-56 R. S., Which provide that officers shall be removed as in the manner provided for the removal of officers.

[50] § 4670 G. C.

[51] State *ex rel* Atty. General vs. McLain, 58 O. S. 213.

It is held where the causes of removal from office are prescribed by statute which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and *quo warranto* will not lie.

See also State *ex rel.* Grisell vs. Marlow, 15 O. S. 114, and State *ex rel.* Jordan vs. Funk, 16 C. C. 155; 8 C. D. 782.

[52] Malfeasance has been defined as the doing of an act wholly unlawful and wrongful. Misfeasance is a default in an office in not doing a lawful act in a proper manner, omitting to do it as it should be done. Colburn vs. Neufarth, Goebel, Probate Reports, 24, which contains the entire charge of the Court to the jury.

taken or prosecuted by the corporation, contrary to law; or that a member of council or an officer of the corporation has been guilty of misfeasance or malfeasance in office, such probate judge shall forthwith issue a citation to the parties charged in such complaint for his appearance before him within ten days from the filing thereof, and also furnish the accused and city solicitor with a copy thereof, but, before acting upon such complaint, such judge shall require the party complaining to furnish sufficient surety for costs." [R. S. § 1732.][53]

§ 2122. Same proceedings.

The action is begun and prosecuted by the filing of a complaint with the Probate Judge of the county in which the municipal corporation or a larger part thereof is situate. This complaint must be brought by at least four electors of such corporation and should set out with certainty the matter charged against the offending officer. The action being *quasi* criminal, the complaint should set out the matter charged with almost the same degree of certainty as is required in an indictment. The Court might not enforce to the fullest extent, the same certainty as in criminal cases. The complaint should be titled, giving the names of the persons filing the complaint as plaintiffs and the officer charged as defendant.

The complaint may be in the following form:

A. B., E. F., G. H. and I. K.
vs.
C. D.

Probate Court,..... County, Ohio.

COMPLAINT.

A. B., E. F., H. G. and I. K. respectfully represent that they are electors of the corporation of....., which is situate in the county of .....; that C. D. is the duly elected, qualified and acting..... ....., an officer in the city of....., a municipal corporation under the laws of this State, situate in.....county. That on or about the.....day of....., said C. D., while so acting as..... .....of said corporation, received compensation for his services, contrary to the provision of the statute in such cases made and provided. (Here set out in detail the specific matters which are charged against the defendant.)

[53] § 4670 G. C.
This section authorizes the Probate Judge to remove an officer for the reasons specifically stated, none other. Mastick vs. Lakewood, 18 C. C. (N.S.) 407. See § 4263 G. C.

Wherefore your complainants pray that the Probate Judge of..... county, will forthwith issue a citation to the said C. D. charged in this complaint, for his appearance before him within ten days from the filing of such complaint, and that such other proceedings may be had thereunder as provided by law.

.....

State of Ohio,.....County, ss.

A. B., one of the above complainants, being first duly sworn, says that the statements in the foregoing complaint are true as he verily believes.

.....

Sworn to before me and subscribed in my presence this.....day of....., 190..[54]

Upon the filing of such complaint, and security for costs being given, the case should be docketed, and the following journal entry made:

(*Title.*)

This day came A. B., *et al.*, and filed their complaint in this Court, alleging that C. D., an official in..... corporation, situate in this county, has been guilty of....., and praying that proceedings may be had thereunder, as provided by statute, it is ordered that a citation be issued forthwith to such party charged in the complaint, for his appearance before this Court, on the.....day of.....(within ten days from the time of filing the complaint) to answer to such charges. And it is also ordered that the complainant furnish the said C. D. and the city solicitor of .....with a copy of the complaint in this case, and the order of the Court thereon made, and said matter is continued to the.....day of.....for further hearing.

The form of citation may be as follows:

To the Sheriff of.....County, Greeting:

You are hereby commanded to cite C. D. to appear before the Probate Court in the.....county of.....on the.....day of..... at.....o'clock, to answer to a certain complaint filed against him. A copy of which you are also ordered to deliver to said C. D.

Witnesseth my hand and seal of said Court, this.....day of..... ....., Probate Judge.

The following is the provision of the General Code, which relates to what shall be done upon the day fixed by the judge for the return of citation:

"On the day fixed by such judge for the return of the citation, the solicitor shall appear on behalf of the complainant to conduct

[54] It will be observed that the probate judge *shall* require the party complained to give security for all costs before acting on such complaint. This may be done by making the following endorsement on the back of the complaint:

We acknowledge ourselves security for all costs accruing in this proceeding. A. B., E. F., G. H., I. K., complainants in this proceeding.

the prosecution, and the accused may also appear by counsel. A time shall be set for hearing the case, which shall be not more than ten days after such return. If a jury is demanded by either party, the probate judge shall direct the summoning of twelve men in the manner provided for the appropriation of property by the municipality. In municipalities having no solicitor, or in case the solicitor is accused of any misfeasance or malfeasance in his office, the prosecuting attorney of the county shall appear on behalf of the complainant to conduct the prosecution." [R. S. § 1733.][55]

On the day fixed for the return of the citation, then the judge should fix a time for trial, and if a jury is demanded, the summoning of a jury. It is probably intended that at this time preliminary questions should be heard and the defendant should be required to answer or plead to the charges. If he admits the truth of the charges, or pleads guilty, no trial will be necessary. If he answer not guilty, the following journal entry should be made:

(*Title.*)

This day this cause came on to be further heard, the complainants being represented by....., said solicitor of.....corporation, and the accused by....., his counsel; and thereupon said accused filed his answer therein denying the charges against him specified in said complaint (or if no answer is filed and defendant pleads not guilty, said statement may be made). It is thereupon ordered that this cause be set for hearing on the.....day of....., at.....o'clock, and a jury being demanded by....., it is ordered that such jury be drawn and summoned, as required by law, to appear on the day above named and serve as the jury thereon, and this cause is continued until said..... day of....., 190..

§ 2123. Same. Trial.

"On the day fixed for trial, if a jury is impaneled, either party, in addition to the peremptory challenges allowed by law in other cases, may object for good cause to any juryman, summoned, and any vacancies occuring for any cause may be

[55] § 4671 G. C.

The section of the General Code referred to in the above section, § 4671 G. C., as to the summoning of a jury refer to the appropriation of private property by municipal corporations.

See § 1748 *et seq.*

filled by the Probate Judge from the bystanders until the panel is full, unless the party charged, or his counsel, demand a special venire to fill such vacancy." [56]

It is the duty of the city solicitor to appear for the prosecution, examine witnesses designated by the complainant, and such others as he may discover,[57] and the trial is to proceed in the same manner as trials are usually conducted. After the evidence has been introduced, the arguments of counsel heard, the charge of the Court given as provided by law applicable to trials for criminal causes, the jury should retire and return their verdict. The following would serve as a journal entry made upon such return:

(*Title.*)

This day came the parties again, by their counsel, and the said C. D. being represented in person, thereupon came the following named persons (here insert names), who were duly impaneled and sworn, according to law, and the jury having heard the evidence and arguments of counsel and charge of the Court, retired to their room for deliberation, and on due time returned to Court and delivered their verdict in words and figures following, to-wit: (Here copy verdict.)

We, the jury duly impaneled in this case, do find that the said defendant is.....guilty of the matters charged against him in said complaint.

(Signed by each member of jury.) [58]

It is therefore considered, ordered and adjudged by the Court, that the said C. D. be and hereby is removed from his office of.....of ....., in.....corporation.

And it is further considered that said.....pay the costs of this proceeding, taxed at.....dollars. (If the defendant is not found guilty, the Court should make an order that he be discharged and the complainants pay the costs.

The following is the section of the General Code relating to the removal of such officer. It will be observed that the Court may apportion the costs as it sees proper. The Court must also transmit a certified copy of the journal entry removing such official to the presiding officer of the Council:

"If, on the trial, the charges in the complaint are sustained by the verdict of the jury, or by the decision of the probate judge, when there is no jury, such judge shall enter the charges and findings thereon upon the record of the court, make an order removing such officer from office, and forthwith transmit a certified copy thereof to the presiding officer of the council,

[56] § 4672 G. C.

[57] § 4675 G. C.

[58] It would perhaps be safer for all the members of the jury to sign

whereupon the vacancy shall be filled as provided by law." [R. S. § 1736.][59]

How costs shall be paid. "The cost and expenses of such trial shall be charged upon the party filing the complaint, the accused, or the municipal corporation, or apportioned among them, as the judge may see fit to direct, and collected as in other cases. No costs or expenses shall be charged to the accused, if upon trial, he is acquitted. If proceedings in error are instituted by the officer complained of, to reverse or vacate the order of the probate court, such officer shall not exercise the functions of his office until such order is finally reversed or vacated." [R. S. § 1736.][59*]

§ 2124. Removal of county auditor. "If a county auditor refuses or neglects to make any settlement with the county treasurer as required by law, or willfully fails to perform any other duty required of him by law, in addition to criminal prosecution therefor, he shall forfeit his office. Upon an affidavit made before the probate judge of the county that the auditor thereof is guilty of a violation of the provisions of this chapter or of any duty herein enjoined, such judge shall immediately issue a summons to the auditor, returnable as in other civil suits." [R. S. § 1031.][60]

§ 2125. Examination of charges; removal, successor. "If satisfied upon examination that there are reasonable grounds for such complaint, the court may report the complaint to the county commissioners, who shall immediately suspend the auditor and appoint a suitable person to perform the duties of auditor until he is restored to the possession of his office, or his successor is duly elected and qualified. Upon such successor giving bond and taking the oath of office as required of county auditors, he shall be authorized to perform all duties and be subject to all obligations and liabilities of county auditors. The bond shall be filed and recorded as bonds of county auditors." [R. S. § 1031.][60]

The above section seems to make the action somewhat of a civil suit, yet it occurs to the writer that the same general method of procedure might be followed as in the previous section, except that a summons should be issued, which should be

this verdict as such is the law in reference to juries in condemnation of private property.

[59] § 4674 G. C.

[59*] § 4675 G. C.

[60] § 2579 G. C.

[60*] § 2580 G. C.

returned as summons in other civil suits. While the word summons is used, from the nature of the proceedings, its form should be very much similar to that of the citation given in the last section. The finding of the Court under the above statute will merely suspend the officer until the next session of the grand jury, and if the grand jury fails to find and present an indictment, or if upon trial of the indictment it is found that the officer is not guilty, he shall be restored to his office.[61]

Upon this hearing before the Probate Court, the auditor is not entitled to a jury trial, and if the Court finds him guilty as charged in the affidavit, or that there is a strong probability of the truth of the affidavit, then the Court should make a finding, which may be as follows:

(*Title.*)

This day this matter came on to be heard upon an affidavit filed in this Court that....., auditor of.....county, has failed and neglected, and still fails and neglects, to deliver to the county treasurer a true copy or duplicate of the book containing the tax list required to be made by him for the year, which he is required by law to do; and thereupon this cause was further heard, the said....., auditor being present and having answered to said charge, and the Court having heard the evidence and arguments of counsel, does find that there are reasonable ground for such complaint. (Or if there are not reasonable ground, so state.)

It is ordered that a certified copy of this entry be sent to the county commissioners as provided by law.[62]

§ 2126. Amercement.

It is provided by law that "sheriffs, deputy sheriffs, coroners and constables shall, when required by the Probate Judge, attend his Court and shall serve and return all process directed to them by the judge."[63]

The subsequent section[64] further provides, "If a sheriff, coroner or constable neglects or refuses to serve and return a process issued by a Probate Judge, and to him directed and delivered, or neglects or refuses to pay over any moneys by him

61 § 2581 G. C.

62 There seems to be no provision for the payment of costs, but as prosecution is somewhat in the character of a public one and for the public good, the county commissioners should pay the costs.

63 § 1596 G. C.

64 § 1596 G. C.

collected to the Probate Judge, or any other person, when so directed by such Probate Judge, he shall be subject to a fine and amercement as in the next section provided."

The next section provides in detail the method of procedure that shall be followed. A summons shall be issued, which must be served within two days, and it must specify the causes, etc., and if the party is found guilty, the judge may fine him not exceeding one hundred dollars. If the cause for the amercement is his refusal to pay over money paid over to him, he shall be amerced the full amount, with the penalty of ten per cent., and the court may enforce such a judgment in the same manner as a contempt.[65]

A number of Ohio decisions have held that amercement proceedings are strictly construed, and that the party is not entitled to a jury trial.[66]

This proceeding is usually brought into requisition where a sheriff fails and neglects to turn over money, etc., and as the party interested can get the same relief by suit on the bond, it is not a very common proceeding in the Common Pleas Court, even much less in the Probate Court, where executions are but seldomly issued. It will therefore not be within the province of this work to go into the matter in detail, but reference will be given to standard works where forms and suggestions may be found.[67]

§ 2127. Attendance of witness.

Judges of the Probate Court are under the same obligation to issue subpoenas for witnesses as are clerks of Courts of Common Pleas,[68] and a failure to obey a subpoena, or a refusal to be sworn, may be punished as a contempt,[69] and if a witness fails to attend he may be attached.[70]

The usual practice, when it is shown that a witness has been properly served, is to make a *rule* against such witness to show cause why he has failed to obey the order of the subpoena. As the practice in the Probate Court in such cases is similar to that in the Court of Common Pleas, reference will merely be given to other standard works containing forms, suggestions, etc.[71]

65 § 1597 G. C.

66 Langdon vs. Summers, 10 O. S. 78.

In another case it was said: "The statute was, no doubt, intended to enforce and secure the proper execution of process by the ministerial officer to whom it may be directed. But where the requirements of the statute have been substantially complied with, so far as the interests of either party can require, a construction closely adhering to its letter, without reference to its spirit and substance, would often work manifest injustice, and convert its wholesome provisions, in the hands of crafty and unscrupulous parties, into mere snares for the unsuspecting, though honest and faithful officer. Conkling vs. Parker, 10 O. S. 33.

67 Yaple's Code Prac. and Precedents, 232 to 236.

Gilmore's Prob. Prac., 248 to 252.

Nash's pleading and prac., 1135.

68 § 11501 G. C.

69 § 11511 G. C.

70 § 11511 G. C.

71 See Yaple's Code Pleading, 469

§ 2128. Justices of the peace.

Two matters in relation to justices of the peace come within the jurisdiction of the Probate Court. First, the court has power to increase the number in any township upon a proper application being made.[72] Proceedings in such a case should probably be had upon the application of a reasonable number of citizens of such township setting forth the necessity of the desired increase. If the court finds in favor of the increase, then the trustees must give notice of the election.[73]

The second matter that may come before the Probate Court is where there is a contest of election by various persons, who have been voted for, for that office.[74] The statute distinctly points out the method of procedure that shall be followed. The contestant must, within ten days after the election, file a formal application or notification with the probate judge that he intends to contest the same, and the judge shall notify the person whose election is contested and cite him to appear on a day not more than fifteen days distant.[75] The judge on the same day that he issues a notice of contest must also select three persons not resident of the township, who shall be a jury to try the matter contested.[76] The judge may subpœna witnesses for either party.[77]

The jury so selected shall be sworn, and the trial should be had as adversary proceedings are generally conducted, and the jury in returning their verdict should all sign the same.[78] But no election should be set aside merely because of illegal votes being cast at such election.[79]

If any person selected as a juror fails to attend, the judge shall appoint some other person, and if the judge fails to attend the trial, a justice of the peace may perform the duties.[80] If the contestor fails, he must pay the costs, etc.[81]

to 476, complete series of forms applicable to such cases. Gilmore's Prob. Prac., 274 to 281; Kinkead's Prac., §§ 455 to 467.

"The fees of witnesses, jurors, sheriffs, coroners, and constables, for all services rendered in the Probate Court, or by order of the Probate Judge, shall be the same as is provided by law, for like services in the Court of Common Pleas." [51 vs. 167, § 57; S. & C. 1217.] § 6405 R. S.

72 § 568 R. S.

73 Form of notice and journal entry in Whittaker's Probate Code.

74 § 572 *et seq.*

75 § 5162 G. C.

See form of application to be filed with the probate judge in Whittaker's Probate Code, 573.

76 § 5163 G. C.

77 § 5164 G. C.

78 § 5165 G. C.

79 § 5166 G. C

80 § 5167 G. C.

81 § 5168 G. C.

A complete set of forms is given in Gilmore' Probate Practice, 14 to 18.

§ 2128a. Miscellaneous.

Other matters that come within the jurisdiction of the Probate Court, but the treatment of which space will not permit in these volumes is that of assisting in the appointment of county commissioners to fill vacancies,[98] committing boys to industrial schools,[99] and girls to industrial home,[100] appointing persons to examine county treasury,[101] to have jurisdiction in cases of contest for county seats,[103] to take charge of property found on dead person,[104] to compel banks to make return,[105] and assist county boards of equalization,[106] to settle controversy between railroads and telegraph companies as to the location of telegraph lines,[108] and to have annual report made by banks of unknown depositors.

§ 2129. Change of name, definition, etc.

At common law, a man might lawfully change his name or by general usage, or habit, acquire a name other than that which was originally given to him, and this might be done without the consent of either a sovereign, any court or act of Parliament; and this common law rule exists in the United States, unless changed by statute.[110]

A name applied to a person has been judicially defined as "A discriminative appellation or designation of an individual."[111]

Or, as elsewhere stated it is,

See Gilmore's Probate Practice, pp. 41 to 48, for forms, etc.

[97] § 7811 to 7815 G. C.
[98] §§ 2397 to 3001 G. C.
[99] § 2083 G. C.
[100] § 2103 G. C.
[101] §§ 2699 to 2708 G. C.
[103] § 5754 G. C.
[104] § 2864 G. C.
[105] § 5413 G. C.
[106] §§ 5580-5787 G. C.
[108] § 9175 G. C.
[110] 21st Amer. & Eng. Ency., 2nd Ed. 311, and cases therein cited.
[111] People vs. Ferguson, 8th Cow. (N. Y.), 116.

"One or more words used to distinguish a particular individual."[112]

There is no statute in our state prohibiting a man from taking to himself whatever name he may please and therefore, by virtue of the common law, which may still be said to be in existence here, he may assume and take to himself whatever name he may choose.[112*]

Both the Christian and surnames are proper names. The former is now usually bestowed by the parents,[113] and the latter is that name which is added to the Christian name and may be said to be the family name.[114]

The father it is said, to the exclusion of its mother, has the right to bestow the name on the child. This rests upon the fact that he is the natural guardian of such child. If the father were dead, the mother would then have the right, or if both parents were deceased, a guardian.

As before stated, the party might assume a certain name, in which he could make legal contracts and sue and be sued, or might acquire such name by reputation. Our Legislature has petition, the cause for which the change of name is sought,

[112] Donaldson vs. Donaldson, 31st Bull. 102.

[112*] New York, Sept. 26, 1910. Justice Smith, in the City Court, in handing down a decision, holds that a person might assume any name other than his own, and that such person might sue under that assumed name legally; also that such assumed name was to all intents and purposes as legally that person's as though he or she had been born with it.

The decision was rendered in sustaining a demurrer in a suit for breach of promise.

Justice Smith, in sustaining the decision, said:

"The code of civil procedure, which authorizes the change of name, is not derogatory to common law.

"At common law a man could change his name, without intervention of either the sovereign, the Courts, or parliament, and the common law, unless changed by statute, of course, obtains in the United Statts.

"A man may lawfully change his name without resort to legal proceedings, and for all purposes the name thus assumed will constitute his legal name, just as much as if he had borne it from birth."

[113] Usually at baptism, and is therfore so called.

[114] See article in 22d Cen. Law Journal, 220.

provided, that a party may change his name by certain court procedure. This legislative provision is, no doubt, made for the purpose of preventing fraud and providing a means for identification.[115]

Formerly a petition for a change of name could only be filed in the Common Pleas Court.[116]

But more recently it was provided, that application might be made in probate court or Court of Common Pleas.

It has, likewise, until recent years, been a frequent practice for the legislature to pass an act, changing a person's name.

The statute relating thereto is as follows:

§ 2130. Proceeding to change name of person. "A person desiring to change his name may file a petition in the common pleas, or probate court of the county in which he resides, setting forth that he has been a *bona fide* resident of such county

[115] Under sections 5852 and 5853, a person desiring to change his name may prove in the common pleas of the county of his residence that he has been a bona fide resident for one year prior to his application, the cause for which the change is sought and new name desired. He shall publish in a newspaper for thirty days, and if the court is satisfied that the ground for the change is reasonable, may order it changed. It might seem that one could not change one's name without these proceedings, or by act of legislature, but the requirement of the statute for publicity by notice, and the fact that the proceedings are had in a court of record, show clearly that its purpose is to protect the public from any injury which might arise from a capricious or designing change in the name by which a man is known, and under which he does business, into some other by which he would be entirely unknown until long association had made it a part of his identity. Where one has always been known by a certain name, that is his name so far as the man and his appellation are associated in people's minds. A sudden change from that name to one which is in fact a combination of his real Christian name and the patronymic borne by his father and ancestors, would be as confusing to the community as the adoption by him of any other than the name he is entitled to by birth and the caprice of his parents. The plaintiff has been known from boyhood by the name set forth in the caption. It is sufficient. England vs. New York Pub. Co., 8 Daly, 375; Matter of Snook, 2 Hilt (N. Y.), 566; Doe vs. Yates, 5 Barn and Ald. 544.

Donaldson vs. Donaldson, 31st Bull. 102.

[116] S. & C. 1138.

for at least one year prior to the filing of the petition, the cause for which the change of name is sought, and the new name asked for. Upon being satisfied, by proof in open court, of the truth of the facts set forth in the petition, that there exists reasonable and proper cause for changing the name of the petitioner, and that notice of the intended application has been given by one publication in a newspaper of general circulation in such county at least thirty days prior to the filing of the petition, the court may order such change of name. The probate judge is authorized to charge for his services in the proceedings, the sum of three dollars, and no more." [R. S. § 5853.] [117]

PROCEDURE—APPLICATION, NOTICE, ETC.

For the reason that a person might change his name without the approbation of any court, sovereign, or act of Parliament, it is probable that a strict compliance with the above statute would not be essential, but the statute ought to be followed if the full benefit is to be derived therefrom. A petition may be in the following form:

Probate Court, Clark County, O.

In the matter of Samuel Smith. *Change of Name.*

Petition.

The undersigned respectfully represents that he is a *bona fide* resident of the County of Clark, now and has been during one year prior to the time of the filing of this petition; that he is now known and has the name of Samuel Smith; that when he was about five years of age, he was taken to raise by a family, who changed his name to Johnson, and thereafter he was known by the name of Samuel Johnson (or allege any other cause which may exist for the desired change of name.)

Wherefore he asks that the court may order that his said name be changed from Samuel Smith to Samuel Johnson, as in such case provided by the Revised Statutes of Ohio.

.....

State of Ohio, Clark County, ss.

..... being duly sworn according to law says that the matter and facts stated in his foregoing petition are true, as he verily believes.

.....

Sworn to and subscribed before me and in my presence this ..... day of ....., 19.....

.....

[117] § 12209 G. C.

FILING AND ENTRY.

The statute seems to contemplate that the notice should be given before the petition is filed, but it tends more to regularity to have the petition first filed and then it would be proper when the petition is filed, for the court to make a journal entry, which might be in the following form:

(*Title.*)

This day came Samuel Smith, and filed in this Court his petition, asking for an order to change his name from Samuel Smith to Samuel Johnson, and it is ordered that said petition be for hearing on the ..... day of ..... (which must be at such a length of time that notice of thirty days may be given) and it is further ordered that notice of the hearing of this petition and intended application be given by publication in a newspaper of general circulation in this county, at least thirty days prior to the time of said hearing.

NOTICE.

The following may serve as a form of notice:

(*To whom it may concern.*)

Samuel Smith, of Clark County, Ohio, has filed his petition in the Probate Court of said County, praying for an order of said court, authorizing the change of his name from Samuel Smith to Samuel Johnson, and said application and petition will be for hearing on the ..... day of .....

If it is intended to give the notice first and then file the petition, in strict conformity of statute, the following would be a proper notice:

(*To whom it may concern.*)

Samuel Smith, of Clark County, Ohio, will on the ..... day of ..... file his petition in the Probate Court of said County, asking for an order changing his name from that of Samuel Smith to that of Samuel Johnson for the reason that [here state reason] and the same will be for hearing on that day or such other time as the court may

HEARING, ENTRY, ETC.

At the time set for hearing, or where notice has been given prior to the filing of the petition, at the filing of the petition, the court should take up the matter, and if it is satisfied by proof of the facts set forth in the petition and that

there exists reasonable and proper cause for changing the name and that the notice required by the statute has been given, then it should order such change of name. The entry might be in the following form:

(*Title.*)

This day this matter came on to be heard upon the petition filed herein, of Samuel Smith, praying for a change of his name to that of Samuel Johnson, and same was heard upon the testimony and exhibits.

Wherefore the court finds that notice of the intended application has been given, as required by statute, and upon proof in open court finds that the facts set forth in the petition are true and there exists reasonable and proper cause for the change of name of the petitioner.

Wherefore it is ordered that the name of Samuel Smith be and the same is hereby changed to Samuel Johnson.

§ 2131. Re-issuing of certificates of stock lost or destroyed. "In case a certificate of stock in a corporation is lost or destroyed, the owner thereof may file his petition in the probate court of the county where the principal business office of such corporation is located in this state, setting forth a pertinent description of the certificate, and a full statement of the facts relating to its destruction or loss; that he is the owner of such certificate, and was at the time of its loss or destruction; that he had not assigned, transferred or disposed of it; and that it was not pledged to anyone, or if so, stating to whom, with the facts relating thereto." [R. S. § 3254-1; 88 v. 336, § 1.][118]

§ 2132. Parties and notice. "Such petitioner shall make the corporation and any pledgee defendants to such proceeding, and serve a certified copy of his petition on some chief officer of the corporation, and such pledgee, on which copies the probate judge over his signature shall state when the petition will be heard. Such copies shall be so served not less than twenty days before the hearing. In a newspaper published and of general circulation in the county where the proceeding is pending, and also in the county where he resides, the petitioner shall publish a notice containing the substance and prayer of his petition, for three consecutive weeks immediately before the day of hearing, and stating when and where it will be heard." [R. S. § 3254-1; 88 v. 336, § 1.][118*]

About the only comments that are necessary under the above section, is that the statute should be strictly followed. This is necessary for several reasons, the principal one of which is

[118] § 8677 G. C.

[118*] § 8678 G. C.

See When court will not issue an order for reissue of stock, etc. Bank vs. Water Works, 22 C. C. (N.S.) 529; Bank vs. Voight, 13 C. C. (N.S.) 267.

that the defendant corporation may be protected in case it should afterwards develop that the certificate was not, in fact, lost or destroyed. The essentials of the petition seem to be,

1st. That the person filing the application is the owner of the stock.

2d. That the petition be filed in the Probate Court of the county in which the corporation has its principal office.

3d. That a pertinent description of the certificate be given.

4th. A full statement of the facts, relating to such destruction or loss.

5th. If it has not been assigned, transferred or disposed of, and if it has been assigned, transferred or disposed of, that the person to whom it was pledged and the facts relating thereto should be stated, and the petition may be in the following form:

Probate Court, Clark County, O.

John Jones, Plaintiff,
vs.
The Springfield Building and Loan Association, Defendant.

Petition.

Plaintiff alleges that the defendant, The Springfield Building and Loan Association, is a corporation, whose principal business office is located in the County of Clark and State of Ohio; that on the ..... day of ....., the said defendant corporation issued and delivered to him a certain certificate of its capital stock, which said certificate was numbered ..... (and such other facts in relation to the certificate as will make a complete and pertinent description of the same); that on the 1st day of March, 1903, the plaintiff's dwelling house and all its contents were destroyed by fire, and that said certificate of stock was among his papers, which were destroyed in said fire (or allege fully any other manner in which the certificate might have become lost or destroyed); that he had not assigned, transferred or disposed of the same, and at the time of its destruction, he was the owner thereof, and that the same was not pledged to any one (or if it had been pledged to any one, set forth the name of such person and the facts relating thereto and the conditions upon which the pledge has been made.)

Wherefore plaintiff asks that such proceedings may be had for the re-issue of said stock, as is provided by sections 3254-1 and 3254-2 Revised Statutes of Ohio, and that the defendant corporation, The Springfield Building and Loan Association may be ordered to issue and deliver a new certificate of stock to the plaintiff petitioner, for the original amount and of the same amount of stock as the one that was destroyed, as set forth in the petition (if the same was pledged to any one, such facts should be here stated), and that he may have such other and proper relief as provided by law.

.....

State of Ohio, Clark County, ss.

John Jones, being duly sworn, says he is the plaintiff above named, and that the matter and facts stated in his foregoing petition are true, as he verily believes.

.....

Sworn to and subscribed in my presence this ..... day of ....., 190.....

Upon the filing of this petition, the court should make a journal entry, of which the following might serve as a form:

(*Title.*)

This day came John Jones, and filed herein his petition against The Springfield Building and Loan Association, for an order of this court to direct and require the said defendant corporation to issue and deliver to him a new certificate of stock, alleged in said petition to be destroyed.

Wherefore it is ordered that said cause be set for hearing on the ..... day of ..... (this should be far enough ahead to allow the service of notice, etc., probably thirty days), and it is further ordered that the plaintiff shall serve a certified copy of said petition on some chief officer of said corporation (and if there is any pledgee, also upon such person) stating the time when same will be heard in this court, which copy shall be served not less than twenty days before such hearing, and he shall also publish for three consecutive weeks in some newspaper published and of general circulation in this county (and if plaintiff resides in another county, the notice must also be published therein) a notice containing the substance of the prayer of the petition and the date of hearing same.

NOTICE.

The statute is specific in the kind of notice that shall be given and also in its manner of service. If possible, this service should be made personally upon the chief officer, having charge of the business of the corporation. In addition if the stock has been pledged, a like service must be made upon the pledgee, also there must be a notice published in a newspaper in the county, in which the action is brought, and if the plaintiff resides in another county, a notice must also be published in such county. After the defendant has given notice, as required by statute, he should make an affidavit of that fact, likewise the newspaper owner should file proof of service. Notice in a newspaper should be for three full weeks, that is,

the order should not be made until at least twenty-two days has expired after the first publication; likewise the order can not be made until at least twenty days has expired from the time that the notice has been given to the defendant. The following may serve as a form of notice:

To The Springfield Building & Loan Association:
You are hereby notified, that on the ..... day of ....., John Jones filed his certain petition in this court, which is in the words and figures as follows, to wit: (here insert copy of petition in full as filed in court). Said petition will be heard on the ..... day of ....., at .... a. m., at the office of the Probate Judge, in the County of Clark, State of Ohio. A. B., Probate Judge.

§ 2133. Finding and order of the court. "If, upon the hearing, the probate court finds that the foregoing provisions have been complied with, that such certificate was lost or destroyed, and that at that time the petitioner was and is its owner, an order shall be made that such corporation issue and deliver a new certificate to him for the original amount and kind of stock, unless the certificate was pledged to some one at the time of its loss or destruction, and the pledgee yet has a claim against it, in which case the order shall direct that such new certificate be delivered to the pledgee on such terms as the court directs. The corporation shall comply with such orders, and it shall in no wise be prejudiced thereby, or by paying dividends on such new certificate, so long as it is not made known to it that the original certificate is in existence and owned by a person other than the petitioner." [R. S. § 3254-2; 88 v. 337, § 2.][119]

§ 2134. Rights and liabilities under new certificate. "All rights and liabilities attaching to the original certificate shall attach to such re-issued certificate, while in force. Upon the production of the original certificate to such corporation by the owner or pledgee, the re-issued certificate shall be cancelled, surrendered and void." [R. S. § 3254-2; 88 v. 337 § 2.][119*]

§ 2135. Proceedings may be had by administrators or executors. "Executors and administrators, on behalf of estates of deceased owners of such lost or destroyed certificates of stock, may proceed under the next three preceding sections, and have all the rights and benefits thereof." [R. S. § 3254-2; 88 v. 337, § 2.][119†]

[119] § 8679 G. C.
[119*] § 8680 G. C.
[119†] § 8681 G. C.

On the day set for the hearing, the Judge should require that proof of service of notice be filed in his court and should ascertain that service has been made, as required by statute, and then he should hear evidence as to the fact of the loss or destruction of the certificate of stock, and after being satisfied that the allegations of the petition are true, and that the stock ought to be re-issued, should make his order, which may be in the following form:

(*Title.*)

Entry.

This day this cause came on to be heard and was submitted to the court upon the testimony of witnesses and exhibits in the case. Whereupon, after due consideration, the court finds that the allegations of the petition are true, and that notice of the filing and hearing thereof has been given, as provided by statute; that the plaintiff is the owner of stock Number ..... (here describe the same as alleged in the petition) and that said certificate of stock is destroyed (or lost, as the case may be). (If it was held by a pledgee, make the entry to conform to the facts). It is therefore ordered, that the defendant, The Springfield Building and Loan Association, shall issue and deliver a new certificate of stock, to said plaintiff, for the original amount and of the same amount and description as the same was, at the time of its destruction, and upon said defendant's compliance thereof, it shall not be liable to any other holder of such original certificate, until it shall have full notice thereof, but upon the production of the original certificate to such corporation by the owner or pledgee, such re-issued certificate shall be cancelled and surrendered and that the cost of this application be taxed against the plaintiff.

CHAPTER CVIII.

DOWER, ANNUITY, AND PRESENT VALUE TABLES.

§ 2136. Introductory.
§ 2137. Mortality tables.
§ 2138. Calculation for consummate dower, and life annuity.
§ 2139. Dower and life annuity table based upon the Carlisle table.
§ 2140. Dower and life annuity table based upon American table.
§ 2141. Calculation of contingent dower.
§ 2142. Contingent dower table.
§ 2143. Expectation of life table.
§ 2144. Table for ascertaining present value of certain annuity.
§ 2145. Table for ascertaining present value of a sum certain due and payable at end of a stated number of years.

§ 2136. Introductory.

It has long been a settled practice in this State, in ascertaining the present value of dower in real estate or of an annuity, payable either at a stated annual period or at some future date, to use tables based upon the expectation of life. In one Ohio case [1] it was said: "Where lands are sold by an administrator for the payment of debts, and a widow who is entitled to dower therein consents to such sale, free from her right to dower, it is the familiar practice to order the sale to be made and to make compensation to the widow out of the proceeds of such sale. * * * * In such a case, the exact value of the widow's dower cannot be known with absolute certainty. It will depend largely upon the length of her life, which can not be foreseen by the Court. Yet its present value can be approximately ascertained. Tables have been constructed, based on wide and long observation, from which, the age of the widow being known, the probable duration of her life, and the present value of her dower right may be ascertained with reasonable certainty."

[1] Black vs. **Kuhlman, 30 O. S. 199.**

See § 2069 for American Experience table.

These tables have also been used for fixing a measure of damages in an action brought for the wrongful death of an individual.[2] It will be the purpose of this chapter to give several tables which will aid in ascertaining the present value of consummate dower, contingent dower, as well as the present value of life and certain annuities.[3]

§ 2137. Mortality tables.

In the ascertainment of the present values of dower, etc., tables are used based upon the expectation of life. These are called mortality tables. The Carlisle, based upon statistics kept in Carlisle, England, is the one which has been most frequently used in the various Courts of the United States.[4]

Another table that was formerly somewhat used was known as the Northampton, and based on statistics in the town of Northampton, England. This table shows a higher rate of mortality and is not now very frequently used. Another English table is known as the Farr table, and was prepared by Dr. Farr of England, and was based upon the census return of England and Wales. The combined experience, or actuaries, or seventeen offices' experience table of mortality was prepared by a committee of eminent actuaries on data afforded by the combined experience of seventeen of the principal life insurance offices in England and Scotland.

[2] Wasner vs. Rawlins, 64 O. S. 585; reported in full, 46 Bull. 147.

[3] An annuity is defined to be a periodical payment of money, amounting to a fixed sum in each year, the moneys paid being either a gift or in consideration of a gross sum received. When the payment is continued for a certain period annually, as 10, 20, or 100 years, it is called a *certain annuity.* When it continues for an uncertain period a contingent annuity. When the period is determined by the duration of one or more lines, a *life annuity.* A deferred or reversionary annuity is one that does not begin till after a certain period or number of years, or till the decease of a person, or some future event. An annuity *in possession* is one which has already begun. Cent. Dic.

See § 692, Legacies in nature of incomes and annuities.

See § 945 as to dower assigned to two different persons, tables showing chance of survivorship may be used.

[4] See Citation of Cases. Giauque & McClure's Present value tables, 185.

The American experience table of mortality was constructed from statistics based chiefly on the experience of the Mutual Life Insurance Company of New York to ascertain the laws of mortality as applicable to healthy lives in this country.

The Thirty Offices' experience table of mortality is based on the experience of thirty of the leading life insurance companies of the United States.[5] Some of these various tables have been designated by statute to be used in different States. So far as calculation of dower or annuity is concerned, no statute provision exists in this State. The Legislature has provided,[6] in reference to life insurance companies, that the combined experience table, or actuaries table of mortality, shall be used, and the same table is referred to in the collateral inheritance tax.[7] The Supreme Court of our State, however, has on two different occasions approved calculations made upon the basis of the Carlisle table.[8]

[5] For more extended description, see Glauque & McClure Present Value Tables, 185 *et seq.*

[6] § 3631-29 R. S., repealed.

[7] § 5343 G. C.

[8] Black vs. Kuhlman, 30 O. S. 199. Wasner vs. Rawlins, 64 O. S. 585; 46 Bull. 147.

Kinkead in his recent work on probate law and practice says, that the American experience table of mortality is the legal basis of valuation in Ohio. From the author's investigation he fails to find, either by legislative act or judicial decision an adoption of the American experience table. As above stated in the text, the Legislature has on several occasions adopted the Actuaries or Combined experience tables; and the Courts have given sanction to the use of the Carlisle table. By noticing the expectancy of life as given subsequently in a table herein, it will be observed that the American table is higher than either the Combined or the Carlisle table, until sixty years of age, after which time the Carlisle table is higher than either of the others. Generally, however, the Carlisle table is nearer the Combined experience table than the American table, and therefore in computing annuities under the collateral inheritance tax the table based thereon, would be nearer correct than if based upon the American table of mortality.

Mr. Kinkead gives a table for the calculation of dower based upon the American table of mortality, which by his kind consent is inserted herein. However, from the fact that the Carlisle table has been sanctioned by the Supreme Court and by long and continued use by the bar of Ohio, as well as recognized writers upon the Ohio law (Glauque & McClure's Present Value Tables, p. 2), the author has come to the conclusion that until otherwise determined by an act of the Legislature, the Carlisle table

§ 2138. Calculation of consummate dower, and life annuity.

The statute in giving a widow power to waive the assignment of dower by metes and bounds, provides that she may have such sum of money in lieu of such dower out of the proceeds as the Court deems a just and reasonable value of such dower interest.[9] In order to aid the Court in determining what is the reasonable value of dower, or life annuity, the Carlisle table of mortality is usually used. Of course, this table is based upon the general expectation of life of a person in ordinary good health. If a person entitled to dower or life annuity was afflicted in such a manner that she could not live very long, such matter should be taken into consideration. The table does not furnish an arbitrary rule, although it is usually followed. A table for contingent right of dower is given in the next section. The widow or widower being entitled to the same dower, the method of calculation will be the same for each.

The value of a widow's dower is founded by computing the interest for one year at six, or five, per cent., or whatever rate is desired,[10] on one-third the value of the entire property, and multiplying the amount by the amount set opposite the widow's age. If the widow is aged 40, and the entire estate is sold for $15,000, the value of her dower will be the interest on one-third of that sum for one year, $300, multiplied by 12.002 (the amount opposite the widow's age), or $3,660.60. If the

is entitled to preference. Another reason suggests itself for giving the Carlisle table the preference, and that is, that the Carlisle table is based upon the lives of *unselected persons.* While the other tables are based upon *selected lives,* and it is reasonably safe to assume that the rate of mortality would be lower among selected lives than unselected lives, and it is hardly fair to base an expectation of life for ordinary purposes upon a table founded upon the lives of persons who were able to pass an examination and secure life insurance. In order, however, that the practitioner and the Courts may have the benefit of tables founded upon the Carlisle and American tables both are inserted.

[9] § 12018 G. C.

[10] Six per cent. is used because that is the legal rate in Ohio, § 8315 G. C., but in calculating dower, the Court is not bound to follow this rate. Although generally used, it may be too high, as real estate does not usually yield as high a rate per cent. as notes, etc., to which § 8305 G. C. particularly applies.

widow is entitled to a life estate, interest would be calculated on the $15,000 for one year, etc.[11] If there is an annuity of $300 per year, and the person entitled to same is 40 years of age, its present value, calculated at six per cent., would be $300 × 12.002 = $3,660.60. If the annuity was $300 per year to run 30 years, it would be $300 × 13.7648 = $4,129.44.[12]

§ 2139. Dower and life annuity table based upon Carlisle table.

Age.	3 per cent.	4 per cent.	5 per cent.	6 per cent.	7 per cent.
10	23.512	19.58339	16.6689	14.4486	12.717
11	23.327	19.45857	16.5813	14.3845	12.669
12	23.143	19.33493	16.4946	14.3215	12.621
13	22.957	19.20937	16.4064	14.2570	12.572
14	22.769	19.08182	16.3165	14.1912	12.522
15	22.582	18.95534	16.2275	14.1262	12.473
16	22.404	18.83636	16.1450	14.0671	12.429
17	22.232	18.72111	16.0667	14.0118	12.389
18	22.058	18.60656	15.9875	13.9559	12.348
19	21.879	18.48649	15.9046	13.8970	12.305
20	21.694	18.36170	15.8177	13.8349	12.259
21	21.504	18.23196	15.7267	13.7692	12.210
22	21.304	18.09386	15.6285	13.6974	12.156
23	21.098	17.95016	15.5256	13.6215	12.098
24	20.885	17.80058	15.4175	13.5413	12.037
25	20.665	17.64486	15.3040	13.4563	11.972
26	20.442	17.48586	15.1876	13.3688	11.904
27	20.212	17.32023	15.0653	13.2761	11.832
28	19.981	17.15412	14.9424	13.1828	11.759
29	19.761	16.99683	14.8272	13.0964	11.693
30	19.556	16.85215	14.7231	13.0200	11.636
31	19.348	16.70511	14.6171	12.9420	11.578
32	19.134	16.55246	14.5062	12.8600	11.516
33	18.910	16.39072	14.3874	12.7711	11.448
34	18.675	16.21943	14.2601	12.6748	11.374
35	18.433	16.04123	14.1267	12.5731	11.295
36	18.183	15.85577	13.9868	12.4656	11.211
37	17.928	15.66586	13.8427	12.3545	11.124
38	17.669	15.47129	13.6944	12.2394	11.033
39	17.405	15.27184	13.5415	12.1203	10.939
40	17.143	15.07363	13.3894	12.0019	10.845
41	16.890	14.88314	13.2441	11.8897	10.757

[11] For table of 3½ per cent., 4½, 8, 9, and 10 per cent., see Giauque & McClure's Present Value Tables, page 10.

[12] See § 2023, This is a certain annuity.

Age.	3 per cent.	4 per cent.	5 per cent.	6 per cent.	7 per cent.
42	16.640	14.69466	13.1006	11.7791	10.671
43	16.389	14.50529	12.9562	11.6679	10.585
44	16.130	14.30874	12.8053	11.5510	10.494
45	15.863	14.10460	12.6475	11.4280	10.397
46	15.585	13.88928	12.4795	11.2957	10.292
47	15.294	13.66208	12.3006	11.1536	10.178
48	14.986	13.41914	12.1070	10.9980	10.052
49	14.654	13.15312	11.8920	10.8226	9.908
50	14.303	12.86902	11.6598	10.6311	9.749
51	13.932	12.56581	11.4093	10.4223	9.573
52	13.558	12.25793	11.1535	10.2078	9.392
53	13.180	11.94503	10.8920	9.98726	9.205
54	12.798	11.62673	10.6243	9.76025	9.011
55	12.408	11.29961	10.3472	9.52367	8.807
56	12.014	10.96607	10.0628	9.27933	8.595
57	11.614	10.62559	9.77061	9.02659	8.375
58	11.218	10.28647	9.47810	8.77240	8.153
59	10.841	9.96331	9.19889	8.52942	7.940
60	10.491	9.66333	8.93987	8.30426	7.743
61	10.180	9.39809	8.71212	8.10751	7.572
62	9.875	9.13676	8.48722	7.91291	7.403
63	9.567	8.87150	8.25790	7.71365	7.229
64	9.246	8.59330	8.01565	7.50165	7.042
65	8.917	8.30719	7.76502	7.28110	6.847
66	8.578	8.00966	7.50262	7.04866	6.641
67	8.238	7.69980	7.22743	6.80323	6.421
68	7.869	7.37976	6.94131	6.54640	6.189
69	7.499	7.04881	6.64341	6.27721	5.945
70	7.123	6.70936	6.33583	5.99748	5.690
71	6.737	6.35773	6.01491	5.70353	5.420
72	6.373	6.02548	5.71057	5.42378	5.162
73	6.044	5.72465	5.43447	5.16953	4.927
74	5.752	5.45812	5.18972	4.94403	4.719
75	5.512	5.23901	4.98924	4.76004	4.549
76	5.277	5.02399	4.79197	4.57852	4.382
77	5.059	4.82473	4.60914	4.41033	4.227
78	4.838	4.62166	4.42210	4.23765	4.067
79	4.592	4.39345	4.21019	4.04041	3.883
80	4.365	4.18289	4.01445	3.85807	3.713
81	4.119	3.95309	3.79936	3.65632	3.523
82	3.898	3.74634	3.60561	3.47444	3.352
83	3.672	3.53409	3.40573	3.28588	3.174
84	3.454	3.32856	3.21145	3.10195	2.999
85	3.229	3.11515	3.00854	2.90873	2.815
86	3.033	2.92831	2.83036	2.73855	2.652
87	2.873	2.77593	2.68472	2.59916	2.519
88	2.776	2.68337	2.59660	2.51514	2.439
89	2.665	2.57704	2.49465	2.41725	2.344

Age.	3 per cent.	4 per cent.	5 per cent.	6 per cent.	7 per cent.
90	2.499	2.41621	2.33879	2.26601	2.198
91	2.481	2.39835	2.32108	2.24838	2.180
92	2.577	2.49199	2.41199	2.33660	2.266
93	2.687	2.59955	2.51749	2.43999	2.367
94	2.736	2.64976	2.56854	2.49163	2.419
95	2.757	2.67433	2.59595	2.52151	2.451
96	2.704	2.62779	2.55532	2.48626	2.420
97	2.559	2.49204	2.42839	2.36750	2.309
98	2.388	2.33222	2.27833	2.22656	2.177
99	2.131	2.08700	2.04468	2.00383	1.964
100	1.683	1.65282	1.62400	1.59608	1.569
101	1.228	1.21005	1.19240	1.17523	1.159
102	0.771	0.76183	0.75283	0.74404	0.735
103	0.324	0.32051	0.31746	0.31447	0.312

§ 2140. Dower and life annuity table based upon American table.

The following table is founded upon the American table of mortality. The method of calculation to ascertain dower, etc., is similar to that given under the Carlisle table. The American table of mortality gives a longer expectation of life than the Carlisle table, and therefore a higher present value to an annuity or dower interest:

Age.	3 per cent.	3½ per cent.	4 per cent.	4½ per cent.	6 per cent.
10	24.343	22.225	20.414	18.855	15.293
11	24.225	22.134	20.343	18.800	15.265
12	24.102	22.039	20.269	18.741	15.236
13	23.976	21.941	20.192	18.681	15.204
14	23.846	21.839	20.112	18.617	15.171
15	23.712	21.733	20.028	18.551	15.137
16	23.573	21.624	19.942	18.482	15.100
17	23.430	21.511	19.851	18.409	15.062
18	23.282	21.393	19.757	18.334	15.021
19	23.129	21.271	19.660	18.255	14.978
20	22.971	21.144	19.558	18.173	14.932
21	22.808	21.013	19.452	18.086	14.885
22	22.640	20.878	19.342	17.997	14.834
23	22.467	20.737	19.228	17.903	14.781
24	22.289	20.592	19.109	17.805	14.725
25	22.104	20.44[illegible]	18.985	17.704	14.666
26	21.914	20.286	18.857	17.597	14.604

Age.	3 per cent.	3½ per cent.	4 per cent.	4½ per cent.	6 per cent.
27	21.718	20.124	18.723	17.486	14.538
28	21.516	19.957	18.585	17.370	14.469
29	21.308	19.784	18.440	17.250	14.396
30	21.093	19.605	18.291	17.124	14.320
31	20.872	19.420	18.135	16.993	14.239
32	20.643	19.229	17.973	16.856	14.154
33	20.408	19.030	17.806	16.713	14.064
34	20.166	18.826	17.632	16.565	13.969
35	19.917	18.614	17.451	16.410	13.870
36	19.661	18.395	17.263	16.249	13.765
37	19.397	18.169	17.069	16.081	13.655
38	19.125	17.935	16.868	15.907	13.540
39	18.846	17.695	16.659	15.725	13.418
40	18.560	17.446	16.443	15.537	13.291
41	18.265	17.190	16.220	15.341	13.157
42	17.963	16.926	15.988	15.138	13.017
43	17.653	16.654	15.749	14.927	12.870
44	17.335	16.374	15.502	14.709	12.716
45	17.009	16.087	15.248	14.483	12.555
46	16.676	15.791	14.985	14.248	12.38.
47	16.335	15.488	14.714	14.006	12.211
48	15.987	15.177	14.436	13.757	12.028
49	15.632	14.859	14.151	13.500	11.838
50	15.271	14.535	13.858	13.236	11.640
51	14.904	14.204	13.559	12.965	11.436
52	14.533	13.868	13.255	12.688	11.226
53	14.157	13.526	12.944	12.405	11.009
54	13.776	13.180	12.628	12.116	10.786
55	13.393	12.830	12.307	11.822	10.556
56	13.006	12.475	11.982	11.523	10.321
57	12.617	12.118	11.653	11.219	10.081
58	12.227	11.758	11.321	10.912	9.836
59	11.835	11.396	10.985	10.601	9.586
60	11.443	11.032	10.648	10.288	9.332
61	11.051	10.668	10.309	9.972	9.074
62	10.660	10.304	9.969	9.654	8.813
63	10.272	9.941	9.630	9.336	8.549
64	9.885	9.579	9.290	9.017	8.283
65	9.502	9.219	8.952	8.699	8.016
66	9.123	8.863	8.616	8.381	7.747
67	8.749	8.510	8.282	8.066	7.479
68	8.381	8.161	7.952	7.754	7.212
69	8.020	7.819	7.627	7.445	6.945
70	7.665	7.482	7.307	7.140	6.681
71	7.319	7.152	6.993	6.840	6.420
72	6.981	6.830	6.685	6.546	6.163
73	6.651	6.514	6.383	6.257	5.908
74	6.328	6.205	6.086	5.972	5.656

Age.	3 per cent.	3½ per cent.	4 per cent.	4½ per cent.	6 per cent.
75	6.011	5.900	5.794	5.691	5.406
76	5.699	5.600	5.505	5.413	5.157
77	5.391	5.304	5.219	5.138	4.908
78	5.088	5.011	4.936	4.864	4.660
79	4.790	4.722	4.656	4.593	4.413
80	4.496	4.437	4.380	4.324	4.167
81	4.208	4.158	4.108	4.060	3.924
82	3.928	3.884	3.842	3.801	3.683
83	3.652	3.615	3.580	3.545	3.445
84	3.379	3.348	3.318	3.289	3.205
85	3.107	3.082	3.057	3.033	2.964
86	2.839	2.819	2.799	2.780	2.724
87	2.579	2.563	2.548	2.532	2.488
88	2.334	2.322	2.310	2.298	2.263
89	2.103	2.094	2.085	2.076	2.050
90	1.880	1.874	1.867	1.861	1.842
91	1.662	1.658	1.654	1.649	1.637
92	1.459	1.457	1.454	1.451	1.443
93	1.294	1.292	1.291	1.289	1.285
94	1.139	1.138	1.137	1.137	1.135
95	1.000	1.000	1.000	1.000	1.000

§ 2141. Calculation of contingent dower.

Our Supreme Court has declared that the contingent right of a wife during her husband's life to be endowed of his real estate at his death is property having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively.[13] It will therefore be very proper to insert a table upon which the calculation is usually to be made. This table is prepared, I have no doubt, upon the assumption that both parties are in a state of reasonable good health. If either one was an invalid whose chance of life was very materially lessened, that matter should be taken into account. Following this table for determining the contingent dower right is a table giving the general expectation of life. This might be of some aid where parties for some physical reason were not possessed

[13] Mandel vs. McCave, 46 O. S. 407; Unger vs. Liter, 32 O. S. 210; Moerlein Brewing Co. vs. Westmeier, 4 C. C. 296, 2 C. D. 668.

of the ordinary expectation of life. The following table is a table prepared by Mr. Bowditch, and is found in 2nd Scribner on Dower, sec. 820, and Giauque & McClure's Present Value Tables, sec. 182. Some years are omitted, but enough are given to enable a reasonable safe calculation to be made. In using the table, the age of the wife will be found at the side, and the husband at the top, where they meet, will be the present value of the dower right in an estate worth one hundred dollars. Thus, if the age of the husband is 50, and that of the wife 32, the present value of the dower on one hundred dollars is $6.70. So that if the estate be worth $10,000, the present value of the dower right would be $670.[14]

[14] The Bowditch table has been referred to with approval by our Supreme Court. Black vs. Kuhlman, 30 O. S. 200. This table is based upon the Carlisle table, and interest at 6 per cent. It will be observed that only alternate years are used from the ages of sixteen to ninety. The table was prepared by J. Ingersoll Bowditch, a self-educated New England mariner and mathematician. For all general purposes the above table could be used, but if a greater degree of accuracy is desired, Giauque & McClure's present value tables from page 21 to 138 should be consulted, where calculation is given, based upon the Carlisle table, and giving various rates of per cent. as well as each year of life of husband or wife.

Table may be used for ascertaining value of alimony, etc.

Tate vs. Tate, 19 C. C. 532, 10 C. D. 321.

§ 2142. Contingent dower table.

AGE OF HUSBAND.

AGE OF WIFE	22	26	30	32	34	36	38	40	42	44
16	3.68	4.10	4.58	4.85	5.14	5.43	5.73	6.06	6.42	6.81
18	3.57	3.99	4.51	4.76	5.03	5.29	5.65	5.99	6.35	6.73
20	3.45	3.88	4.38	4.64	4.92	5.15	5.49	5.86	6.22	6.60
22	3.33	3.77	4.25	4.46	4.74	5.00	5.33	5.69	6.03	6.43
24	3.23	3.65	4.11	4.32	4.57	4.85	5.17	5.52	5.85	6.18
26	3.12	3.53	3.97	4.18	4.42	4.70	5.01	5.35	5.66	5.98
28	3.01	3.41	3.83	4.03	4.26	4.54	4.84	5.17	5.47	5.78
30	2.90	3.28	3.69	3.88	4.10	4.38	4.66	4.99	5.28	5.58
32	2.79	3.15	3.55	3.73	3.94	4.21	4.48	4.80	5.09	5.38
34	2.68	3.02	3.40	3.57	3.78	4.03	4.30	4.60	4.88	5.17
36	2.56	2.89	3.25	3.41	3.61	3.85	4.11	4.40	4.66	4.94
38	2.44	2.76	3.10	3.25	3.44	3.67	3.92	4.19	4.44	4.70
40	2.32	2.62	2.95	3.09	3.27	3.49	3.72	3.98	4.22	4.46
42	2.20	2.48	2.79	2.93	3.10	3.30	3.52	3.76	3.99	4.22
44	2.07	2.34	2.63	2.76	2.92	3.11	3.32	3.54	3.75	3.98
46	1.94	2.21	2.47	2.59	2.73	2.92	3.12	3.32	3.50	3.71
48	1.85	2.10	2.31	2.42	2.54	2.76	2.91	3.10	3.25	3.44
50	1.71	1.92	2.15	2.24	2.35	2.56	2.71	2.87	3.00	3.17
52	1.54	1.74	1.95	2.06	2.18	2.31	2.45	2.60	2.76	2.90
54	1.40	1.58	1.77	1.87	1.97	2.08	2.21	2.34	2.48	2.63
56	1.30	1.44	1.61	1.70	1.79	1.89	1.99	2.10	2.22	2.35
58	1.17	1.32	1.48	1.56	1.64	1.72	1.81	1.90	2.00	2.11
60	1.03	1.17	1.32	1.40	1.48	1.56	1.65	1.74	1.84	1.95
62	0.91	1.03	1.16	1.23	1.30	1.37	1.45	1.54	1.63	1.73
64	0.82	0.92	1.03	1.09	1.16	1.23	1.30	1.37	1.44	1.51
66	0.74	0.82	0.92	0.97	1.02	1.08	1.13	1.19	1.25	1.31
68	0.65	0.73	0.82	0.86	0.91	0.96	1.01	1.06	1.10	1.15
70	0.54	0.62	0.70	0.74	0.78	0.83	0.87	0.92	0.97	1.02
72	0.44	0.50	0.57	0.61	0.65	0.69	0.73	0.77	0.81	0.85
74	0.38	0.43	0.49	0.52	0.55	0.58	0.61	0.64	0.68	0.71
76	0.35	0.38	0.42	0.45	0.48	0.51	0.53	0.56	0.58	0.60
78	0.30	0.34	0.38	0.40	0.43	0.45	0.47	0.49	0.50	0.52
80	0.24	0.28	0.32	0.34	0.36	0.38	0.41	0.43	0.44	0.46
82	0.20	0.22	0.25	0.27	0.29	0.32	0.34	0.36	0.38	0.40
84	0.17	0.18	0.21	0.23	0.24	0.25	0.27	0.29	0.30	0.32
86	0.14	0.16	0.18	0.19	0.20	0.21	0.22	0.23	0.25	0.26
88	0.13	0.15	0.17	0.18	0.19	0.20	0.21	0.21	0.22	0.22
90	0.11	0.13	0.15	0.16	0.17	0.18	0.19	0.20	0.21	0.21

AGE OF HUSBAND.

AGE OF WIFE.	46	48	50	52	54	56	58	60	62	64
16	7.25	7.74	8.42	9.18	9.93	10.69	11.62	12.48	13.20	13.86
18	7.08	7.57	8.21	8.96	9.71	10.51	11.40	12.24	12.96	13.63
20	6.90	7.38	8.00	8.74	9.49	10.30	11.18	12.03	12.72	13.40
22	6.72	7.19	7.79	8.52	9.27	10.09	10.95	11.80	12.48	13.17
24	6.54	6.99	7.58	8.30	9.05	9.86	10.71	11.56	12.23	12.94
26	6.36	6.79	7.37	8.08	8.83	9.62	10.47	11.30	11.97	12.69
28	6.17	6.59	7.15	7.85	8.60	9.37	10.22	11.03	11.70	12.42
30	5.96	6.38	6.93	7.61	8.35	9.11	9.96	10.75	11.42	12.13
32	5.74	6.16	6.70	7.36	8.08	8.84	9.69	10.46	11.13	11.82
34	5.51	5.92	6.45	7.10	7.80	8.56	9.40	10.15	10.82	11.50
36	5.26	5.66	6.18	6.83	7.51	8.26	9.08	9.82	10.49	11.16
38	5.00	5.39	5.90	6.53	7.21	7.95	8.75	9.48	10.13	10.80
40	4.74	5.11	5.61	6.22	6.89	7.62	8.41	9.13	9.76	10.42
42	4.48	4.83	5.31	5.90	6.56	7.27	8.04	8.76	9.37	10.02
44	4.22	4.55	4.99	5.57	6.21	6.91	7.65	8.37	8.96	9.60
46	3.96	4.26	4.67	5.22	5.84	6.53	7.25	7.95	8.52	9.15
48	3.71	3.97	4.35	4.85	5.45	6.10	6.84	7.49	8.04	8.66
50	3.49	3.75	4.03	4.48	5.05	5.64	6.17	7.01	7.52	8.12
52	3.18	3.46	3.78	4.12	4.63	5.22	5.56	6.22	6.97	7.54
54	2.81	3.05	3.37	3.77	4.21	4.78	5.18	5.72	6.30	6.92
56	2.50	2.72	3.00	3.36	3.80	4.30	4.81	5.33	5.85	6.37
58	2.24	2.39	2.59	2.87	3.27	3.79	4.30	4.96	5.40	6.00
60	2.07	2.20	2.35	2.57	2.89	3.31	3.83	4.41	4.95	5.47
62	1.85	1.99	2.17	2.38	2.64	2.97	3.36	3.82	4.33	4.87
64	1.61	1.75	1.93	2.15	2.41	2.70	3.03	3.39	3.78	4.22
66	1.37	1.47	1.63	1.85	2.12	2.43	2.74	3.06	3.39	3.74
68	1.20	1.25	1.36	1.54	1.79	2.09	2.44	2.77	3.07	3.38
70	1.07	1.12	1.17	1.27	1.43	1.67	1.98	2.36	2.70	3.01
72	0.90	0.96	1.03	1.11	1.22	1.36	1.57	1.85	2.17	2.50
74	0.75	0.86	0.89	0.93	1.08	1.20	1.35	1.54	1.77	2.03
76	0.63	0.67	0.73	0.82	0.94	1.09	1.25	1.42	1.59	1.76
78	0.53	0.55	0.60	0.68	0.79	0.94	1.12	1.29	1.45	1.60
80	0.47	0.48	0.50	0.55	0.64	0.77	0.94	1.10	1.26	1.41
82	0.41	0.43	0.45	0.47	0.52	0.60	0.71	0.84	1.00	1.16
84	0.34	0.37	0.40	0.42	0.45	0.50	0.58	0.68	0.79	0.90
86	0.27	0.29	0.32	0.36	0.40	0.45	0.51	0.58	0.66	0.74
88	0.23	0.24	0.26	0.30	0.35	0.41	0.48	0.55	0.62	0.69
90	0.22	0.22	0.23	0.25	0.29	0.35	0.42	0.51	0.60	0.68

AGE OF HUSBAND.

AGE OF WIFE.	66	68	70	72	74	76	80	84
16	14.67	15.63	16.62	17.74	18.53	19.27	20.78	22.10
18	14.45	15.39	16.41	17.51	18.31	19.03	20.48	21.86
20	14.22	15.15	16.18	17.26	18.08	18.78	20.18	21.62
22	13.98	14.90	15.93	16.99	17.85	18.56	19.87	21.34
24	13.73	14.63	15.66	16.74	17.60	18.25	19.57	21.05
26	13.46	14.35	15.37	16.46	17.34	17.96	19.26	20.77
28	13.18	14.05	15.06	16.15	17.06	17.66	18.96	20.47
30	12.88	13.74	14.74	15.82	16.75	17.34	18.65	20.14
32	12.57	13.42	14.41	15.48	16.40	17.00	18.32	19.78
34	12.25	13.09	14.07	15.12	16.01	16.65	17.96	19.39
36	11.92	12.75	13.71	14.74	15.62	16.28	17.57	19.00
38	11.57	12.39	13.33	14.34	15.22	15.89	17.15	18.59
40	11.19	12.00	12.93	13.93	14.80	15.47	16.72	18.16
42	10.78	11.58	12.50	13.52	14.47	15.03	16.26	17.70
44	10.34	11.13	12.04	13.08	13.92	14.56	15.76	17.22
46	9.87	10.65	11.54	12.59	13.52	14.06	15.22	16.70
48	9.37	10.15	11.00	12.03	12.72	13.50	14.65	16.10
50	8.83	9.61	10.43	11.39	11.90	12.87	14.05	15.41
52	8.24	9.02	9.82	10.68	11.27	12.16	13.32	14.63
54	7.59	8.37	9.18	9.97	10.72	11.37	12.81	13.77
56	6.89	7.68	8.48	9.26	9.62	10.50	12.01	13.12
58	6.46	6.89	7.77	8.56	8.64	9.37	10.90	12.06
60	5.98	6.48	6.98	7.85	8.08	8.69	9.99	11.23
62	5.43	6.00	6.57	7.15	7.72	8.28	9.36	10.37
64	4.71	5.25	5.84	6.47	7.14	7.76	8.84	9.70
66	4.12	4.55	5.04	5.60	6.22	6.88	8.05	9.02
68	3.69	4.02	4.39	4.82	5.32	4.89	7.08	8.08
70	3.32	3.65	3.94	4.27	4.65	5.09	6.15	7.12
72	2.84	3.18	3.53	3.88	4.24	4.61	5.38	6.23
74	2.33	2.67	3.05	3.43	3.77	4.11	4.80	5.49
76	1.94	2.16	2.43	2.76	3.15	3.60	4.35	5.03
78	1.75	1.90	2.08	2.31	2.51	2.98	3.78	4.46
80	1.56	1.71	1.87	2.06	2.28	2.54	3.20	3.85
82	1.33	1.50	1.68	1.87	2.07	2.29	2.75	3.28
84	1.03	1.18	1.36	1.57	1.81	2.04	2.45	2.80
86	0.83	0.94	1.08	1.25	1.44	1.66	2.09	2.48
88	0.76	0.83	0.92	1.04	1.20	1.39	1.79	2.17
90	0.75	0.81	0.87	0.96	1.08	1.23	1.57	1.92

§ 2143. Expectation of life table.

Table of expectancy of life, as shown by the following tables of mortality.[14*]

Age	Carlisle	Combined or Seventeen Offices' Experience	American Experience	Thirty Offices' Experience		Farr No. 3		Northampton
				Males	Females	Males	Females	
1	44.68	.....	.....	.....	.....	46.65	47.31	32.74
2	47.55	.....	.....	.....	.....	48.83	49.40	37.79
3	49.82	.....	.....	.....	.....	49.61	50.20	39.55
4	50.76	.....	.....	.....	.....	49.81	50.43	40.58
5	51.25	.....	.....	.....	.....	49.71	50.33	40.84
6	51.17	.....	....	.....	.....	49.39	50.00	41.07
7	50.80	.....	.....	.....	.....	48.92	49.53	41.03
8	50.24	.....	.....	.....	.....	48.37	48.98	40.79
9	49.57	.....	.....	.....	.....	47.74	48.35	40.36
10	48.82	48.36	48.72	49.99	48.05	47.05	47.67	39.78
11	48.04	47.68	48.08	49.32	47.21	46.31	46.95	39.14
12	47.27	47.01	47.44	48.64	46.40	45.54	46.20	38.49
13	46.51	46.33	46.82	47.95	46.64	44.76	45.44	37.83
14	45.75	45.64	46.16	47.26	44.91	43.97	44.66	37.17
15	45.00	44.96	45.50	46.57	44.19	43.18	43.90	36.51
16	44.27	44.27	44.85	45.88	43.48	42.40	43.14	35.85
17	43.57	43.58	44.19	45.18	42.79	41.60	42.40	35.20
18	42.87	42.88	43.53	44.48	42.12	40.90	41.67	34.58
19	42.17	42.19	42.87	43.78	41.46	40.17	40.97	33.99
20	41.46	41.49	42.20	43.07	40.82	39.48	40.29	33.43
21	40.75	40.79	41.53	42.36	40.19	38.80	39.63	32.90
22	40.04	40.09	40.85	41.65	39.56	38.13	38.98	32.39
23	39.31	39.39	40.17	40.93	38.96	37.46	38.33	31.88
24	38.59	38.68	39.49	40.21	38.38	36.79	37.68	31.36
25	37.86	37.98	38.81	39.49	37.80	36.12	37.04	30.85
26	37.14	37.27	38.11	38.77	37.23	35.44	36.39	30.33
27	36.41	36.56	37.43	38.04	36.66	34.77	35.75	29.82
28	35.69	35.86	36.73	37.31	36.08	34.10	35.10	29.30
29	35.00	35.15	36.03	36.58	35.49	33.43	34.46	28.79
30	34.34	34.43	35.33	35.85	34.89	32.76	33.81	28.27
31	33.68	33.72	34.62	35.12	34.29	32.09	33.17	27.76
32	33.03	33.01	33.92	34.38	33.69	31.42	32.53	27.24
33	32.36	32.30	33.21	33.65	33.06	30.74	31.88	26.72
34	31.68	31.58	32.50	32.91	32.42	30.07	31.23	26.20
35	31.00	30.87	31.78	32.17	31.78	29.40	30.59	25.68
36	30.32	30.15	31.07	31.43	31.13	28.73	29.94	25.16
37	29.64	29.44	30.35	30.70	30.47	28.06	29.29	24.64
38	28.96	28.72	29.62	29.96	29.81	27.39	28.64	24.12

[14*] This table is taken from Glauque & McClure's Present Value Tables, etc. In actions for damages for wrongful death, etc., Courts do not permit life annuity tables to be given in evidence to determine the probable present value of decedent's earnings, but tables of expectancy of life may be introduced in evidence and considered in estimating the amount of damages recoverable in such suits. Wasmer vs. Rawlin, 46 Bull. 147; 64 O. S. 585.

See 55 Gen. Law J. 101 (1902), for cases on this subject.

See cases cited in Glauque & McClure's tables, pages 8, 184, 185, 186, 187, 190.

Age	Carlisle	Combined or Seventeen Offices' Experience	American Experience	Thirty Offices' Experience		Farr No. 3		Northampton
				Males	Females	Males	Females	
39	28.28	28.00	28.90	29.22	29.16	26.72	27.99	23.60
40	27.61	27.28	28.18	28.48	28.48	26.06	27.34	23.08
41	26.97	26.56	27.45	27.75	27.82	25.39	26.69	22.56
42	26.34	25.84	26.72	27.01	27.15	24.73	26.03	22.04
43	25.71	25.12	25.99	26.28	26.45	24.07	25.38	21.54
44	25.09	24.40	25.27	25.55	25.74	23.41	24.72	21.03
45	24.46	23.69	24.54	24.82	25.02	22.76	24.06	20.52
46	23.82	22.97	23.80	24.09	24.30	22.11	23.40	20.02
47	23.17	22.27	23.08	23.38	23.57	21.46	22.74	19.51
48	22.50	21.56	22.36	22.66	22.83	20.82	22.08	19.00
49	21.81	20.87	21.63	21.95	22.08	20.17	21.42	18.49
50	21.11	20.18	20.91	21.24	21.33	19.54	20.75	17.99
51	20.39	19.50	20.20	20.54	20.59	18.90	20.09	17.50
52	19.68	18.82	19.49	19.84	19.87	18.28	19.42	17.02
53	18.97	18.16	18.79	19.15	19.15	17.67	18.75	16.54
54	18.28	17.50	18.09	18.47	18.44	17.06	18.08	16.06
55	17.58	16.86	17.40	17.80	17.73	16.45	17.43	15.58
56	16.89	16.22	16.72	17.13	17.03	15.86	16.79	15.10
57	16.21	15.59	16.05	16.47	16.35	15.26	16.17	14.63
58	15.55	14.97	15.39	15.83	15.67	14.68	15.55	14.15
59	14.92	14.37	14.74	15.19	15.02	14.10	14.94	13.68
60	14.34	13.77	14.09	14.56	14.37	13.53	14.34	13.21
61	13.82	13.18	13.47	13.94	13.73	12.96	13.75	12.75
62	13.31	12.61	12.86	13.34	13.10	12.41	13.17	12.28
63	12.81	12.05	12.26	12.74	12.49	11.87	12.60	11.81
64	12.30	11.51	11.68	12.16	11.90	11.34	12.05	11.35
65	11.79	10.97	11.10	11.60	11.31	10.82	11.51	10.88
66	11.27	10.46	10.54	11.04	10.74	10.32	10.98	10.42
67	10.75	9.96	10.00	10.50	10.19	9.83	10.47	9.96
68	10.23	9.47	9.48	9.97	9.65	9.36	9.97	9.50
69	9.70	9.00	8.98	9.46	9.13	8.90	9.48	9.05
70	9.18	8.54	8.48	8.97	8.62	8.45	9.02	8.60
71	8.65	8.10	8.00	8.49	8.13	8.03	8.57	8.17
72	8.16	7.67	7.54	8.02	7.65	7.62	8.13	7.74
73	7.72	7.26	7.10	7.57	7.20	7.22	7.71	7.33
74	7.33	6.86	6.68	7.14	6.76	6.85	7.31	6.92
75	7.01	6.48	6.28	6.72	6.34	6.49	6.93	6.54
76	6.69	6.11	5.88	6.32	5.93	6.15	6.56	6.18
77	6.40	5.76	5.48	5.93	5.55	5.82	6.21	5.83
78	6.12	5.42	5.10	5.57	5.18	5.51	5.88	5.48
79	5.80	5.09	4.74	5.21	4.82	5.21	5.56	5.11
80	5.51	4.78	4.38	4.87	4.49	4.93	5.26	4.75
81	5.21	4.48	4.04	4.55	4.17	4.66	4.98	4.41
82	4.93	4.18	3.71	4.24	3.88	4.41	4.71	4.09
83	4.65	3.90	3.39	3.95	3.59	4.17	4.45	3.80
84	4.39	3.63	3.08	3.67	3.33	3.95	4.21	3.58
85	4.12	3.36	2.77	3.40	3.08	3.73	3.98	3.37
86	3.90	3.10	2.47	3.14	2.84	3.53	3.76	3.19
87	3.71	2.84	2.19	2.89	2.62	3.34	3.56	3.01
88	3.59	2.59	1.91	2.64	2.42	3.16	3.36	2.86
89	3.47	2.35	1.66	2.39	2.33	3.00	3.18	2.66
90	3.28	2.11	1.42	2.17	2.05	2.84	3.01	2.41
91	3.26	1.89	1.19	1.98	1.89	2.69	2.85	2.09
92	3.37	1.67	.98	1.81	1.73	2.55	2.70	1.75

Age	Carlisle	Combined or Seventeen Offices' Experience	American Experience	Thirty Offices' Experience		Farr No. 3		Northampton
				Males	Females	Males	Females	
93	3.48	1.47	.80	1.64	1.59	2.41	2.55	1.37
94	3.53	1.28	.64	1.49	1.46	2.29	2.42	1.05
95	3.53	1.12	.50	1.34	1.34	2.17	2.29	.75
96	3.46	.99	.....	1.18	1.23	2.06	2.17	.50
97	3.28	.89	.....	1.03	1.09	1.95	2.06	.....
98	3.07	.75	.....	.83	.93	1.85	1.96	.....
99	2.77	.50	.....	.50	.50	1.76	1.86	.....
100	2.28	.....	.....	.....	.....	1.68	1.76	.....
101	1.79	.....	.....	.....	.....	.....	.....	.....
102	1.30	.....	.....	.....	.....	.....	.....	.....
103	.83	.....	.....	.....	.....	.....	.....	.....
104	.50	.....	.....	.....	.....	.....	.....	.....

§ 2144. Table for ascertaining present value of certain annuity.

The following table is for the purpose of showing the present value of a certain sum, payable annually for a stated period of years, which comes within the definition of a certain annuity. Thus, if by A.'s will, B. is given the sum of $500 annually for a period of 30 years, this would be an annuity certain. If the annuity was given for the life of B., it would be a life annuity; and if the present value of a life annuity was desired, the table for the ascertainment of dower might be used. There is a difference between the present value of an annuity which ceases upon a certain person's death and one which terminates in a certain number of years. Thus, if a person of the age of 35 years has granted to him an annuity for 31 years, the present value of $1.00 at six per cent. would be $13.93. If the same person had given to them an annuity for life, such person would have an expectation of life of 31 years by the Carlisle table, yet the present value of $1.00 for the life annuity would be $12.57.[15]

[15] See Glauque & McClure's Present Value Tables, 4, where this matter is explained. Here it is said "Many persons, with but an imperfect knowledge of the subject, erroneously suppose that the value of a vested dower or curtesy is found by calculating the value of an annuity certain for a number of years equal to the expectation of life of the widow or widower. This, however, is by no means the case, as is well known to actuaries and those who have more carefully in-

The following table might also be used to ascertain the amount of damages to be properly awarded for death or permanent injury. Where by death of such party the family was deprived of a known and fixed amount of earnings for a definite number of years. The table, however, for that purpose would not be absolutely reliable. Allowance would neeed be made for sickness and other contingencies that might deprive the person of his ability to continue in such services.[16]

Rule for Finding Present Value.— Multiply the number of dollars per year of such annuity or sum by the amount found in both the column of the adopted rate per cent. and to the right of the number of years, in the "Years" column, which indicates the time the annuity has to run. For instance: If a person (or his heirs, etc., in case of his death) is to receive an annuity certain, or other net income, etc., of $500 per year for 33 years, its present value, at six per cent., would be found by multiplying 14.2302, found in the "6 per cent." column, opposite "33" in the "Years" column, by 500, which would be $7,115.10. Three hundred dollars per year for 15 years would be, at four per cent., $300 \times 11.1184 = \$3,335.52$.[17]

vestigated the methods of computing life annuities. Indeed, the number of years given as the expectation is not used in computing a life annuity at all. For example, suppose the value of a widow's dower to be $100 and her age 30. To find the present value of her dower, first the present value of $100 due one year hence is found and multiplied by the chance of the widow's living one year; then the present value of $100, due in two years, is found and multiplied by the chance of her living two years; and finding in the same manner the present value of each year's payment to the extremity of human life, which, according to the Carlisle Table, is 104 years; the sum of all these present values is the present value of the annuity."

[16] In such cases the mortality tables are admissible to show the expectation of life. Wasner v. Rawlins, 46 Bull. 147, reported in full, 64 O. S. 585, without report.

See 8 Am. & Eng. Ency. of Law, 2nd ed., 947, 940, and cases cited in Giauque & McClure's Present Value Tables, 184 *et seq.*

[17] See Giauque & McClure's Present Value Tables, 196, for same table.

Yrs.	2 per ct	2½ per ct	3 per ct	3½ per ct	4 per ct	4½ per ct
1	.9804	.9756	.9709	.9662	.9615	.9569
2	1.9416	1.9274	1.9135	1.8997	1.8861	1.8727
3	2.8839	2.8560	2.8286	2.8016	2.7751	2.7490
4	3.8077	3.7620	3.7171	3.6731	3.6299	3.5875
5	4.7135	4.6458	4.5797	4.5151	4.4518	4.3900
6	5.6014	5.5081	5.4172	5.3286	5.2421	5.1579
7	6.4720	6.3494	6.2303	6.1145	6.0021	5.8927
8	7.3255	7.1701	7.0197	6.8740	6.7327	6.5959
9	8.1622	7.9709	7.7861	7.6077	7.4353	7.2688
10	8.9826	8.7521	8.5302	8.3166	8.1109	7.9127
11	9.7868	9.5142	9.2526	9.0016	8.7605	8.5289
12	10.5753	10.2578	9.9540	9.6633	9.3851	9.1186
13	11.3484	10.9832	10.6350	10.3027	9.9856	9.6829
14	12.1062	11.6909	11.2961	10.9205	10.5631	10.2228
15	12.8493	12.3814	11.9379	11.5174	11.1184	10.7395
16	13.5777	13.0550	12.5611	12.0941	11.6523	11.2340
17	14.2919	13.7122	13.1661	12.6513	12.1657	11.7072
18	14.9920	14.3534	13.7535	13.1897	12.6593	12.1600
19	15.6785	14.9789	14.3238	13.7098	13.1339	12.5933
20	16.3514	15.5892	14.8775	14.2124	13.5903	13.0079
21	17.0112	16.1845	15.4150	14.6980	14.0292	13.4047
22	17.6580	16.7654	15.9369	15.1671	14.4511	13.7844
23	18.2922	17.3321	16.4436	15.6204	14.8568	14.1478
24	18.9139	17.8850	16.9355	16.0584	15.2470	14.4955
25	19.5235	18.4244	17.4131	16.4815	15.6221	14.8282
26	20.1210	18.9506	17.8768	16.8904	15.9828	15.1466
27	20.7069	19.4640	18.3270	17.2854	16.3296	15.4513
28	21.2813	19.4649	18.7641	17.6670	16.6631	15.7429
29	21.8444	20.4536	19.1885	18.0358	16.9837	16.0219
30	22.3965	20.9303	19.6004	18.3920	17.2920	16.2889
31	22.9377	21.3954	20.0004	18.7363	17.5885	16.5444
32	23.4683	21.8492	20.3888	19.0689	17.8736	16.7889
33	23.9886	22.2919	20.7658	19.3902	18.1476	17.0229
34	24.4986	22.7238	21.1318	19.7007	18.4112	17.2468
35	24.9986	23.1452	21.4872	20.0007	18.6646	17.4610
36	25.4888	23.5563	21.8323	20.2905	18.9083	17.6660
37	25.9695	23.9573	22.1672	20.5705	19.1426	17.8622
38	26.4406	24.3486	22.4925	20.8411	19.3679	18.0500
39	26.9026	24.7303	22.8082	21.1025	19.5845	18.2297
40	27.3555	25.1028	23.1148	21.3551	19.7928	18.4016
41	27.7995	25.4661	23.4124	21.5991	19.9931	18.5661
42	28.2348	25.8206	23.7014	21.8349	20.1856	18.7235
43	28.6616	26.1664	23.9819	22.0627	20.3708	18.8742
44	29.0800	26.5038	24.2543	22.2828	20.5488	19.0184
45	29.4902	26.8330	24.5187	22.4954	20.7200	19.1563
46	29.8923	27.1542	24.7754	22.7009	20.8847	19.2884
47	30.2866	27.4675	25.0247	22.8994	21.0429	19.4147
48	30.6731	27.7732	25.2667	23.0912	21.1951	19.5356

Yrs.	2 per ct	2½ per ct	3 per ct	3½ per ct	4 per ct	4½ per ct
49	31.0521	28.0714	25.5017	23.2766	21.3415	19.6513
50	31.4236	28.3623	25.7298	23.4556	21.4822	19.7620
51	31.7878	28.6462	25.9512	23.6286	21.6175	19.8679
52	32.1450	28.9231	26.1662	23.7958	21.7476	19.9693
53	32.4950	29.1932	26.3750	23.9573	21.8727	20.0663
54	32.8383	29.4568	26.5777	24.1133	21.9930	20.1592
55	33.1748	29.7140	26.7744	24.2641	22.1086	20.2480
56	33.5047	29.9649	26.9655	24.4097	22.2198	20.3330
57	33.8281	30.2096	27.1509	24.5504	22.3267	20.4144
58	34.1452	30.4484	27.3310	24.6864	22.4296	20.4922
59	34.4561	30.6814	27.5058	24.8178	22.5284	20.5667
60	34.7609	30.9087	27.6756	24.9447	22.6235	20.6380
61	35.0597	31.1304	27.8404	25.0674	22.7149	20.7062
62	35.3526	31.3467	28.0003	25.1859	22.8028	20.7715
63	35.6398	31.5578	28.1557	25.3004	22.8873	20.8340
64	35.9214	31.7637	28.3065	25.4110	22.9685	20.8938
65	36.1975	31.9646	28.4529	25.5178	23.0467	20.9510
66	36.4681	32.1606	28.5950	25.6211	23.1218	21.0057
67	36.7334	32.3518	28.7330	25.7209	23.1940	21.0581
68	36.9936	32.5383	28.8670	25.8173	23.2635	21.1082
69	37.2486	32.7203	28.9971	25.9104	23.3303	21.1562
70	37.4986	32.8979	29.1234	26.0004	23.3945	21.2021
71	37.7437	33.0711	29.2460	26.0873	23.4563	21.2460
72	37.9841	33.2401	29.3651	26.1713	23.5156	21.2881
73	38.2197	33.4050	29.4807	26.2525	23.5727	21.3283
74	38.4507	33.5658	29.5929	26.3309	23.6276	21.3668
75	38.6771	33.7227	29.7018	26.4067	23.6804	21.4036
76	38.8991	33.8758	29.8076	26.4799	23.7312	21.4389
77	39.1168	34.0252	29.9103	26.5506	23.7800	21.4726
78	39.3302	34.1709	30.0100	26.6190	23.8269	21.5049
79	39.5394	34.3131	30.1068	26.6850	23.8720	21.5358
80	39.7445	34.4518	30.2008	26.7488	23.9154	21.5653

Yrs.	5 per ct.	6 per ct.	7 per ct.	8 per ct.	9 per ct.	10 per ct.
1	.9524	.9434	.9346	.9259	.9174	.9091
2	1.8594	1.8334	1.8080	1.7833	1.7591	1.7355
3	2.7232	2.6730	2.6243	2.5771	2.5313	2.4869
4	3.5460	3.4651	3.3872	3.3121	3.2397	3.1699
5	4.3295	4.2124	4.1002	3.9927	3.8897	3.7908
6	5.0757	4.9173	4.7665	4.6229	4.4859	4.3553
7	5.7864	5.5824	5.3893	5.2064	5.0330	4.8684
8	6.4632	6.2098	5.9713	5.7466	5.5348	5.3349
9	7.1078	6.8017	6.5152	6.2469	5.9952	5.7590
10	7.7217	7.3601	7.0236	6.7101	6.4177	6.1446
11	8.3064	7.8869	7.4987	7.1390	6.8052	6.4951
12	8.8633	8.3838	7.9427	7.5361	7.1607	6.8137

Yrs.	5 per ct.	6 per ct.	7 per ct.	8 per ct.	9 per ct.	10 per ct.
13	9.3936	8.8527	8.3577	7.9038	7.4869	7.1034
14	9.8986	9.2950	8.7455	8.2442	7.7862	7.3667
15	10.3797	9.7122	9.1079	8.5595	8.0607	7.6061
16	10.8378	10.1059	9.4466	8.8514	8.3126	7.8237
17	11.2741	10.4773	9.7632	9.1216	8.5436	8.0216
18	11.6896	10.8276	10.0591	9.3719	8.7556	8.2014
19	12.0853	11.1581	10.3356	9.6036	8.9501	8.3649
20	12.4622	11.4699	10.5940	9.8181	9.1285	8.5136
21	12.8212	11.7641	10.8355	10.0168	9.2922	8.6487
22	13.1630	12.0416	11.0612	10.2007	9.4424	8.7715
23	13.4886	12.3034	11.2722	10.3711	9.5802	8.8832
24	13.7986	12.5504	11.4693	10.5288	9.7066	8.9847
25	14.0939	12.7834	11.6536	10.6748	9.8226	9.0770
26	14.3752	13.0032	11.8258	10.8100	9.9290	9.1609
27	14.6430	13.2105	11.9867	10.9352	10.0266	9.2372
28	14.8981	13.4062	12.1371	11.0511	10.1161	9.3066
29	15.1411	13.5907	12.2777	11.1584	10.1983	9.3696
30	15.3725	13.7648	12.4090	11.2578	10.2737	9.4269
31	15.5928	13.9291	12.5318	11.3498	10.3428	9.4790
32	15.8027	14.0840	12.6466	11.4350	10.4062	9.5264
33	16.0025	14.2302	12.7538	11.5139	10.4644	9.5694
34	16.1929	14.3681	12.8540	11.5869	10.5178	9.6086
35	16.3742	14.4982	12.9477	11.6546	10.5668	9.6442
36	16.5469	14.6210	13.0352	11.7172	10.6118	9.6765
37	16.7113	14.7368	13.1170	11.7752	10.6530	9.7059
38	16.8679	14.8460	13.1935	11.8289	10.6908	9.7327
39	17.0170	14.9491	13.2649	11.8786	10.7255	9.7570
40	17.1591	15.0463	13.3317	11.9246	10.7574	9.7791
41	17.2944	15.1380	13.3941	11.9672	10.7866	9.7991
42	17.4232	15.2245	13.4524	12.0067	10.8134	9.8174
43	17.5459	15.3062	13.5070	12.0432	10.8380	9.8340
44	17.6628	15.3832	13.5579	12.0771	10.8605	9.8491
45	17.7741	15.4558	13.6055	12.1084	10.8812	9.8628
46	17.8801	15.5244	13.6500	12.1374	10.9002	9.8753
47	17.9810	15.5890	13.6916	12.1643	10.9176	9.8866
48	18.0772	15.6500	13.7305	12.1891	10.9336	9.8969
49	18.1687	15.7076	13.7668	12.2122	10.9482	9.9063
50	18.2559	15.7619	13.8007	12.2335	10.9617	9.9148
51	18.3390	15.8131	13.8325	12.2532	10.9740	9.9226
52	18.4181	15.8614	13.8621	12.2715	10.9853	9.9296
53	18.4934	15.9070	13.8898	12.2884	10.9957	9.9360
54	18.5651	15.9500	13.9157	12.3041	11.0053	9.9418
55	18.6335	15.9905	13.9399	12.3186	11.0140	9.9471
56	18.6985	16.0288	13.9626	12.3320	11.0220	9.9519
57	18.8607	16.0649	13.9837	12.3445	11.0294	9.9563
58	18.8195	16.0990	14.0035	12.3560	11.0361	9.9603
59	18.8758	16.1311	14.0219	12.3667	11.0423	9.9639
60	18.9293	16.1614	14.0392	12.3766	11.0480	9.9672

Yrs.	5 per ct.	6 per ct.	7 per ct.	8 per ct.	9 per ct.	10 per ct.
61	18.9803	16.1900	14.0553	12.3857	11.0532	9.9701
62	19.0288	16.2170	14.0704	12.3942	11.0580	9.9729
63	19.0751	16.2425	14.0845	12.4020	11.0624	9.9753
64	19.1191	16.2665	14.0976	12.4093	11.0664	9.9776
65	19.1611	16.2891	14.1099	12.4160	11.0701	9.9796
66	19.2010	16.3105	14.1214	12.4222	11.0735	9.9815
67	19.2391	16.3307	14.1322	12.4280	11.0766	9.9831
68	19.2753	16.3497	14.1422	12.4333	11.0794	9.9847
69	19.3098	16.3676	14.1516	12.4382	11.0820	9.9861
70	19.3427	16.3845	14.1604	12.4428	11.0844	9.9873
71	19.3740	16.4005	14.1686	12.4471	11.0866	9.9885
72	19.4038	16.4156	14.1763	12.4510	11.0887	9.9895
73	19.4322	16.4298	14.1834	12.4546	11.0905	9.9905
74	19.4592	16.4432	14.1901	12.4580	11.0922	9.9914
75	19.4850	16.4558	14.1964	12.4611	11.0938	9.9921
76	19.5095	16.4678	14.2022	12.4640	11.0952	9.9929
77	19.5329	16.4790	14.2077	12.4666	11.0965	9.9935
78	19.5551	16.4897	14.2128	12.4691	11.0977	9.9941
79	19.5763	16.4997	14.2175	12.4714	11.0988	9.9946
80	19.1965	16.5091	14.2220	12.4735	11.0998	9.9951

§ 2145. Table for ascertaining present value of a sum certain due and payable at end of a stated number of years.

In the administration of estates, especially in the termination of a trust, it becomes important to ascertain the present value of an amount payable at the end of a certain number of years. Thus A. may by will or deed provide that B. ten years after his death shall be paid a certain sum of money. If no limitations are placed upon this provision, B. and other interested parties consenting, this trust may be terminated and B. paid his legacy at once. If the sum so devised to A. was $5,000, and we desired to find the present value, by looking at the table under the six per cent. column we would find the present value of one dollar to be .5584, and $5,000 would be 5,000 times .5584, which would give 2.792 as its present value. The interest by this table is based upon calculation at a compound rate, and is taken from a calculation made by the Mutual Life Insurance Company of New York.[18]

[18] If it is desired to find the present value of the use of a certain sum during the life of another, the table for ascertaining dower is the one to be used. Thus if B., being thirty-five years of age, had

Yrs.	3 per ct.	3½ per ct.	4 per ct.	4½ per ct.	5 per ct.	6 per ct.
1	.9709	.9692	.9651	.9569	.9524	.9434
2	.9426	.9335	.9246	.9157	.9070	.8900
3	.9151	.9019	.8890	.8763	.8638	.8396
4	.8885	.8714	.8548	.8386	.8227	.7921
5	.8626	.8420	.8219	.8025	.7835	.7473
6	.8375	.8135	.7903	.7679	.7462	.7050
7	.8131	.7860	.7599	.7348	.7107	.6651
8	.7894	.7594	.7307	.7032	.6768	.6274
9	.7664	.7337	.7026	.6729	.6446	.5919
10	.7441	.7089	.6756	.6439	.6139	.5584
11	.7224	.6849	.6496	.6162	.5847	.5268
12	.7014	.6618	.6246	.5897	.5568	.4970
13	.6810	.6394	.6006	.5643	.5303	.4688
14	.6611	.6178	.5775	.5400	.5051	.4423
15	.6419	.5969	.5553	.5167	.4810	.4173
16	.6232	.5767	.5339	.4945	.4581	.3936
17	.6050	.5572	.5134	.4732	.4363	.3714
18	.5874	.5384	.4936	.4528	.4155	.3503
19	.5703	.5202	.4746	.4333	.3957	.3305
20	.5537	.5026	.4564	.4146	.3769	.3118
21	.5375	.4856	.4388	.3968	.3589	.2942
22	.5219	.4692	.4220	.3797	.3419	.2775
23	.5067	.4533	.4057	.3634	.3256	.2618
24	.4919	.4380	.3901	.3477	.3101	.2470
25	.4776	.4231	.3751	.3327	.2953	.2330
26	.4637	.4088	.3607	.3184	.2812	.2198
27	.4502	.3950	.3468	.3047	.2678	.2074
28	.4371	.3817	.3335	.2916	.2551	.1956
29	.4243	.3687	.3206	.2790	.2429	.1846
30	.4120	.3563	.3083	.2670	.2314	.1741
31	.4000	.3442	.2965	2555	.2204	.1643
32	.3883	.3326	.2851	.2445	.2099	.1550
33	.3770	.3213	.2741	.2340	.1999	.1462
34	.3660	.3105	.2636	.2239	.1904	.1379
35	.3554	.3000	.2534	.2143	.1813	.1301
36	.3450	.2898	.2437	.2050	.1727	.1227
37	.3350	.2800	.2343	.1962	.1644	.1158
38	.3252	.2706	.2253	.1878	.1566	.1092
39	.3158	.2614	.2166	.1797	.1491	.1031
40	.3066	.2526	.2083	.1719	.1420	.0972

the use or was entitled to the income of five thousand dollars during his life, the present value would be found by calculating the interest on five thousand dollars for one year at six per cent. (if that rate is the one to be used), which would be three hundred dollars, and then multiply three hundred dollars by (Carlisle table) 12.5731, the amount in the six per cent. column opposite thirty-five years, we would have $3,671.93 as its present value. If present value of an annuity certain is desired the table in the previous section is the one to be used.

Yrs.	3 per ct.	3½ per ct.	4 per ct.	4½ per ct.	5 per ct.	6 per ct.
41	.2976	.2440	.2003	.1645	.1353	.0917
42	.2890	.2358	.1926	.1574	.1288	.0865
43	.2805	.2278	.1852	.1507	.1227	.0816
44	.2724	.2201	.1780	.1442	.1169	.0770
45	.2644	.2127	.1712	.1380	.1113	.0727
46	.2567	.2055	.1646	.1320	.1060	.0685
47	.2493	.1985	.1583	.1263	.1009	.0647
48	.2420	.1918	.1522	.1209	.0961	.0610
49	.2350	.1853	.1463	.1157	.0916	.0575
50	.2281	.1791	.1407	.1107	.0872	.0543

CHAPTER CIX.

JUVENILE COURT.

§ 2147 Nature of court.
§ 2148 Historical.
§ 2149 Object and purpose.
§ 2150 Judge of court.
§ 2151 What courts have jurisdiction (§ 1639).
§ 2152 Designation of judge.
§ 2153 Juvenile Court defined (§ 1639-1).
§ 2154 Seal of court—what court (§ 1640).
§ 2155 Appearance docket and journal (§ 1641).
§ 2156 Jurisdiction of subject matter (§ 1642).
§ 2157 Jurisdiction, comments.
§ 2158 Continuing jurisdiction.
§ 2159 When jurisdiction terminates (§ 1643).
§ 2160 Delinquent child defined (§ 1644).
§ 2161 Who is delinquent child.
§ 2162 Dependent child defined (§ 1645).
§ 2163 Who is dependent child.
§ 2164 Proper parental care defined (§ 1646).
§ 2165 What is not proper parental care.
§ 2166 Who may file complaint (§ 1647).
§ 2167 Procedure. Filing complaint, etc.
§ 2168 Form complaint, child.
§ 2169 Citation, Warrants, etc. (§ 1648).
§ 2170 Citation or Warrant.
§ 2171 Journal entry, entry for hearing, etc.
§ 2172 Form citation to child and custodian.
§ 2173 Form notice to parents.
§ 2174 Service of citation, etc., personally.
§ 2175 Service of notice by publication.
§ 2176 Form of affidavit for.
§ 2177 Journal entry, order for publication.
§ 2178 Form of notice for publication and for sending by mail, when parent, etc., are out of state or residence unknown.
§ 2179 Form Warrant to arrest minors.
§ 2180 Form complaint delinquency.
§ 2181 Warrants to arrest, etc.
§ 2182 Journal entry order for warrant to arrest.
§ 2183 Form warrant to arrest on complaint.
§ 2184 Provisions to avoid incarceration.
§ 2185 Special juvenile court room (§ 1649).
§ 2186 Hearing (§ 1650).
§ 2187 Trial of juvenile.
§ 2188 Trial of adult.
§ 2189 Jury trial; costs, etc. (§ 1651).
§ 2190 Right to jury trial.
§ 2191 Commitment of child (§ 1652).
§ 2192 Commitment of minors, etc.
§ 2193 Examination of physicians (§ 1652-1).
§ 2194 Commitment to institution or suitable person.
§ 2195 Commitment of dependent or neglected child (§ 1653).
§ 2196 Journal entry—placing child, etc.
§ 2197 Journal entry.
§ 2198 Age limitations.
§ 2199 Penalty for abuse or aiding delinquency (§ 1654).
§ 2200 Commitment for causing delinquency.
§ 2201 Journal entry—plea of guilty.
§ 2202 Journal entry—judgment.
§ 2202a Entry—verdict.
§ 2202b Entry—judgment. Trial by jury.
§ 2203 Failure or neglect, etc. (§ 1655).
§ 2204 Form complaint. Abandonment.
§ 2205 Commitment for non-support.
§ 2206 Journal entry—non-support, etc.
§ 2207 Form bond to support.
§ 2208 Sentenced to jail or workhouse.
§ 2209 Journal entry—workhouse.
§ 2210 Provisions in case of workhouse sentence (§ 1656).
§ 2211 Commitment to county jail, etc. (§ 1657).
§ 2212 Citation, etc., on hearing (§ 1658).

§ 2213 Journal entry for arrest.
§ 2214 Form warrant to arrest.
§ 2215 Transfer of case to Juvenile Court (§ 1659).
§ 2216 Child arrested on warrant from Justice of the Peace or Police Court, etc.
§ 2217 Writs to whom issued (§ 1660).
§ 2218 Expense—how paid (§ 1661).
§ 2219 Probation officer—appointment (§ 1662).
§ 2220 Appointment—probation officer.
§ 2221 Form appointment—probation officer.
§ 2222 Form oaths.
§ 2223 Duties and powers of probation officer (§ 1663).
§ 2224 Prosecuting attorneys, duty (§ 1664).
§ 2225 Bail (§ 1665).
§ 2226 Suspension of sentence (§ 1666).
§ 2227 Forfeit of bond (§ 1667).
§ 2228 Error proceedings (§ 1668).
§ 2229 Appeal and error.
§ 2230 Findings, not lawful evidence (§ 1669).
§ 2231 Detention home (§ 1670).
§ 2232 Expense of home (§ 1671).
§ 2233 When child's commitment is temporary (§ 1672).
§ 2234 Commitment temporary or permanent.
§ 2235 Agreement with incorporated institution for care of child (§ 1673).
§ 2236 Agents of institution (§ 1674).
§ 2237 Judge to require report (§ 1675).
§ 2238 Association in other states (§ 1677).
§ 2239 Penalty for violation, etc. (§ 1678).
§ 2240 Religious belief (§ 1679).
§ 2241 How construed as to industrial schools (§ 1680).
§ 2242 When child charged with felony (§ 1681).
§ 2243 Binding over to Court of Common Pleas.
§ 2244 Journal entry—binding to court.
§ 2245 Form recognizance.
§ 2246 Fees and costs, how paid.
§ 2247 Chapter liberally construed (§ 1683).
§ 2248 Jurisdiction additional (§ 1683-1).
§ 2249 Misdemeanors against children.

§ 2147. Nature of.

The Juvenile Court as it exists in Ohio can hardly be said to be a separate and independent court but rather a mere adjunct of the court of which the judge designated to be judge of the Juvenile Court, is a member. The jurisdiction of the Juvenile Court is not that however which belongs to the court of which the judge is a member, but that which is conferred on the Juvenile Court. All the writs are issued in the name of the court of which the judge of the Juvenile Court is a judge. Thus if he is selected from the Common Pleas Court, they would be issued in the name of this court; if from the Probate Court, in the name of that court. It would be well, however, in all such cases, to have added in addition the words "Juvenile Court Division."

The records are kept separately and all matters are concluded the same as if the court was absolutely a separate and independent court. "The provisions of this humane law," says the Illinois court, "are not new in principle; the novelty is in the procedure only. The State has always retained the ultimate

control of minors. The right and duty of the parent primarily to care for and bring up the child, is not exclusive or final. In case the child is abandoned or neglected, or what is worse, its home is unfit for the child, the State has the right and it is its duty to take the child from the parents in order that it may have the chance to grow up into a law abiding citizen. Without the enabling statutes, this right in England and in this country, is invested in Courts of Chancery."[1] Construing our statute it has been said it "is not penal, delinquency not being a crime, but is an administrative police regulation of a corrective character."[2] While our statute punishes the person contributing to the child's misfortune and thus to such person becomes penal in its nature, yet the ultimate object is the welfare of the child.

§ 2148. Historical.

It is generally recognized that the first Juvenile Court in this country was organized in Chicago, Illinois, in 1899. The act providing for this court bears some similarity as to organization of the court, to that of Ohio, in that it provided that the judge to preside therein should be taken from another court and should be designated as the Juvenile Court.[3] There were, however, previous to this time in some of the States, courts somewhat similar in character. Thus Massachusetts in 1883 passed a law providing for children's courts for separate hearing of children's cases. New York followed in 1892, providing in its penal code that children's cases should be heard separate and apart from adults. In far away Australia, South Adelaide, December 20, 1895, a juvenile or children's court was established.

While the idea therefore was not a new one, which the Chicago law established, the satisfactory workings of that court under the able judge who was designated to preside in the court, gave great impetus to the movement for such courts.

Judge Lindsey's work in Denver, Colorado, did very much to awaken the people to the beneficial influence that might be expected from courts of this character. At this time such a court exists in a great majority of the states of our commonwealth, and in the leading foreign nations of the world.

In Ohio the first law was passed in 1902 (95 v. 785), and applied alone to Cuyahoga County, and conferred jurisdiction

[1] *In re* Brown, 117 Ill. App. 335. [2] *In re* Januszewski, 196 Fed. 123; 10 O. L. R. 151.

on the Insolvency Court, and for convenience, provided it might be the "Juvenile Court." This act was amended in 1904 (97 v. 561), providing that Courts of Common Pleas, Probate Courts, Insolvency Courts and Superior Courts might have concurrent jurisdiction, and should designate one of their number as judge, etc. This act was again amended in 1908 (99 v. 192); in 1913 (103 v. 864); in 1914 (104 v. 176); in 1919 (108 v. 260) and in 1920 (108 v. 1130).

§ 2149. Object and purpose.

The object and purpose of the Juvenile Court in being a separate body from the ordinary criminal court is to keep youthful offenders away from the environments of such courts and the criminals who congregate there. Its object and purpose is correctional and educational. It is not punishment except as the same may follow attendant to the betterment of the minor offenders. The child is not regarded as a prisoner, but merely one retained until, the great father, the State, through the court may determine what should be done for his best welfare. The statute is intended to be educational and charitable; thereby the State reaches out and takes hold of those who are bereft of that parental care to which they are by nature entitled.[4] "In a general way," says a Kansas court, "it may be said that the statutes instead of attempting to punish juvenile offenders for misconduct, criminal or otherwise, try to remove them from the path of temptation, and by preventive and corrective means seek to direct them in the paths of rectitude. It is an assertion on the part of the State of the right to exercise its power as *parens patria* for the welfare of such of its minor citizens as are deprived of proper parental control and oversight and are disposed to go wrong."[5]

In another jurisdiction it was said, "such laws are most salutary, and are in no sense criminal and not intended as punishment, but are calculated to save the child from becoming a criminal. The whole and only object of such laws is to provide the child with an environment such as will save him to the State and society as a useful and law abiding citizen and

3 § 3388 Ill. Stats.
4 *Ex parte* Small, 116 Pac. 118.
5 *In re* Turner, 94 Kans. 115; 145 Pac. 870.

give him the educational requirements necessary to attain that end. To effect this purpose some restraint is essential."[6]

"The purpose of this statute is to extend a protecting hand to unfortunate boys and girls who by reason of their own conduct, evil tendencies or improper environments, have proven that the best interests of society, the welfare of the State and their own good, demand that the guardianship of the State be substituted for the natural parents. To accomplish that purpose the statute should be given a broad and liberal construction, but it should not be held to extend to cases where there is merely a difference of opinion as to the best course to pursue in rearing a child. There should be evidence of neglect, abandonment, incapacity, or cruelty on the part of the parent, or that the child is being exposed to immorality or vice."[7]

"I wish to call your attention to one thing, which seems to me to be a grand feature of this juvenile law. It is a wonderful law, gentlemen of the jury. It contemplates wonderful results, and I am glad to say that it has accomplished good. The ordinary way of the world is that, when a man falls, or when a woman falls, to let them go, and if anything, give them a little push down to hell, a little kick to the infernal regions. The juvenile law says: No. It says that the boy or girl, no matter how delinquent, is worth saving; has a soul of commercial value, beyond all estimation; because we are told: 'What shall it profit a man if he shall gain the whole world, and lose his own soul?'

"So that this juvenile law comes to every fallen or delinquent juvenile, and to every bad boy and girl, and says: 'You are worth saving; you are worth the protection of the law, and are worth saving; no matter whether you are already guilty, and stained with guilt through and through; if any man or woman still further offends and further contributes to your delinquency, and still further drags you down towards perdition, he, or she, shall be held amenable to the law.'

"Now, that is the theory of the juvenile law."[8]

§ 2150. Judge of the court.

In order to best administer the Juvenile Court the judge should possess some very high moral and social characteristics. Someone in speaking of the qualifiation necessary for ideal

[6] Mill vs. Brown, 31 Utah 473; 86 Pac. 609.

[7] Lindsay vs. Lindsay, 257 Ill. 328; 45 L. R. A. 908.

[8] J. Brister in State vs. Hawkins, 51 Bull. 166.

Juvenile Court work, said "that the judge should have the magnetism of Moses; the patience of Job; the firmness of Abraham; the wisdom of Solomon and the unselfishness and love of our Lord and Master." In addition it might be said he should be of high moral character and very exemplary habits. The infant mind is very much impressed by what its bright eyes see, and its sharp ears hear, and the judge may rest assured these eyes and ears are always open, looking for what they may see and listening for what they may hear. If the child learns that the judge preaches and teaches that which he does not practice, his influence is gone, and with that particular child he has lost the mission the law placed in his hands.

§ 2151. What courts having powers and jurisdiction. § 1639. Courts of common pleas, probate courts, and insolvency courts and superior courts, where established shall have and exercise, concurrently, the powers and jurisdiction conferred in this chapter. The judges of such courts in each county, at such times as they determine, shall designate one of their number to transact the business arising under such jurisdiction. When the term of the judge so designated expires, or his office terminates, another designation shall be made in like manner.

Procedure in absence of judge. In case of the temporary absence or disability of the judge so designated another designation shall be made in like manner to cover the period of such absence or disability.

Definitions. The words, juvenile court when used in the statutes of Ohio shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words "judge of the juvenile court" or "juvenile judge" as meaning such judge while exercising such jurisdiction.

Jurisdiction in Hamilton county. The foregoing provisions shall not apply to Hamilton county, in which county the powers and jurisdiction conferred in this chapter shall be exercised by the court of common pleas, and in 1914 and every sixth year thereafter, one of the common pleas judges to be elected at said times shall be elected as a judge of the court of common pleas, division of domestic relations. To him shall be assigned all juvenile court work arising under this chapter, and all divorce and alimony cases, and whenever said judge of the court of common pleas, division of domestic relations, shall be sick, absent or unable to perform his duties, the presiding judge of the common pleas court shall assign another common pleas judge to perform his duties during his illness, absence or indisposition. [99 v. 192, § 1; 103 v. 864 (868); 104 v. 176; 108 v. 1130.]

§ 2152. Designation of judge.

The designation of the judge determines the court that shall have jurisdiction in juvenile cases. If he be from the Common Pleas, then that court has jurisdiction; if from the Probate Court, then that court has jurisdiction. This law permitting, or rather requiring the judges of the various courts to select one of their number to act as juvenile judge, is within the power of the legislature and does not conflict with the constitution of our State.[9]

"The act in question authorizes the judges of the several courts of equal original jurisdiction to designate the one that shall hear and dispose of the business in which each is given equal original authority. Jurisdiction consists of the power to hear and determine. The source of this power resides in the legislature. In this act it is conferred upon the several courts named by that authority, and the mere selection of one to dispose of the business by the several judges is not conferring jurisdiction. For, without such designation, either of the courts named could entertain jurisdiction of the matter specified in the act; whilst if the authority was conferred upon the judges, neither of said courts could exercise the power to hear and determine unless authorized by the judges before hand.

"The court first acquiring jurisdiction would hold it until the action was finally disposed of.

"The constitutionality of the act was challenged in the case of Giltman vs. State, before this court in Clark County. We were then of the opinion that the act did not contravene any of the provisions of that instrument. A re-examination of the act does not convince us that our opinion in the Giltman case was wrong; and it is, therefore, adhered to here."[10]

When there is a vacancy in the position of judge of the Juvenile Court, then it is the duty of the judges of the Courts of Common Pleas, Probate Court and (where established) the Insolvency Court and Superior Court, to meet and select one of their number to act as judge of the Juvenile Court. In doing so they may fix the length of time he should serve; not to exceed the time for which he is elected. If no time is fixed I assume he will serve until the expiration of his term. In a number of counties there is one common pleas judge and one probate judge. If they could not agree on which one should act, some difficulty

[9] Travis vs. State, 31 C. C. 492; 12 C. C. (N.S.) 374; affirmed no op. 82 O. S. —.

[10] See Mill vs. Brown, 31 Utah 473; 88 Pac. 609; Marlowe vs. Com., 142 Ky. 106; 133 S. W. 1137.

might be experienced in the matter of who should act as such judge.[11]

If the person designated as judge of the Juvenile Court is temporarily absent or suffering disability, another judge within the selected class is to be designated to act during such absence or disability. Whenever a designation is made an entry should be put upon the records of the Juvenile Court showing such fact. In all the counties of Ohio as I am now informed, in but five the judge of the Probate Court acts as juvenile judge.[12]

In three other counties the Common Pleas Court and Probate Court are combined, and there as a matter of course the judge of such courts would also be judge of the Juvenile Court, and while he might act as juvenile judge under either his common pleas or probate jurisdiction, I think it preferable that he act under his common pleas jurisdiction. In order to determine this matter it would be advisable to place an entry on the records of the Juvenile Court, settling it beyond question.[13]

§ 2153. "Juvenile Court" defined. (§ 1639-1.) § 2. The term "juvenile court" as used in this act [G. C. §§ 1643, 1672, and 3093] shall be construed as applying to such courts as are created by section 1639 and all other courts now or hereafter created to administer the provisions of law relating to dependent, delinquent and neglected children. [108 v. Pt. I 260 (262), § 2.][14]

§ 2154. Seal. § 1640. The seal of the court, the judge of which is designated to transact such business, shall be attached to all writs and processes. [99 v. 192, § 2.][15]

§ 2155. Appearance docket and journal. § 1641. The clerk of the court of the judge exercising the jurisdiction shall keep an appearance docket and a journal, in the former of which shall be entered the style of the case and a minute of each

[11] It might be well to have some legislation on this matter, permitting the Chief Justice of the Supreme Court to determine the question in such cases.

[12] These five are Hamilton, Preble, Drake, Warren, Clark and now Montgomery.

[13] These three counties are Adams, Henry and Wyandotte.

[14] § 3093 refers to county children's homes, and makes that apply to the provisions of § 1672.

[15] This means that when a judge of the Court of Common Pleas is designated to act as Juvenile Judge, then the writs are issued under the name of that court. If a judge of the Probate Court, then under that name.

proceeding and in the latter of which shall be entered all orders, judgments and findings of the court. [99 v. 192, § 3.][16]

§ 2156. Jurisdiction statute. § 1642. Such courts of common pleas, probate courts, insolvency courts and superior courts within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors, under the age of eighteen years, not inmates of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children, and their parents, guardians, or any person, persons, corporation or agent of a corporation, responsible for, or guilty of causing, encouraging, aiding, abetting or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations, or their agents, for the commission of any misdemeanor involving the care, protection, education or comfort of any such minor under the age of eighteen years. [99 v. 192, § 4; 103 v. 864 (868).][17]

§ 2157. Jurisdiction of court.

This section gives equal and concurrent jurisdiction to the Courts of Common Pleas, Insolvency, Superior and Probate, in the matters coming within the province of the Juvenile Court; and therefore the court first exercising the jurisdiction would have jurisdiction to the exclusion of all others; and the judges of the various courts having designated the judge to act as such juvenile judge, the judges of such other courts would not have jurisdiction in matters conferred on the judge of the Juvenile Court, and it has therefore been held that the Juvenile Court has exclusive jurisdiction over minors who are under eighteen years of age, not inmates of a state institution, etc., and charged with some misdemeanor.[18]

The court has no jurisdiction other than that conferred by statute, and the jurisdiction conferred is, *first,* over minors under eighteen years of age who are either delinquent, neglected or dependent, who are not inmates of some institution, etc.; *second,* over the person who causes such delinquency. This

[16] Under the above section it is intended that the records of the Juvenile Court are to be kept separate from the records of the court of which the designated judge has been selected. It does not seem to provide for a final record, but it seems such should be made.

[17] See § 1683-1 for additional jurisdiction conferred, § 2248.

[18] State vs. Forest Joiner, 20 N. P. (N.S.) 313.

The statute now gives to the Juvenile Court jurisdiction in cases of truancy. § 7774 G. C. [109 v. —].

latter class includes parents, guardians or any person, persons, or corporation, or agent of corporation responsible for, or guilty of causing, encouraging, aiding, abetting or contributing to the neglect, delinquency or dependency of such minor. What constitutes a dependent or delinquent child is defined by future sections.[19]

It has been held that Probate Courts or Juvenile Courts are courts of record, and their jurisdiction being attached, it is exclusive, and can not be assailed by any other court in an independent proceeding.[20]

In addition to the offenses heretofore mentioned, a subsequent section [21] gives jurisdiction of all misdemeanors against minors and offenses therein prescribed.[22]

§ 2158. Continuing jurisdiction.

When the court once comes into custody of a child under eighteen years of age then for the discipline and protection of that person, it remains a ward of the court until it is twenty-one years old; the exception is when the child is placed in the permanent care of the Ohio Board of Administration, etc., with permission and power to place the child in a home with probability of adoption; then the jurisdiction ceases at the time of commitment

If the child is once under the jurisdiction of the Juvenile Court, then no other court can acquire jurisdiction,[23] and if the child is under the jurisdiction of some other court the Juvenile Court can acquire no jurisdiction.[24]

Thus when in a divorce proceedings the child was awarded to the mother, afterwards proceedings was brought in the Juvenile Court on the ground that the child did not have proper care, etc., and was adjudged by the Juvenile Court to be such

[19] Dependent, § 1645, G. C. § 2162. Delinquent, § 1644, G. C. § 2160. Proper parental care, § 1646, G. C. § 2164.

[20] Children's Home vs. Felter, 90 O. S. 110.

[21] § 1683 G. C., § 2248.

[22] § 928 G. C. No offense seems to be charged in this section. § 6344 G. C. Articles pawned belonging to minor. § 6345 G. C. Minor employed as pawnbroker. § 6373 G. C. Second hand dealer with minor. § 12674 G. C. Selling poisons, etc. § 12787 G. C. Failure to report with diseased eyes. § 13031 G. C. Keeping house of ill fame. § 13035 G. C. Selling obscene literature. § 13038 G. C. Delivering immoral literature.

[23] Children's Home vs. Felter, 90 O. S. 110.

[24] Orphan Asylum vs. Soule, 36 O. C. C. 135; 5 App. 70; 36 C. C. (N.S.) 138.

and ordered committed, etc., it was held that the Juvenile Court had no jurisdiction, and sustained an action in habeas corpus.[25]

In the other case the child was adjudged a delinquent child by a Juvenile Court, and it was held no other court could review the action on writ of habeas corpus.[26]

In the light of the two decisions referred to, the latter part of the following section as to writ of habeas corpus, does not seem to be of much effect. It therefore appears that if a divorce proceeding was afterwards had between the parents, the court in such action could not make an order as to the custody of the child that could interfere with the orders or continuing power of the Juvenile Court.

§ 2159. **When jurisdiction terminates.** § 1643. When a child under the age of eighteen years comes into the custody of the court under the provisions of this chapter, such child shall continue for all necessary purposes of discipline and protection, a ward of the court, until he or she attain the age of twenty-one years. The power of the court over such child shall continue until the child attains such age.

Exception. Provided, in case such child is committed to the permanent care and guardianship of the Ohio board of administration, or the board of state charities, or of an institution or association, certified by the board of state charities, with permission and power to place such child in a foster home, with the probability of adoption, such jurisdiction shall cease at the time of commitment.

When writ of habeas corpus may issue. No court shall issue a writ of habeas corpus against any parties holding a child by reason of a commitment of the juvenile court before such parties have been heard by the court to which application has been made for such writ and their rights to hold such child have been finally determined by the proper court. [108 v. 260.]

§ 2160. **Delinquent child defined.** § 1644. "DELINQUENT CHILD DEFINED." For the purpose of this chapter, the words "Delinquent child" includes any child under eighteen

[25] Orphan Asylum vs. Soule, *supra.*

[26] Children's Home vs. Felter, 90 O. S. 110. The presumption is that the Juvenile Court when it committed the child to the home, was acting with reference to the best interest and welfare of the child. It is in the power of that court if it deem it desirable to restore the child to its parents. But there is no authority for any other court to interfere in an independent proceeding, with the custody of the child thus entrusted by law to the jurisdiction of the Juvenile Court.

years of age who violates a law of this state, or a city or village ordinance, or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill repute; or who knowingly patronizes or visits a policy shop or place where any gambling device or gambling scheme is, or shall be, operated or conducted; or who patronizes or visits a saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits a public pool or billiard room or bucket shop; or who wanders about the streets in the night time; or who wanders about railroad yards or tracks, or jumps or catches on to a moving train, traction or street car, or enters a car or engine without lawful authority, or who uses vile, obscene, vulgar, profane or indecent language; or who is guilty of immoral conduct; or who uses cigarettes, cigarette wrapper or substitute for either, or cigars, or tobacco; or who visits or frequents any theater, gallery, penny arcade or moving picture show where lewd, vulgar or indecent pictures, exhibitions or performances are displayed, exhibited or given, or who is an habitual truant; or who uses any injurious or narcotic drug. A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and be proceeded against in the manner hereinafter provided. [106 v. 458.]

§ 2161. Who is a delinquent child.

A child is delinquent when it is under eighteen years of age, and when

1. It violates a State law or city ordinance.
2. It is incorrigible.
3. It knowingly associates with thieves or immoral persons.
4. It is growing up in idleness or crime.
5. It knowingly visits or enters a house of ill repute.
6. It knowingly patronizes or visits a policy shop.
7. It knowingly patronizes or visits a gambling place.
8. It patronizes or visits a saloon.
9. It patronizes or visits a pool room, bucket shop, etc.
10. It wanders about the streets in the night time.
11. It wanders about railroad yards or tracks.
12. It jumps or catches on moving trains or street cars.
13. It enters a car or engine without authority.
14. It uses vile, obscene, vulgar or profane language.
15. It is guilty of immoral conduct.
16. It uses cigarettes or cigars or tobacco.
17. It visits or frequents a show of lewd or vulgar exhibitions.

18. It is an habitual truant.
19. It uses an injurious drug.

This category seems to be wide enough to cover any possible case where the child might be *bad* or become *bad.*

§ 2162. **Dependent child defined.** § 1645. "DEPENDENT CHILD" Defined. For the purpose of this chapter, the words "dependent child" shall mean any child under eighteen years of age who is dependent upon the public for support; or who is destitute, homeless or abandoned; or who has not proper parental care or guardianship; or who begs or receives alms; or who is given away or disposed of in any employment, service, exhibition, occupation or vocation contrary to any law of this state; who is found living in a house of ill fame, or with any vicious or disreputable persons or whose home, by reason of neglect, cruelty or depravity on the part of its parent; step-parent, guardian or other person in whose care it may be, is an unfit place for such child; or who is prevented from receiving proper education because of the conduct or neglect of its parent, step-parent, guardian or other person in whose care it may be; or whose environment is such as to warrant the state, in the interest of the child, in assuming its guardianship. [106 v. 458 (459).]

§ 2163. **Who is a dependant child.**

A dependent child is one who is under eighteen years of age, and when

1. Dependent on the public for support.
2. Destitute, homeless or abandoned.
3. Has not proper parental care or guardianship.
4. Who begs or receives alms.
5. Is engaged in an occupation forbidden by law.
6. Is living in a house of ill fame.
7. Is living with vicious or disreputable persons.
8. Its home is an unfit place for it to live, etc.
9. Is prevented from receiving a proper education, etc.
10. Its environment is such that the State may take charge of it.[1]

§ 2164. **"Proper parental care" defined.** § 1646. A child within the provisions of this chapter whose parents, step parents or guardian permits it to use or become addicted to the use of tobacco, or intoxicating liquors as a beverage and not for medicinal purposes, or any injurious or narcotic drug, or whose parents or guardian rears, keeps or permits it in or about a saloon or place where intoxicating liquors are sold, or a gambling

[1] This would include truancy from school. § 7774 G. C. [109 v. —].

house or place where gambling is practiced or carried on, or a house of ill fame, or ill repute, shall be deemed to be without proper parental care or guardianship.

Child defined. The word "child" or "children" may mean one or more children and includes males and females.

Parent defined. The word "parent" may mean one or both parents or step parents when consistent with the intent of this chapter.

Minor defined. The word "minor" means child. [99 v. 193, § 6; 103 v. 864 (870).]

§ 2165. What is not proper parental care.

A child has not proper parental care when its parents, stepparents or guardian permits it

1. To use or become addicted to the use of tobacco or intoxicating liquors.
2. To use or become addicted to the use of an injurious drug.
3. To be about a place where intoxicating liquors are sold.
4. To be about a place where gambling is practiced.
5. To be about a house of ill fame or ill repute.

§ 2166. **Who may file complaint.** § 1647. Any person having knowledge of a minor under the age of eighteen years who appears to be either a delinquent, neglected or dependent child, may file with such juvenile court a complaint, sworn to, which may be upon information and belief, and for that purpose such complaint shall be sufficiently definite by using the word delinquent, or dependent, as the facts may be. [103 v. 864 (870).]

§ 2167. Procedure—Filing complaint, etc.

While the Juvenile Court is not considered as a criminal court and the minor charged with a violation of the laws within the jurisdiction of that court, not a criminal, yet the procedure is much nearer allied to that of a criminal court than a civil court. Originally the delinquent was not entitled to a jury trial, and the law was held constitutional.[27] And it was also held the law was not invalid because a trial might be had on affidavit, and not on an indictment.[28] The complaint must be drawn with sufficient certainty that it will show who the person

[27] *In re* Januszewski, 196 Fed. R. 123; 10 O. L. R. 151.

[28] *In re* Januszewski, 196 Fed. 123.

is that is charged with the offense and what the offense is.[29] If the case is submitted to a jury the offense must be proven beyond a reasonable doubt.[30]

[29] Willison vs. State, 21 C. C. (N.S.) 526; 3 App. 244. In a prosecution for contributing to the delinquency of a minor the affidavit, in order to charge a crime must, allege that the minor is under eighteen years of age, and is a delinquent within the meaning of the statute, and that the defendant is guilty of contributing to such delinquency. *Id.* State vs. Joiner, 20 N. P. 313.

[30] State vs. Smith, 34 C. C. 661; 14 C. C. (N.S.) 257. In this case charge of court is given. State vs. Joiner, 20 N. P. 316; State vs. Hawkins, 56 Bull. 166. Charge of court. See State vs. Tollinger, 66 Bull. 141, for very clear and succinct statement of law, in charge of Judge F. W. Geiger, who has been a judge of the Juvenile Court since its creation, and as it is a splendid exposition of the law, will insert it.

"The complaint in this case charges, in substance, that D. C. is a minor under eighteen years of age, to-wit, about the age of fourteen years, and is a delinquent child in that she did, on or about April 1, 1920, and other days and times between said day and April 17, unlawfully and knowingly associate with certain viscious and immoral persons, one of said viscious and immoral persons being D. Lewis Tollinger; that said D. C. did then and there have unlawful sexual intercourse with the said D. Lewis Tollinger; that the said D. C. was thereby guilty of immoral conduct.

"The complaint further alleges that the said D. Lewis Tollinger, on or about April 1, 1920, and at divers other times between said day and April 17, 1920, did unlawfully aid, abet, induce, cause, encourage and contribute to the delinquency of said D. C., in that the said Tollinger did unlawfully and knowingly aid, abet, cause and encourage the said D. C. to associate with viscious and immoral persons, one of said viscious and immoral persons being the said Tollinger; and the said Tollinger did then and there have unlawful sexual intercourse with the said D. C.: that the said Tollinger did then and there unlawfully aid, abet, cause, contribute and encourage said D. C. to be thereby guilty of immoral conduct.

"Before the defendant can be found guilty as he stands charged in the complaint, the state must prove beyond a reasonable doubt, the material allegations of the complaint, among which are that the female D. C. is under the age of eighteen years, to-wit, about the age of fourteen years: that she is a delinquent child in that she did, at the time and place named in the complaint, associate with viscious and immoral persons, one of said viscious and immoral persons being D. Lewis Tollinger, and further that the said D. Lewis Tollinger did contribute to the delinquency of the said D. C. by having unlawful sexual intercourse with her.

"This charge is based upon two sections of the statute, the one defining who is to be considered a delinquent child, providing in brief, so far as it relates to this case, that a delinquent child includes any child under the age of eighteen years, who knowingly associates with viscious or immoral persons, or who is guilty of immoral conduct.

"The other section provides that whoever aids, abets, induces, causes, encourages or contributes towards the delinquency of a minor under the age of eighteen years, shall be punished as therein provided.

"It will be observed that the complaint charges that the child is a delinquent in two respects. First, that she has associated with viscious and immoral persons, one of said viscious and immoral persons being the defendant Tollinger; and next, that she is guilty of immoral conduct in that she had illicit sexual relations with the defendant Tollinger.

"The juvenile laws were enacted to protect and correct delinquent children, and to punish those adults

It must be shown that the offense was committed within the county when the affidavit is filed; the verdict would have to

who may be responsible for said delinquency.

"The statute fixes the age under which a child may be regarded as delinquent, as eighteen years, and the complaint alleges that D. C. is about fourteen years of age. It is not necessary that the state prove her exact age. If you are satisfied beyond a reasonable doubt, that she is under eighteen years of age, and about the age stated in the complaint, that is sufficient.

"If you find that D. C. is a delinquent child, as stated in the complaint, you may then proceed to the consideration of the question whether the state has proved, beyond a reasonable doubt, that D. Lewis Tollinger at the time and place named in the complaint, did abet, aid, induce, cause, encourage or contribute to the delinquency of the said female by aiding and encouraging her to associate with vicious and immoral persons, one of said viscious and immoral persons being the said D. Lewis Tollinger, and further, whether or not the said D. C., or her association with vicious and immoral persons, did encourage and contribute to the delinquency of the said female by having illicit sexual intercourse with her.

"It is not necessary for the court to define more at length the terms used in the complaint,—aid, abet, induce, cause, and encourage the delinquency of the said D. C. or her association with vicious and immoral persons; neither is it necessary for the court to determine to you what would constitute a vicious or immoral person; whether or not a person is viscious or immoral in his actions is a matter for your determination.

"If you find that D. C. was a child under eighteen years of age, to-wit, about fourteen years of age, that she had illicit sexual relations with the defendant Tollinger, as claimed by the state, you would be justified in finding the defendant guilty, if in your judgement that constitutes immoral conduct on her part.

"If the state has proved beyond a reasonable doubt that Tollinger himself was a viscious and immoral person, and that he immorally associated with the female D. C. and that by encouraging said asssociation with himself he thereby contributed to her delinquency, you should find him guilty, provided all the other elements of the offense have been proved beyond a reasonable doubt.

"It is not claimed by the state that D. C. is anything other than her admissions on the stand indicate—that is, an immoral young woman; but this fact will not excuse the defendant if he in any way, as I have pointed out, contributed to her further delinquency.

"The fact that a girl under eighteen years of age with whom a man conducts immoral relations, or aids, induces, or encourages to associate with immoral persons, is already immoral, will not excuse the man except in so far as it may be a lesser offense to immorally associate with one who is already immoral, or to further contribute to her delinquency than it is to cause the first immorality or delinquency.

"If it is true that when a girl first becomes immoral, she thereby forfeits all protection and becomes the easy victim of men, there would be little probability of her reformation. The law is designed to protect females under the age of eighteen years, and while such females may be immoral on account of their former associations, the law has endeavoored to protect them against anyone who further contributes to their delinquency or immorality.

"Those who afford opportunity to and encourage girls under the age of eighteen, to indulge in immoral practices, should not escape because such young persons may have been immoral at other times and places.

"If the defendant be found guilty it is the right and duty of the court imposing sentence to take into consideration all questions that may bear upon the enormity of the

be unanimous before a conviction could be had. Also the gen-

defendant's offense, and to mete out punishment in accordance therewith.

"If you find beyond a reasonable doubt, that the girl D. C. was immoral before she associated with the said D. T. but that D. T. in the manner alleged in the complaint, further contributed to her immorality, and all other elements have been proved, it is your duty to find the defendant guilty, leaving to the court the exercise of a discretion in the measure of the punishment to be imposed.

"The defendant in this case is not charged with contributing to the delinquency of any other of the parties concerned in the transaction than D. C., and you should only consider his relations with said other persons, if any have been proved, in order to determine whether said defendant is a viscious and immoral person, as charged in the complaint, and as throwing such light as it may upon the question whether the defendant thereby caused the said D. C. to associate with himself, if you find him to be a viscious and immoral person.

"The law makes it an offense to contribute to the delinquency of a minor under eighteen years of age, and if you find this female is in fact under eighteen years of age, it makes no difference what her age may have appeared to be, nor what the defendant may have thought it was, nor what the child may have alleged it to be—the only question is, what her real age as a matter of fact, is.

"If you are convinced beyond a reasonable doubt of the defendant's guilt, it is your duty to say so, and the jurors should not fail in their duty or return a verdict of not guilty, when in their own minds they are convinced, beyond a reasonable doubt, that the defendant is guilty, simply because of good-fellowship, kind heartedness, or a desire not to work a hardship on a fellow citizen.

"On the other hand, you are not to find the defendant guilty, unless the state has proved, beyond a reasonable doubt, all the elements of the offense charged. A mere suspicion of the defendant's guilt will not be sufficient, but you must be satisfied beyond a reasonable doubt of his guilt.

"The court has instructed you that all the material elements of the charge against the defendant must be proved beyond a reasonable doubt. A reasonable doubt is such a doubt as would exist in the mind of a reasonable man after a full, fair and careful examination and comparison of all the evidence. It is such a doubt as would cause a careful and prudent man to pause and consider before acting in the grave and important affairs of life. It is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. Nor is it a mere captious, ingenious, artificial doubt, formed in the mind of a juror in order to escape the performance of a disagreeable duty. Nor does proof beyond a reasonable doubt mean absolute certainty—but a reasonable doubt, as the term is used in these instructions, must be one arising from a candid and impartial investigation of all the evidence. A doubt produced by an undue sensibility in the mind of a juror, in view of the consequences of his verdict is not a reasonable doubt and the jury is not allowed to create sources of materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from those established by the evidence. You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt, where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge against him, then you are satisfied beyond a reasonable doubt. You will look then, to all the evidence, and if that satisfies you beyond a reason-

eral rules of evidence as applicable to criminal cases would apply.[31]

§ 2168. Complaint—A delinquent, etc., child.

The State of Ohio, ... County, Probate Court.

Before the Probate Court of said county [juvenile division], personally came ..... residing at ..... who being first duly sworn, says that he has knowledge of A. B., a minor under the age of eighteen years, to-wit: about the age of ..... years, who is not an inmate of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children; that said minor is in the custody or control of *.....

.....

.....

and that said A. B., a minor, resides in ..... County, Ohio; that said minor appears a delinquent child in this, that in ..... County, Ohio from ..... to ....., 19... the said A. B. did knowingly associate with viscious and immoral persons, said viscious and immoral persons being C. D., E. F. and G. H., and that the said C. D., E. F. and G. H. have aided, caused, encouraged and contributed to the delinquency of said A. B. by aiding, causing and encouraging said A. B. to associate with viscious and immoral persons being said C. D., E. F. and G. H., that said C. D., E. F. and G. H. did then and there unlawfully aid, cause and encourage the said A. B. to be then and there guilty of immoral conduct, contrary to the statute

able doubt of the defendant's guilt, you must find that to be the fact by your verdict. If you are not so fully satisfied, but find there are only strong probabilities of guilt, your only safe course is to acquit.

"You are the sole judges of the facts in this case and of the weight and credibility to be given to the testimony of the different witnesses. The court is the sole judge of the law, but it is the duty of the jury to find and determine the facts and apply thereto the law as given by the court.

"In determining the credit you will give a witness and the weight and value you will attach to his testimony, you should consider his conduct and appearance before you; his interest, if any, in the result of the case; his motives; his bias or prejudice, if any has been disclosed; the opportunity the witness had to be informed or to observe as to the matters testified to by him; his intelligence; his inclination and disposition to tell the truth or otherwise, and the probability or improbability of his statements taken together in connection with the other facts and circumstances shown in evidence. Taking all these matters into account, it is your duty to give to each of the witnesses such credit, and to the testimony of each witness such value as you may think proper.

"The forms of verdict will be given you. If under the evidence and charge of the court, you find the defendant guilty as he stands charged in the complaint, you will use the form of verdict marked No. 1. If under said evidence and instructions you find the defendant is not guilty, you will use the form of verdict marked No. 2.

"In criminal cases the verdict of the jury must be unanimous, and signed by one of your number as foreman, whom you will select when you retire to your jury room.

[31] See state vs. Smith, 34 C. C. 601 as to resident of house of ill fame. Peter vs. State, 25 C. C. (N. S.) 255 as to proof of delinquency.

See State vs. Hawkins, 56 Bull 166 as to evidence of former immoral conduct. State vs. Fisher, 84 O. S. 360 as to record of child's delinquency.

See § 1651 G. C., § 2189, as to right to jury trial.

in such case made and provided and against the peace and dignity of the State of Ohio.

.....

Sworn to before me and signed in my presence this ..... day of ....., 19...

....., Judge of the Probate Court.

By ....., Deputy Clerk.

* Besides naming the custodian, state who are the parents, or guardian, etc.

§ 2169. Citation, warrant, contempt. § 1648. Upon filing of the complaint, a citation shall issue, requiring such minor to appear, and the parents or guardian or other person, if any, having custody or control of the child, or with whom it may be, to appear with the minor at a time and place to be stated in the citation;

Warrant. Or the judge may in the first instance, issue a warrant for the arrest of such minor or for any person named in the complaint and charged therein with having abused or abandoned, or charged therein with neglect of or being responsible for or having encouraged, aided or abetted the delinquency or dependency of such child, or having acted in a way tending to cause delinquency in such child.

Parent, step parent subpoenaed. A parent, step parent, guardian or other person not cited may be subpoenaed to appear and testify at the hearing.

Contempt. Any one cited or subpoenaed to appear who fails to do so, may be punished as in other cases in the common pleas court for contempt of court.

Residence unknown. Whenever it shall appear from affidavit that a parent or guardian or other person having the custody of such child resides or has gone out of the state or that his or her place of residence is unknown so that such citation can not be served on him or her, the clerk shall cause such citation to be published once in a newspaper of general circulation throughout the county, and published in the county, if there be one so published.

Publication. The citation shall state the nature of the complaint, and the time and place of the hearing, which shall be held at least two weeks later than the date of the publication; and a copy of such citation shall be sent by mail to the last known address of such parent, guardian or other person having custody of such child, unless said affidavit, shows that a reasonable effort has been made without success to ascertain such address. The certificate of the clerk that such publication has been made or such citation mailed shall be sufficient evidence thereof. Until the time for the hearing arrives, the court shall make such temporary disposition of such child as it may deem best. When said period of two weeks from the time of publication shall have elapsed, said court shall have full jurisdiction to deal with such child as provided by this chapter.

Fugitive. When a person charged with violating a provision of this chapter shall have fled from justice in this state, such judge shall have all the powers of a magistrate under the laws of this state relating to fugitives from justice. [103 v. 864 (870).]

§ 2170. Citation or warrant.

On the complaint being filed the court may issue either a citation or a warrant. If the matter sought to be brought before the court is that which affects the child, and not that of whether or not someone is guilty of causing the child's delinquency; and it is not necessary to acquire immediate control or possession of the child, it would be proper, and the law so intends a citation should issue. In case where it is sought to bring some one before the court for contributing to the delinquency of the child, a warrant of arrest is proper. The statute probably intends that ordinarily it is better to leave the child in its present surroundings until an investigation can be made than to take immediate charge, and besides the word citation has a less criminal significance to the ordinary mind than arrest or warrant. It is in the discretion of the judge, which shall issue. If a citation, it is for the minor to appear, and the parents, guardian or other person having the custody or control of the minor. Any person not cited may be subpoenaed.

The citation must state the nature of the complaint; that is, the matter of delinquency with which the child is charged in the complaint filed under § 1647 (§ 2166), and the time and place of hearing. If service is made on the parent by publication, the time fixed for hearing must be at least two weeks after the date of publication; otherwise it may be fixed at such time as the court shall designate. It should be long enough ahead to give the minor and parents reasonable opportunity to prepare whatever defense they may have, as well as to permit the probation officer, under § 1663 (§ 2223), to make his investigations, etc. When the citation is issued it is directed to the probation officer who is to serve the same.

§ 2171. Journal entry, entry for hearing, etc.

State of Ohio vs. ..... [Alleged delinquent, neglected or dependent child]

This day came ....., and filed herein a complaint alleging that ..... is a[1] ..... child, and that said child is in the control of .....

Wherefore it is by the court ordered that said case be set for hearing on the ..... day of ....., 19..., at ..... o'clock, ... m., and it is ordered that a[2] ..... directed to[3] ..... of this county, be

issued for said child and the person having the custody of the same to bring said child with him and appear in this court at the time set for hearing thereof. This writ to be returned on the ..... day of ..... and subpoenas be issued for .....

.....

1 "Delinquent" or "dependent."
2 "Citation" or "warrant."
3 "Sheriff" or "probation officer."

§ 2172. Form—Citation to child and custodian.

[*Title.*]

To ..... Probation Officer of said County:

you are commanded to cite ..... a minor to appear, and ..... the person having custody or control of said minor, or with whom the same may be, to personally be and appear with said minor.., before the judge of the Probate Court on the ..... day of ....., A. D. 19..., at ..... o'clock, ... m., at the court house in said county, in a certain case in said court, in the matter of said child: and this they shall in no wise omit under penalty of the law. A person so cited, and failing to appear, may be punished as in other cases for contempt of court.

Said probation officer will take notice that it is his duty to proceed to inquire and make full examination and investigation into the facts and circumstances surrounding the alleged delinquency, etc., or dependency of said child in reference to his exact age, habits, school record, etc., and be present in court to represent the interests of the said child, when the case is heard, etc., and said officer shall make due return of this citation on the ..... day of ....., 19....

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this ..... day of ....., 19...

....., Judge of the Probate Court,
By ....., Deputy Clerk.

§ 2173. Notice to parent, etc.

[*Title.*]

To ..... residing at .....:

As the ..... of the above named child you are hereby notified that proceedings have been instituted in the Probate Court of said county in behalf of said child, under the laws concerning delinquent, neglected or dependent children, and that said case will be heard by the judge of said court on the ..... day of ....., 19..., at ..... o'clock ... m., at the court house in said county, when and where you are requested to be present.

The nature of said case as charged is .....

Parents, guardians, or if there be neither, then any relative of such child, are expected to be present with it in open court. Serious consequences may be avoided by a compliance with this notice. Any excuse for failure to appear should be communicated to the judge before the date set for hearing.

§ 2174. Service of citation, etc., personally.

The statute contemplates that the service be made personally upon the minor and also upon the parent or other person in charge. It is only when the parent or other person in charge

of such minor resides or has gone out of the State, or his place of residence is unknown, that personal service is excused.

The question whether or not a statute authorizing the court to assume control of a minor without notice to the parent or person in charge, would be constitutional, is a mooted one, but not material in this State where notice is required. If no notice has been given under an assumed state of facts which did not exist, the court on motion of the parent must open up the case and give the parent a right to be heard.[32]

§ 2175. Service by publication.

If no personal service can be made on the parent or person having the infant in charge, because he resides or has gone out of the State, or his residence is unknown, an affidavit of the fact should be made by the probation officer or other person having knowledge, and then the clerk must have such citation

[32] Where an order has been made and entered by a juvenile court, finding that certain children are neglected and abandoned by their mother, and committing their custody to an institution named in the sections of the General Code relating to juvenile courts, upon an affidavit filed in that court charging in substance that the minor children named therein are dependent and neglected children, that their mother has deserted and abandoned them and is an unfit person to have the care and custody of them, and that the residence of the mother is unknown, a petition filed in that court by the mother, after such order has been entered, asking the court to open up and vacate the same, averring in substance that the affidavit was false, that affiant knew at the time he filed such affidavit or with reasonable diligence could have discovered her residence, that she had no notice of such proceeding, that she had not abandoned and deserted her minor children, that the affidavit and the proceedings had thereunder and the evidence offered in support thereof was false and a fraud upon the court and in fraud of petitioner's rights, that the order was irregularly obtained, and that the petitioner, the mother, had no notice of such proceedings whatever and by unavoidable casualty and misfortune and without any fault or want of diligence on her part was prevented from appearing in court and defending her parental rights and vindicating herself against the charges made in the affidavit, and from having an opportunity to be heard in the proceedings, states facts sufficient, either as a petition or motion, to invoke the jurisdiction of the court to hear and determine the truth of these averments.

It is the duty of the court making such order, and in which the petition is filed, to hear the same upon evidence, and to make such order and judgment in the premises as to it seems just and proper. State vs. Bristline, 96 O. S. 582.

published in a newspaper of general circulation in the county, once; and the time of hearing must be at least two weeks later than such publication. If the address of the parent is known, a copy of the complaint must also be sent to him by mail. The statute does not so say but it would be advisable to send it by registered mail.

§ 2176. Form—Affidavit for publication.

[*Title.*]

State of Ohio, Clark County, ss.

..... being first duly sworn says that he has made diligent inquiry and effort to ascertain the residence of ....., the parent [*or*, guardian or other person having the custody of] ....., minors, charged in the above entitled case as being delinquents, and that the residence of said ..... is at ..... [*or*, is unknown] not within the State of Ohio, and that citation can not be served on him personally.

.....

Sworn to and subscribed before me and in my presence this ..... day of ....., 19...

....., Notary Public.

§ 2177. Journal entry for publication.

[*Title.*]

On this day came ....., and filed his affidavit herein; that ....., parent of ....., resides at ..... [*or*, is unknown, etc.] and citation can not be served on him personally; wherefore it is ordered that the clerk shall cause such citation to be published once in a newspaper of general circulation in the county; that said citation shall state the nature of the complaint and the time and place of hearing, which time of hearing is here fixed at ....., at ..... a. m., on the ..... day of ....., 19..., at least two weeks after the date of said publication. It is also ordered that the clerk mail a copy of such citation by registered letter to the last known residence of .....

§ 2178. Notice for publication and for sending by mail, when affidavit shows parent, etc., out of state, or residence unknown, etc.

CITATION TO CHILD AND CUSTODIAN.

The State of Ohio, ... County. Probate Court.

In the matter of ....., a minor.

Said minor is hereby cited to appear, and ..... the ..... of said minor, and any other person having custody or control of said minor, or with whom the same may be, to personally be and appear with said minor.., before the judge of the Probate Court on the ..... day of ....., A. D. 19..., at ..... o'clock ... m., at the court house in said county, in a certain case in said court, in the matter of said child; and this they shall in no wise omit under penalty of the law. A person so cited, and failing to appear may be punished as in other cases for contempt of court.

The nature of the complaint in the case is as follows: .....

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this ..... day of ....., 19...

....., Judge and Ex-officio Clerk of the Probate Court.

PROOF OF NOTICE BY PUBLICATION.

The State of Ohio, ... County.

On this ..... day of ....., 19..., personally came before me the undersigned authority ..... who being first duly sworn, deposes and says that the foregoing notice was published in the ..... a newspaper printed in and of general circulation in ..... County, Ohio, for ..... consecutive weeks; the first publication being on the ..... day of ....., 19..., and that he has personal knowledge of such publication being made, as herein alleged.

.....

Sworn to before me, and signed in my presence, this ..... day of ....., 19...

....., Probate Judge.

By ..... Deputy Clerk.

§ 2179. Form—Warrant to arrest minors.

The State of Ohio, ... County. Probate Court.

To ..... of said county:

A complaint has been filed in this court, duly verified as provided by statute, that the following named children are under eighteen years of age, residing as follows:

.....

.....

and that said children are* ..... children, within the provisions of the laws to regulate the treatment and control of delinquent, neglected and dependent children. Said case has been set for hearing on the ..... day of ....., 19..., at ..... o'clock ... m.

You are therefore commanded to take said children and have them at the appointed time above specified before this court.

The probation officer will take notice that it is his duty to proceed to inquire and make full examination and investigation into the facts and circumstances surrounding the alleged delinquency or dependency of said children in reference to their exact age, habits and school record, and be present in court to represent the interests of said children. Said officer will make due return of this writ on the ..... day of ....., 19...

....., Judge of the Probate Court.

By ....., Deputy Clerk.

* "Delinquent" or "dependent."

§ 2180. Complaint charging contributing to delinquency, etc., of children.

The State of Ohio, ... County.

Probate Court [Juvenile Division].

Before the Probate Court of said county, personally came ..... residing at ....., who being first duly sworn, says that he has knowledge of certain minors under the age of eighteen years, to-wit: .....

.....

.....

who are not inmates of a state institution, or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children; that said minors are in the custody or control of *.....
and that said minors appear to be ..... children in this, that .....
[here describe the matter charged constituting the delinquency, etc.]

.....

.....

And that one ....., residing at ..... has ..... said child ..... at the county of ..... in the State of Ohio.

.....

Sworn to before me and signed in my presence this ..... day of ....., 19...

.....

* Besides naming the custodian, who are the parents, or guardian, etc.

§ 2181. Warrant to arrest, etc.

The juvenile law of our State has two kinds of offenders to deal with; one is the child who is delinquent, and the other is the person who is responsible for the delinquency, the object of both, however, being the welfare of the child. The court may, on complaint being filed, order arrest of the child, but this should rarely be done; however when it is an adult who is charged with causing the delinquency of the child, then it will generally be found advisable to order a warrant for arrest. When an adult is charged with a violation of the provisions of the juvenile law, the matter is, characteristically, more of a criminal nature, than when it is a child who is charged. The object then, to such adult person, is not reformatory, correctional and educational, but punitive. A subsequent section provides such warrant may be issued when it appears on hearing that a person is guilty of some offense. § 1658 (§ 2212). The order ought to set out definitely the offense charged.

§ 2182. Journal entry—Order for warrant to arrest.

[*Title.*]

..... [Name of person to be arrested.]

This day this case came on for hearing at complaint herein filed: and upon the hearing it appearing that ....., residing at ..... has probably ["Aided" "induced" "caused" "encouraged" or "contributed to"] the delinquency of minors.

Therefore it is ordered that a warrant issue to ..... of this county to arrest the said ..... and bring h.. before the judge of this court forthwith.

.....

§ 2183. Form—Warrant to arrest, on complaint.

The State of Ohio, ... County.
Probate Court [Juvenile Division].

To the ..... of said County:

A complaint has been filed in this court, duly verified as provided by statute, in the matter of ..... a delinquent, neglected or dependent child, that one ..... residing at ..... has ..... the said child; and thereupon the judge made an order upon the journal of the court, that a warrant issue for the arrest of said .....;

These are therefore to command you to take the said ..... if ..he be found in your county, or, if ..he has fled, that you pursue after h.. into any other county in the state, and take and safely keep the said ..... so that you have h.. body forthwith before said court, to answer the said order, and be further dealt with according to law.

Given under my hand and the seal of said court, this ..... day of ....., 19...

....., Judge of the Probate Court.
By ....., Deputy Clerk.

§ 2184. Provision to avoid incarceration. § 1648-1. In any case where a child under the age of eighteen years is arrested with or without a warrant, in order to avoid the incarceration of such child, if practicable, the officer so arresting, unless otherwise ordered by the court, shall accept the written promise of the parent, guardian or other person with whom such child resides, or any other reputable person, to be responsible for the presence of said child in the proper court at the time and place when such child is to appear, and at any other time to which the hearing in the case may be continued or adjourned by the court. Nothing herein contained shall be construed to prevent the admitting of such child to bail, in accordance with the general provisions of the crimes act. [103 v. 864 (871).][33]

§ 2185. Special room for juvenile court. § 1649. The county commissioners shall provide a special room not used for the trial of criminal cases, when avoidable, for the hearing of juvenile cases. [99 v. 194, § 9.][34]

§ 2186. Hearing. § 1650. On the day named in the citation or upon the return of the warrant of arrest, or as soon thereafter as may be, the judge shall proceed, in a summary

[33] This means that unless the child be charged with a crime under the criminal laws, it is not to be placed in jail until time of hearing, or even in a house of detention, unless there is no one who will answer for its presence who is a proper person so to do.

[34] This is for the purpose of keeping the child away from all surroundings of matters pertaining to crime, when possible it would be wise if this room were in the detention home. This would not only keep the child away from courts, etc., but would put the judge in closer touch with the matters in the home.

manner to hear and dispose of the case, and the person arrested or cited to appear may be punished in the manner hereinafter provided. [99 v. 194, § 10]

§ 2187. Trial of juvenile.

The trial of the juvenile should be conducted in as informal a way as is proper in the hearing of judicial matters. It would differ in this respect from the trial of an adult even in Juvenile Court. Only in rare instances should an oath be administered to the child; the judge should as much as possible put himself on a common plane with the child. The practice of the judge sitting high above the child on a bench, and looking down upon him as a culprit has been severely condemned. Even the room in which the hearing is had, it is said, should not appear as a place where punishment is doled out, but more like a living room in a private home, and the proceedings conducted like a father with his child.

The prosecuting attorney should not be called in such cases. The officials are the judge and the probation officer. The judge represents the great commonwealth of Ohio: the probation officer, the child. The office and province of both is to do that which is to the best interests of the child. The probation officeer is not a prosecution official, neither is the court. The probation officer, will make his report, and must be present at the hearing. The judge will make such inquiries of the witnesses, parents and others as he may think necessary to place before his mind the true condition as to the matters charged, and what disposition should be made of the child. If the child has no home, of necessity the court must provide one, or if the home is an improper one some other place must be provided. When a child has a home, rarely for a first offense should he be taken therefrom; only as a last resort should he be sent to a reformatory. Here is where a difficult matter comes up to the judge. Sometimes then, from the things provided that he may do, there is little discretion.

But whatever is done must be that which in the mind of the judge will do the child the most good. The interest of parents and others is only secondary to that of the child. The law seems to provide that the question as to the child's delinquency may, on demand before trial, made on behalf of the child, be determined by a jury. But such is not the general procedure intended

by the juvenile law as to juvenile offenders. It has little to commend it as to such offenders.

§ 2188. Trial of adult.

The trial of an adult person contributing to the delinquency of a minor or for the support of a minor, etc., under the juvenile law, need not be conducted in any different manner from that when a person is on trial for commitment of any crime. If the adult so desires he may, if he makes such demand before the time of hearing, have the fact of whether or not he is guilty of the matter charged, submitted to a jury. In such cases he has a right to, and should be represented by counsel, and the prosecution should be represented by the prosecuting attorney. If found guilty the judge fixes the sentence within the limits provided by law.[35]

§ 2189. Jury trial; costs. § 1651. Any person charged with violating any of the provisions of this chapter or being responsible for or with causing, aiding or contributing to the delinquency, dependency or neglect of a child, or with acting in a way tending to cause delinquency in a child, arrested or cited to appear before such court, at any time before hearing, may demand a trial by jury, or the judge upon his own motion may call a jury.

Drawing jury. The statutes relating to the drawing and impaneling of jurors in criminal cases in the court of common pleas, other than in capital cases, shall apply to such jury trial.

Compensation. The compensation of jurors and costs of the clerk and sheriff shall be taxed and paid as in criminal cases in the court of common pleas. [99 v. 194, § 11; 103 v. 864 (871).][36]

[35] As to law see charges of court. State vs. Smith, 34 C. C. 661; 14 C. C. (N.S.) 257. Contributing to delinquency by going to house of ill-fame with minor. State vs. Hawkins, 56 Bull. 166. By having sexual intercourse with minor. State vs. Tollinger, 66 Bull. 141; § 2167. Same offense. See Patterson's Wilson's Cr. Code, §§ 13642-13687.

[36] §§ 11427 G. C. to 11446 G. C. relate to drawing and impaneling a jury and see §§ 11447 G. C. to 11468 G. C. as to trial by jury, general provisions. See §§ 13642 to 13679 Patterson's Wilson's Criminal Code, criminal provisions and see pages 1437 to 1499 same volume as to criminal evidence; also § 13533 as to forms of commitments. If no demand is made, and the record shows none, the defendant will be deemed to have waived it. Billigheimer vs. State, 32 O. S. 435.

§ 2190. Right to jury trial.

The previous section as it originally stood only provided that the right to jury trial should be given to the person who was charged with being responsible for or causing, aiding or contributing to the delinquency of the child. The statute as it now is, seems to be broad enough to include cases where the child itself is on trial. Of course to have the right it must be demanded; if not demanded it will be conclusively presumed to have been waived, and the waiver need not be in writing.[37] Even if the law did not give to the minor a right to a jury trial, the law would not be unconstitutional, and this would be true even though the charge in the affidavit was a felony.[38]

§ 2191. Commitment continued. § 1652. In case of a delinquent child the judge may continue the hearing from time to time and may commit the child to the care or custody of a probation officer, and may allow such child to remain at its own home, subject to the visitation of the probation officer or otherwise, as the court may direct, and subject to be returned to the judge for further or other proceedings whenever such action may appear to be necessary; or the judge may cause the child to be placed in a suitable family home, subject to the friendly supervision of a probation officer, and the further order of the judge, or he may authorize the child to be boarded in some suitable family home in case provision be made by voluntary contribution or otherwise for the payment of the board of such child, until suitable provision be made for it in a home without such payment; or the judge may commit such child, if a boy, to a training school for boys, or, if a girl, to an industrial school for girls, or commit the child to any institution within the county that may care for delinquent children, or be provided by a city or county suitable for the care of such children.

Limitation. In no case shall a child, committed to such institutions, be confined under such commitment after attaining the age of twenty-one years; or the judge may commit the child to the care and custody of an association that will receive it, embracing in its objects, the care of neglected or dependent children, if duly approved by the board of state charities, as provided by law. Where it appears at the hearing of a male delinquent child, that he is 16 years of age, or over, and has committed a felony, the juvenile court may commit such child

[37] Walton vs. State, 3 App. 97; 19 C. C. (N.S.) 452.

[38] *In re* Januszewski, 196 Fed. 123; 10 O. L. R. 151. See Marlowe vs. Com., 142 Ky. 106; 133 S. W. 1137; Mill vs. Brown, 31 Utah 473; 88 Pac. 809.

to the Ohio state reformatory. [99 v. 194, § 12; 103 v. 864 (871.)][39]

§ 2192. Commitment of minor delinquent.

There are three classes of persons that the court has jurisdiction over to commit to institutions, etc. The first is the delinquent child, second the dependent child and third the person, if he be a minor under eighteen years of age, who has caused, aided or contributed to the delinquency or dependency of the child.

The previous section refers to the first and third of these, and means the order the court may make when the matter comes up for hearing. The first commitment is of a probationary character by continuing the case and committing the child to the care and custody of the probation officer, etc. The second is of like character by causing the child to be placed in a suitable family home, etc. The third, if a boy, he is to be committed to a training school for boys; if a girl, to an industrial school. These would seem to mean to include the penal institutions of the boys industrial school and the girls industrial school. The fourth to any institution within the county that may care for such children. In all cases the institution must be one certified by the Ohio Board of State Charities, as proper.[40] If the child is sixteen years of age and not over twenty-one, and has committed a felony, it may be sent to the Ohio State Reformatory.[41]

§ 2193. Examination by competent physician. § 1652-1. Any child coming within the provision of this chapter may be subjected to a physical and mental examination by a competent physician or physicians, to be appointed by the Juvenile Court. Whenever any such child is committed to any institution by virtue of the provision of this chapter, a record of such examination or examinations shall be sent with the commitment to such institution. The Juvenile Court shall tax as part of the costs, a reasonable fee for such examination. [109 v. 523.]

§ 2194. Commitment to institution or suitable person. § 1653. When a minor under the age of eighteen years, or any ward of the court under this chapter, is found to be dependent

[39] See § 1672 G. C., § 2233, as to temporary and permanent custody.

[40] § 1352 G. C., § 2191.

[41] § 2131 G. C. The Ohio State Reformatory is not intended exclusively as a place of confinement of criminals. Leonard vs. Licker, 23 O. C. C. (N.S.) 444; 3 App. 377.

or neglected, the judge may make an order committing such child to the care of the children's home if there be one in the county where such court is held, if not, to such a home in another county, if willing to receive such child, for which the county commissioners of the county in which it has a settlement, shall pay reasonable board; or he may commit such child to the board of state charities or to some suitable state or county institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or an industrial school, as provided by law, or to the care of some association willing to receive it, which embraces within its objects the purposes of caring for or obtaining homes for dependent, neglected or delinquent children or any of them, and which has been approved by the board of state charities as provided by law.

Hospital. When the health or condition of the child shall require it, the judge may cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge.

Charge maintenance to parent. The court may make an examination regarding the income of the parents or guardian of a minor committed as provided by this section and may then order that such parent or guardian pay the institution or board to which the minor has been committed reasonable board for such minor, which order, if disobeyed, may be enforced by attachment as for contempt. [103 v. 864 (872).]

§ 2195. Commitment of dependent or neglected children.

If the child is not a delinquent under Sec. 1644, G. C. (§ 2160), but the court has found that he is dependent under Sec. 1645, G. C. (§ 2162), or neglected under Sec. 1646, G. C. (§ 2164), it may be committed *first,* to the children's home of the county, etc.; *second,* to the Board of State Charities; *third,* to some suitable State or county institution; *fourth,* to some reputable citizen; *fifth,* to some training or industrial school; *sixth,* to some association willing to receive it which has been approved by the Ohio Board of State Charities. But no dependent or neglected child is to be committed to the boys industrial school or the girls industrial school. The Ohio Board of State Charities shall, when able to do so, receive such children,[42] and when it does it becomes vested with the exclusive guardianship of such child and may place the children in homes. The

[42] § 1672 G. C., § 2233.

court may make an order that the parent pay a certain amount for the child's maintenance.

§ 2196. Journal entry—Orders on hearing, placing child in care and custody and suspending final judgment.

[*Title.*]

This day this case came on for hearing. The said child was brought before the court; and it appearing that the citation—warrant to arrest heretofore issued has been duly served, and that all persons interested are now before the court. And the judge having heard the evidence and being fully advised in the premises, finds that said ..... is under the age of eighteen years, to-wit, about the age of ..... years; and is a[1] ..... child, as alleged in the petition; that ..he ..... and therefore comes into the custody of the court, and will continue for all necessary purposes of discipline and protection, a ward of the court, until ..he shall attain the age of twenty-one years.

It is ordered that until the further order of the judge the said child be placed in the care and custody of, ... and, subject to future discipline, disposition and conditions as may be imposed by the judge, final judgment herein, or final commitment to any other place, person or institution, is hereby stayed and suspended.

....., Judge.

[1] Dependent, neglegted or delinquent.

§ 2197. Journal entry—Finding, judgment and order of the Court.

[*Title.*]

Juvenile No. .....

Commitment for [2]temporary [permanent] care ..... a[1] ..... child.

This ..... day of ....., 19..., ... was brought before the court, complained of by[3] ..... with being a[1] ..... child and the court having instituted an investigation, and having heard all the evidence finds:

That the law has been duly complied with in this case;

That the said child was born on or about the ..... day of ....., 19..., in the ..... of ....., county of ....., state of .....;

That the name, residence, nationality, and occupation of each parent is as follows:

Father .....

Mother[4] .....

That said child is[1] ..... in this, that .....

.....

.....

and therefore comes into the jurisdiction of this court, being in all respects within the provisions of the law concerning delinquent, dependent, and neglected children.

The court, finding further that it is for the best interests of said child that its[5] ..... be deprived of its care and custody temporarily [permanently] for the reason that [6]..... therefore orders that said child be committed to the temporary [permanent] care and custody of the [7]....., it appearing that said child is a suitable person to be so committed.

The court, finding further that the said [5]..... residing [Number and Street or R. F. D.], [City], [County], [State], is able to contribute toward

the support of said child, orders the said [5]..... to pay to the said [7]....., the sum of ..... per ..... from and after ....., 19..., first payment to be made on or before ..... and ..... thereafter.

It is further ordered that a warrant issue to ..... to convey and deliver said child to [7]..... and due return thereof be made to this court.

....., Judge of the Probate Court.

[1] "Dependent," "neglected" or "delinquent."
[2] Strike out "temporary" or "permanent" according to character of commitment.
[3] Name of party making complaint.
[4] Give maiden name of mother.
[5] Designate by name "parents," "father," "mother" or "guardian."
[6] State reasons order is temporary or permanent.
[7] Name of institution, child-caring agency or state board to which child is committed.

[A copy of this journal entry and family history sheet must accompany each child.]

§ 2198. Age limitations. § 1653-1. The provisions of section 1652 shall not apply to the girls' industrial school or the boys' industrial school, so far as the same allows the commitment of a child under ten years or over eighteen years of age to such institution. In no case shall a child found to be a dependent or neglected child be committed to such institution, nor shall any child under ten years or over eighteen years of age, be committed to such schools except as provided in section 2111 of the General Code. [101 v. 379; 103 v. 864 (873).][43]

§ 2199. Penalty for abuse or aiding and abetting delinquency. § 1654. Whoever abuses a child or aids, abets, induces, causes, encourages or contributes toward the dependency, neglect or delinquency, as herein defined, of a minor under the age of eighteen years, or acts in a way tending to cause delinquency in such minor, shall be fined not less than ten dollars, nor more than one thousand dollars or imprisoned not less than ten days nor more than one year, or both.

Each day additional offense. Each day of such contribution to such dependency, neglect or delinquency, shall be deemed a separate offense. If in his judgment it is for the best interest of a delinquent minor, under the age of eighteen years, the judge may impose a fine upon such delinquent not exceeding ten dollars, and he may order such person to stand committed until fine and costs are paid. [99 v. 195, § 14; 103 v. 864 (873).]

§ 2200. Commitment for causing delinquency, etc.

Either a minor or an adult might be committed under the previous section. The act for which he may be found guilty

[43] § 2111, permits a girl under eighteen years of age sentenced to the penitentiary, county jail or other penal institution to be transferred to the girls industrial school, on written order of the board of administration.

is for either aiding, abetting, inducing, causing, encouraging or contributing toward the dependency,[44] or the neglect,[45] or delinquency[46] of a minor under eighteen years of age. If a minor under eighteen years of age is the guilty party he may be fined not exceeding ten dollars, and he may be committed to some place of detention until paid. If found guilty he would also be a delinquent child and might be committed as such.[47] If the guilty party is over eighteen years of age the fine is not less than ten dollars nor more than one thousand, and imprisonment not less than ten days nor more than one year, or both fine and imprisonment. The nature of the crime is not felony but misdemeanor.[48] In all cases where the penalty is imprisonment, it means the county jail when the imprisonment is not more than one year; if longer it means penitentiary.[49] If the party is over sixteen years of age the court may sentence it to a workhouse.[50] Each element of the crime must be proved beyond a reasonable doubt.[51]

§ 2201. Journal entry on arraignment, plea of guilty.

[*Title.*]

This day came the prosecuting attorney of said county, on behalf of the State of Ohio, and the said defendant ..... was brought before the court in custody of the ..... and arranged upon the information filed in the said case. And having had a reasonable time to examine the charge preferred against ..... the charge was then distinctly read to ....., and ..... was required to plead thereto. Whereupon the said defendant pleads guilty to the offense charged against ..... in said information; and being inquired if ..... had anything to say why judgment should not be pronounced against ....., and having nothing but what ..... hath already said and showing no good and sufficient cause why judgment should not be pronounced: it is therefore the sentence of the said court that ..... be imprisoned in the ..... the term of ..... and to pay a fine of ..... dollars, and costs taxed at ..... dollars.

The court hereby suspends the imprisonment upon the payment of the fine and costs and during good behavior.

....., Probate Judge.

The State of Ohio, ... County. Probate Court.

I the undersigned, judge and ex-officio clerk of the Probate Court, within and for said county, and in whose custody the files, journals and

44 § 1645 G. C., § 2162.
45 § 1646 G. C., § 2164.
46 § 1647 G. C., § 2160.
47 § 1652 G. C., § 2191.
48 State vs. Rose, 89 O. S. 383.
49 § 12370 G. C.
50 § 4128 G. C.; Walton vs. State, 3 App. 97; 19 C. C. (N.S.) 452.
51 State vs. Hawkin, 56 Bull. 166. See this case for charge of court, also Smith vs. State, 14 C. C. (N.S.) 257; 34 C. C. 661 for charge, etc. See Patterson's Wilson's Cr. Code, p. 1477 for evidence.
See notes § 2167.

records of said court are required by the laws of the State of Ohio to be kept, do hereby certify that the foregoing is taken and copied from the journal of the proceedings of said court; that the foregoing has been compared by me with the original entry on said journal, and that the same is a true and correct copy thereof.

In testimony whereof, I hereunto subscribe my name officially, and affix the seal of said court, at the court house, in ..... in said county, this ..... day of ....., 19...

..... Judge and ex-officio clerk of said Probate Court.

By ....., Deputy Clerk.

§ 2202. Journal entry—Judgment.

The State of Ohio vs. .....,

Contributing to delinquency of .....

This day this cause came on for hearing upon the complaint heretofore filed herein, and the defendant was brought before the court. The court having duly heard and considered the evidence in the case, finds that said defendant ..... has, as alleged in the complaint, contributed to the delinquency of said ..... a child.. eighteen years of age or under, which said child ..... heretofore duly found to be a delinquent child.. as defined by the statutes of this state.

The court orders that said ..... defendant be fined in the sum of ..... dollars, and imprisoned in the ..... for a period of .....

The court hereby suspends the foregoing sentence upon condition that said defendant shall furnish a good and sufficient bond or undertaking to the people of the State of Ohio in the penal sum of ..... dollars, conditioned for the payment of ..... dollars per month in money or its equivalent, for [here specify the monthly amount for each child] for the support, care and maintenance of said child.. while under the guardianship or in the custody of .....

§ 2202a. Entry—Verdict of jury.

....., Plaintiff, vs. ....., Defendant.

This day this cause came on further to be heard, and came the defendant ....., in person and by council, and came the ..... by ....., prosecuting attorney, and thereupon came the jurors.

Thereupon, after argument of counsel and the charge of the court, the cause was submitted to the jury for its consideration, and the jury having considered said cause, returned into court the following verdict:

Verdict: We, the jury, duly impaneled and sworn to try the issues joined between the ..... and the defendant herein, do find the said defendant ....., guilty in manner and form as he stands charged in the complaint herein.

....., Foreman.

And this cause is continued.

....., J.

§ 2202b. Entry—Judgment—Trial by jury.

..... Court, ... County, Ohio.

....., Plaintiff, vs. ....., Defendants.

This day this cause came on further to be heard, and came the defendant, ..., in person and by counsel, and came ..... by .....,

prosecuting attorney, and thereupon the motion of the defendant for a new trial was argued by counsel and submitted to the court, upon consideration whereof the court finds said motion not well made, and the same is by the court overruled. To which ruling of the court the defendant by his counsel excepts.

Thereupon the court informed the defendant of the verdict of the jury and inquired of said defendant if he had any reason to state why sentence should not be passed upon him, said defendant, not having sufficient reason, it is by the court ordered, adjudged and decreed that said defendant ....., be committed to the ..... work house, ..., for the period of six months, and that he pay a fine in the sum of two hundred dollars and the costs of prosecution taxed herein at thirty-four dollars and ten cents ($34.10) and it is ordered that said defendant be confined in the ..... work house, ..., until said fine and costs are either paid or secured to be paid, or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs for each day of confinement in such work house, or he be otherwise legally discharged.

And it is ordered that warrant issue to probation officer to convey the said ..... to said ..... work house and that due return of such writ be made to this court.

..... ,J.

§ 2203. Failure or neglect to support—Penalty. § 1655. Whoever is charged by law with the care, support, maintenance or education of a minor under the age of eighteen years, and is able to support or contribute toward the support or education of such minor, fails, neglects, or refuses so to do, or who abandons such minor, or who unlawfully beats, injures, or otherwise ill treats such minor, or causes or allows him or her to engage in common begging, upon complaint filed in the juvenile court, as provided in this chapter, shall be fined not less than ten dollars, nor more than five hundred dollars, or imprisoned not less than ten days nor more than one year, or both.

In county, etc. Such neglect, non-support, or abandonment shall be deemed to have been committed in the county in which such minor may be at the time of such neglect, non-support, or abandonment.

Each day additional offense. Each day of such failure, neglect, or refusal shall constitute a separate offense, and the judge may order that such person stand committed until such fines and costs are paid. [99 v. 196, § 15; 103 v. 864 (873).]

§ 2204. Form—Complaint charging abandonment, etc.

The State of Ohio, ... County. Probate Court.

Before the Probate Court of said county, personally came ....., who being first duly sworn, says that he resides at ..... in said county, and upon information and belief says that ..... residing at ..... in said county, is the parent of the following named child.., ...

.....

.....

who ..... under eighteen years of age, to-wit:.....

.....

.....

and is charged by law with the care, support, maintenance and education of said child... and is able to perform such duty, or to contribute toward such support or education, but fails, neglects, and refuses so to do, *..... at the county of ..... in the State of Ohio.

.....

Sworn to before me and signed in my presence, this ..... day of ....., 19...

....., Judge of the Probate Court.
By ....., Deputy Clerk.

* Or "abandons said child."

§ 2205. Commitment for non-support, etc.

The person who could be found guilty under the previous section might be a minor under eighteen years of age, but that would be very unusual. The minor, to come within the above section, might be termed a dependent child within Sec. 1645 (§ 2162) or within Sec. 1646 (§ 2164), but the latter relates more to parental duties, than otherwise. It applies to whoever is charged by law with the care, support, maintenance or education of a minor under eighteen years of age; and if able, fails to do so; or if such person abandons the minor, or unlawfully beats, injures or mistreats him, or suffers the child to engage in common begging, etc.

The four things to be shown are, *first*, the minor must be under eighteen years of age; *second*, the party charged must be one charged by law to support the minor; *third*, the party charged must be able to render support; *fourth*, that the party charged, neglected to do so, or when the charge of abandonment is made, etc., that he did abandon the minor, etc. In all cases it must be shown that the offense was committed in the county. However, when it is non-support, if the child is in the county, the non-support will be *presumed* to have occurred in the county. But it is not necessary that the parent reside in county or even in the State.[52]

§ 2206. Journal entry—Judgment, non-support.

[*Title.*]

This day this case came on for hearing upon the complaint heretofore filed herein, and the defendant was brought before the court. The court

[52] State vs. Sauner, 81 O. S. 393. For form of mittimus. See Patterson's Wilson's Cr. Code § 13510, comments; also § 13511 and § 13515 for commitment of witness.

having duly heard and considered the evidence in the case, finds that said defendant ..... is charged by law with the care, support, maintenance and education of the following named child..: .....

.....

.....

all of said child.. being under eighteen years of age; that said defendant is able to support or contribute to the support and education of said minor: and further that said defendant, as alleged in the complaint, fails, neglects and refuses so to do, *.....

The court orders that said ..... defendant be fined in the sum of ..... dollars, and imprisoned in the ..... for a period of .....

The court hereby suspends the foregoing sentence upon condition that said defendant shall furnish a good and sufficient bond or undertaking to the people of the State of Ohio in the penal sum of ..... dollars, conditioned for the payment of ..... dollars per month in money or its equivalent, for [here specify the monthly amount for each child] for the support, care and maintenance of said child.. while under the guardianship or in the custody of .....

* Or "has abandoned said child."

§ 2207. Form—Bond to support delinquent, neglected or dependent child.

KNOW ALL MEN BY THESE PRESENTS, That ..... as principal and ..... as sureties are held and firmly bound unto the State of Ohio in the penal sum of ..... dollars, to the payment of which we hereby jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

Signed by us at ....., Ohio, this ..... day of ....., A. D. 19...

The condition of the above obligation is such that whereas the above bound ..... was on the ..... day of ....., 19..., in the Probate Court of ..... county, adjudged to be responsible for the abandonment, or by an act causing, encouraging, or contributing to the delinquency, neglect or dependence of the following described child.., eighteen years of age or under, to-wit: ..... who is about ..... years of age, ...

.....

.....

and this day the court sentenced the said ..... to .....

And whereas the court required as one of the conditions of suspending said sentence, that said ..... give bond that he will furnish to ..... or to such persons as the court may direct, money or its equivalent amounting to ..... dollars per month for said child.., payable on the ..... day of each month, and beginning ....., and continuing .....; unless before that time the court or other proper authority change this order.

Now if the said ..... shall faithfully comply with the terms and conditions of this bond, then these presents shall be void, otherwise to remain in full force and effect.

.....

.....

.....

.....

The above bond taken and approved by me this ..... day of ....., 19...

....., Judge of the Probate Court.

§ 2208. Sentenced to jail or workhouse.

It is a general provision of law, Sec. 4128, G. C., that when a person over sixteen years of age is found guilty of an offense for which the court may sentence him to county jail; the court may sentence him to a workhouse, and the courts have held that "imprisoned" as used in these juvenile statutes means imprisonment in the county jail, and therefore whenever a person under these juvenile laws commits an offense which subjects him to imprisonment, he may be sentenced to the workhouse,[53] and another general provision is that in all cases when a fine may be imposed in whole or in part in punishment of an offense, the court may order the person committed to the county jail until the fine and costs are paid, or to a workhouse until the fine is paid, or until he is discharged by allowing him sixty cents per day for each day of confinement.[54]

It will be observed that under the juvenile laws, that a minor, if he is guilty of causing delinquency, might be sentenced to imprisonment,[55] and also if he is guilty of non-support, etc., when that could be,[56] and if he was over sixteen he might be sent to the workhouse; a dependent child could not.[57] An adult if guilty of causing a delinquency, etc.,[58] or for non-support, etc.,[59] is subject to imprisonment, and therefore can be sent either to the county jail or workhouse.

If the child is himself a delinquent, he is not subject to fine and imprisonment, and therefore can not be sent to a workhouse. If he is guilty of a felony he may be sent to the State reformatory.[60] The industrial school is not a prison.[61]

§ 2209. Journal entry—Sentence to workhouse.

[*Title.*]

This day this cause came on for hearing upon the complaint heretofore filed herein, and the defendant was brought into court. The court having duly heard and considered the case [*or*, the defendant having demanded a jury and entered a plea of not guilty and the jury having rendered a verdict of guilty, etc.], finds that said defendant ....., has, as alleged in the complaint, contributed to the delinquency [*or*, has failed to support, etc.], of said ....., a child ..... years of age, which said child has heretofore been duly found to be a delinquent child [*or*, that said defend-

53 Walton vs. State, 3 App. 97; 19 C. C. (N.S.) 452.
54 § 12387 G. C.
55 § 1654 G. C., § 2199.
56 § 1655 G. C., § 2203.
57 § 1653 G. C., § 2195.
58 § 1654 G. C., § 2199.
59 § 1655 G. C., § 2203.
60 § 1652.
61 Prescott vs. State, 19 O. S. 184. See §§ 4148 and 12387 Patterson's Wilson's Cr. Code for comments, etc.

ant is able to support, or contribute to the support of said minor, etc., and fails and neglects so to do]. The court orders that said defendant pay a fine of $..... and the costs of this prosecution, fixed at $....., and it is further ordered that said defendant ....., stand committed to the ..... work house, there to remain confined and kept at labor until such fine and costs are paid, or he is discharged therefrom by allowing a credit of sixty cents per day on the fine and costs for each day of confinement, or until otherwise legally discharged.

.....

§ 2210. Provisions in case of workhouse sentence. § 1656. When a person is convicted and sentenced under this chapter for the abandonment of, or for the neglect of, or failure to maintain or support a minor, to imprisonment in a workhouse, the county from which such prisoner is so sentenced, shall pay from the general revenue fund fifty cents, for each day such prisoner is so confined, to the chief probation officer of such county, to be by him expended, under the direction of the judge, for the maintenance of the dependent minors of such prisoner, of which expenditure such officer shall make monthly reports to the judge. The county commissioners of such county shall make the allowances herein provided for, which shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor in favor of such probation officer. [99 v. 196, § 16; 103 v. 864 (873).]

§ 2211. Commitment to county jail, etc. § 1657. Pending final disposition of a case, the judge may commit any person arrested or cited to appear, except the minor under fourteen years of age, to the county jail until the case is disposed of, but such trial shall be commenced within four days of such commitment unless upon the request of the defendant. Pending final disposition, the judge may direct that the minor in question be left in the possession of the person having charge of him, or that he be kept in some suitable place provided by the county or city authorities. [99 v. 196, § 17.]

§ 2212. Citation or arrest ordered after hearing. § 1658. If it appear upon the hearing that any person not cited to appear, has probably abused or has aided, induced, caused, encouraged, or contributed to the dependency, neglect or delinquency of a minor under the age of eighteen years, or acted in a way tending to cause delinquency in such minor, or that a person, charged by law, with the care, support, education and maintenance of any minor, has abandoned, failed, refused, or neglected, being able to do so, to support, or sufficiently contribute toward the support, education and maintenance of such minor, the judge may order such person to be cited to appear at a subsequent day, or may issue a warrant to arrest such person as hereinbefore provided, and upon citation, warrant and hearing the same proceedings may be had as in the first instance. [99 v. 196, § 18; 103 v. 864 (874).]

§ 2213. Journal entry—Order for arrest on hearing, etc.

[*Title.*]

It appearing to the court on the ..... of ....., that ....., who was not cited to appear in said cause, has probably abused ....., or contributed to the delinquency of said ....., a minor under eighteen years of age, etc. [*or*, other matter mentioned in section 1658], it is ordered that a warrant be issued for the arrest of said ....., and he be brought forthwith before this court.

§ 2214. Warrant to arrest, after hearing.

The State of Ohio, ... County. Probate Court.

To the ..... of said county:

Whereas, in the matter of ..... a delinquent, neglected or dependent child, it appearing at the hearing of said matter in this court, that one ..... residing at ..... has ..... the said child; and thereupon the judge made an order upon the journal of the court, that a warrant issue for the arrest of said .....;

These are therefore to command you to take the said ..... if ..he be found in your county, or, if ..he has fled, that you pursue after h.. into any other county in the state, and take and safely keep the said ..... so that you have h.. body forthwith before me, to answer the said order, and be further dealt with according to law.

Given under my hand and the seal of said court, this ..... day of ....., 19...

....., Judge of the Probate Court.
By ....., Deputy Clerk.

§ 2215. Transfer of case to juvenile court. § 1659. When a minor under the age of eighteen years is arrested, such child, instead of being taken before a justice of the peace or police judge, shall be taken directly before such juvenile judge; or, if the child is taken before a justice of the peace or a judge of the police court, it shall be the duty of such justice of the peace or such judge of the police court, to transfer the case to the judge exercising the jurisdiction herein provided. The officers having such child in charge shall take it before such judge, who shall proceed to hear and dispose of the case in the same manner as if the child had been brought before the judge in the first instance. [99 v. 197, § 19; 103 v. 864 (874).]

§ 2216. Child arrested on warrant from justice of peace or police court.

The previous section removes all jurisdiction over a child who violates the law who is under eighteen years of age. No matter where, or when such child is arrested, it is not to be taken to a police court or a justice of the peace. One object of the law is to keep children away from such courts; the other is to have the child dealt with as the juvenile law provides.

When the child is taken to the Juvenile Court the case is then proceeded with the same as if the citation or warrant had issued from that court in the first instance.

The police court or justice of the peace should note on his docket that the case is transferred to the Juvenile Court and send all the papers to that court. If the offense charged is a felony, the Juvenile Court may bind the child over to the Court of Common Pleas, the same as the police court or justice of the peace might have done, had that court retained jurisdiction.[62]

§ 2217. Writs, to whom issued. §1660. The summons, warrants, citations, subpoenas and other writs of such judge may issue to a probation officer of any such court or to the sheriff of any county, and the provisions of law relating to the subpoenaing of witnesses in criminal cases shall apply in so far as they are applicable. [99 v. 197, § 20; 103 v. 864 (874).]

§ 2218. Expense, how paid. § 1661. When a summons or warrant is issued to any such officer, the expense in pursuing and bringing the person named therein, before such judge, shall be paid by the county in the manner prescribed by law for the payment of deputies, assistants and other employes of county officers. [99 v. 197, § 21; 103 v. 864 (874).]

§ 2219. Probation officers—Appointment. § 1662. The judge designated to exercise jurisdiction may appoint one or more discreet persons of good moral character, one or more of whom may be a woman, to serve as probation officers, during the pleasure of the judge. One of such officers shall be known as chief probation officer and there may be one or more assistants. Such chief probation officer and assistants shall receive such compensation as the judge appointing them may designate at the time of the appointment;

Compensation. Provided, however, that such compensation may be increased or decreased at any time by said judge, but the compensation of the chief probation officer shall not exceed three thousand dollars per annum and that of the assistants shall not exceed twenty-four hundred dollars per annum. The judge may appoint other probation officers, with or without compensation, when the interests of the county require it.

How paid. The compensation of the probation officers shall be paid by the county treasurer from the county treasury upon the warrant of the county auditor, which shall be issued upon itemized vouchers sworn to by the probation officers and certified to by the judge of the juvenile court. The county auditor shall issue his warrant upon the treasury and the treasurer

[62] § 1681 G. C., § 2242.

shall honor and pay the same, for all salaries, compensation and expenses provided for in this act, in the order in which proper vouchers therefor are presented to him. [109 v. 527.]

§ 2220. Appointment of probation officer.

On no one person rests greater opportunity to accomplish the purposes of the juvenile law, than the probation officer. All that was said concerning the attributes of the judge, presiding over this court, apply to this official. The law says he must be a discreet person and of good moral character, but this is not all; he should be industrious and have the faculty of getting along with children and getting into their confidence. He should be absolutely free from prejudice, with a judicial mind that would make him free from bias or influence in the performance of his duties. Necessarily the judge must rely upon his reports. Then too, in all hearings he must be present and represent, not the State, not the person filing the complaint, *but the child*. He must never forget that he represents the child. The object and purpose of the law is the child's welfare, and it is his duty to do that and that only, which will contribute to that result. He may fail in many instances, but that should always be his sole aim.

§ 2221. Form—Appointment of probation officer.

Probate Court, ... County, O., ..., A. D. 19...

In the matter of ....., probation officer.

APPOINTMENT.

Pursuant to the laws of Ohio concerning delinquent, neglected or dependent children, the Probate Court of this county, believing that ..... residing at ..... is a discreet person of good moral character, hereby appoints the said ..... to serve as ..... probation officer of said court.

The law provides that said appointment shall continnue during the pleasure of the judge.

It is the duty of said probation officer, when any child is to be brought before the judge, pursuant to the above-mentioned law, to make investigation of such ase; to be present in court to represent the interest of the child when the case is heard: to furnish to the judge such information and assistance as he may require; and to take charge of any child before and after the trial as may be directed by the judge.

And it is ordered by the judge that a certificate of this appointment under the seal of said court as evidence of the same, issue to said person so appointed.

....., Judge of the Probate Court.

CERTIFICATE.

The State of Ohio, ... County.

I, the undersigned judge of the Probate Court within and for said county, hereby certify that the foregoing is a true copy from the journal

of the proceedings of said court within and for said county.

In testimony whereof, I do hereunto subscribe my name officially, and affix the seal of said court, this ..... day of ....., 19...

....., Judge of the Probate Court.

[SEAL]

§ 2222. Oath of office of probation officer.

The State of Ohio, ... County.

..... being duly sworn says that ..he will support the Constitution of the United States and the Constitution of the State of Ohio, and will faithfully discharge the duties devolving upon h.. as probation officer of ..... County, Ohio.

.....

Sworn to before me and signed in my presence, this ..... day of ....., A. D. 19...

.....

.....

§ 2223. Duties and powers of probation officers. § 1663. When a complaint is made or filed against a minor, the probation officer shall inquire into and make examination and investigation into the facts and circumstances surrounding the alleged delinquency, neglect, or dependency, the parentage and surroundings of such minor, his exact age, habits, school record, and every fact that will tend to throw light upon his life and character.

Shall be present in court. He shall be present in court to represent the interests of the child when the case is heard, furnish to the judge such information and assistance as he may require, and take charge of any child before and after the trial as the judge may direct.

Shall serve warrants within and without county. He shall serve the warrants and other process of the court within or without the county, and in that respect is hereby clothed with the powers and authority of sheriffs.

May make arrests on view, etc. He may make arrests without warrant upon reasonable information or upon view of the violation of any of the provisions of this chapter, detain the person so arrested pending the issuance of a warrant, and perform such other duties, incident to their offices, as the judge directs.

All sheriffs shall assist. All sheriffs, deputy sheriffs, constables, marshals and police officers shall render assistance to probation officers, in the performance of their duties, when requested so to do. [99 v. 198, § 23.]

§ 2224. Prosecuting attorney, duty of. § 1664. On the request of the judge exercising such jurisdiction, the prosecuting attorney of the county shall prosecute all persons charged with violating any of the provisions of this chapter. [99 v. 198, § 24.][63]

[63] The court has no power to appoint an attorney to assist the prosecuting attorney. Atty. Genl's. opinion (1921), 66 Bull. 165.

§ 2225. **Bail.** § 1665. The provisions of law relating to bail in criminal cases in the common pleas court shall apply to persons committed or held under the provisions of this chapter so far as they are applicable. [99 v. 198, § 25.][63a]

§ 2226. **Suspension of sentence.** § 1666. In every case of conviction and where imprisonment is imposed as part of the punishment, such judge may suspend sentence upon such conditions as he imposes. [99 v. 198, § 26.]

§ 2227. **Forfeit of bond.** § 1667. When, as a condition of suspension of sentence, bond is required and given, upon the failure of a person giving such bond to comply with the terms and conditions thereof, such bond may be forfeited, the suspension terminated by the judge, the original sentence executed as though it had not been suspended, and the term of any jail or workhouse sentence imposed in such case shall commence from the date of imprisonment of such person after such forfeiture and termination of suspension. Any part of such sentence which may theretofore have been served, shall be deducted from any such period of imprisonment. [99 v. 198, § 27.][64]

§ 2228. **Error proceedings.** § 1668. The provisions of the law relating to error proceedings from the court of common pleas, including the allowance and signing of bills of exceptions shall apply to prosecutions of persons over eighteen years of age under this chapter, and from the judgment of a judge of the court of common pleas in such prosecutions error may be prosecuted to the circuit court of the county under laws governing prosecution of proceedings in error in other criminal cases to such circuit court; and from the judgment of a judge of the probate court in such prosecution, error may be prosecuted to the common pleas court of the county under the laws governing prosecution of proceedings in error from the probate court to the court of common pleas.

Lease obtained. A petition in error shall not be filed either in the circuit court or court of common pleas except upon good cause shown, upon motion and notice to the prosecuting attorney, as in civil cases, or unless such motion is allowed by such courts. [103 v. 405 (416); 103 v. 864 (875).][65]

§ 2229. Appeal and error.

It is a well-settled rule in Ohio that the matter of appeal and error are purely statutory matters, and if the statute does

[63a] See §§ 13492 to 13757 G. C.

[64] See § 13545 G. C., for forms of forfeiture. Patterson's Wilson's Cr. Code § 13552, forms of recognizances.

[65] See §§ 13745 to 13750 G. C. for proceedings preliminary to error, and §§ 13751 to 13764 G. C. for error proceedings and notes and forms in Patterson's Wilson's Cr. Code.

not provide for such, none exists,[66] and this rule applies to criminal as well as civil cases.[67]

It would therefore follow that there is no right of appeal of any case from the decision of the Juvenile Court, and no right to prosecute error in any case, unless the person charged is over eighteen years of age; it makes no difference what the offense may be with which he is charged. If the offender is over eighteen years of age, then he may prosecute error to the Court of Common pleas if the probate judge is presiding as judge in the Juvenile Court, and to the Court of Appeals if the judge presiding in the Juvenile Court be a common pleas judge.

However, no such error can be prosecuted unless by leave of the higher court, on good cause shown and notice to the prosecuting attorney.

If, however, the offense committed be such that under our law it is not only such as may be covered by the juvenile law, but also one recognized as a crime by the laws of our State, it seems he might be amenable to punishment under such criminal laws, notwithstanding the fact that he had been tried in the Juvenile Court. This is so because the juvenile laws are special, statutory and correctional, but not criminal. Thus if a minor under eighteen years of age shot a person and killed him, and

[66] *In re* Januszewski, 196 Fed. 123; 10 O. L. R. 661; Barr vs. Closterman, 2 C. C. 390; Karb vs. State, 54 O. S. 383. It is a rule of construction that when a new right with its remedy is given by statute and there is no provision for review or appeal from those who administer the statute creating such right, such determination is usually final. In such case an adverse decision cannot be overcome by appeal or original petition in a court of justice. Id—.

[67] In Andrews vs. Swartz, 156 U. S. 272, Mr. Justice Harlan, quoting with approval McKane vs, Durston, 153 U. S. 684, 687, said:

"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appelate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. It is therefore, clear that the right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be proper; and whether an appeal should be allowed, and if so, under what circumstances or on what conditions are matters for each state to determine for itself."

It is not urged and can not be successfully maintained that a laxer rule obtains in distinctively criminal cases than in those of a civil or quasi-criminal nature.

was afterwards charged in the Juvenile Court with a delinquency for the same act and found guilty, this would not prevent the grand jury from indicting the child for murder, and the child being tried and convicted thereon. The fact that the next section provides that the proceedings of the Juvenile Court are not admissible in any other legal proceedings against the child, bears out the view that it may be subject to such further criminal proceedings.

The twice in jeopardy rule could not be applied, because the same offense, although it may be the same act, is not charged in each case. Whether or not the child after he was within the jurisdiction of the Juvenile Court could be punished for such crime until he was twenty-one years old, or the jurisdiction of the Juvenile Court had terminated, may be one of some doubt. If a felony has been committed, the judge may, instead of proceeding under the juvenile law, bind him over to the grand jury, to be proceeded with as a criminal,[68] and probably in such cases unless there are some great mitigating circumstances, this should be done instead of proceeding under the juvenile law. Whether if the proceedings be in the Probate Court or not, the statute providing that the court shall have monthly terms or quarterly terms, is not clear, but as the proceeding is more in the nature of a criminal proceeding than a civil action, I am inclined to believe that the terms are monthly, beginning on the first Monday of each month.[69]

§ 2230. Findings, not lawful evidence. § 1669. The disposition of, or any order, judgment, or finding against a child under this chapter, or any evidence given in any proceeding thereunder, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases herein against the same child. [99 v. 199, § 29.]

§ 2231. Detention home, how established and conducted. § 1670. Upon the advice and recommendation of the judge exercising the jurisdiction provided herein, the county commissioners shall provide by purchase or lease, a place to be known as a "detention home" within a convenient distance of the court house, not used for the confinement of adult persons charged with criminal offenses, where delinquent, dependent or neglected minors under the age of eighteen years may be detained until final disposition, which place shall be maintained by the county as in other like cases.

[68] § 1681 G. C., § 2242.

[69] § 3457 G. C., § 5.

Superintendent and matron. In counties having a population in excess of forty thousand, the judge may appoint a superintendent and matron who shall have charge of said home, and of the delinquent, dependent and neglected minors detained therein.

Qualifications. Such superintendent and matron shall be suitable and discreet persons, qualified as teachers of children.

How furnished. Such home shall be furnished in a comfortable manner as nearly as may be as a family home.

Delinquent and dependent children separate. So far as possible delinquent children shall be kept separate from dependent children in such home. The compensation of the superintendent and matron shall be fixed by the county commissioners.

Compensation. Such compensation and the expense of maintaining the home shall be paid from the county treasury upon the warrant of the county auditor, which shall be issued upon the itemized voucher, sworn to by the superintendent and certified by the judge.

Sexes separate. In all such homes the sexes shall be kept separate, so far as practicable. [99 v. 199, § 30; 103 v. 864 (875).]

§ 2232. **Expenses of detention home.** § 1671. When such detention home is provided by the county commissioners, and upon such home being recommended by the judge, the commissioners shall enter an order on their journal transferring to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to purchase or lease such home and properly furnish and conduct it and pay the compensation of the superintendent and matron. The commissioners shall likewise upon the appointment of probation officers, transfer to the proper fund from any other fund or funds of the county, in their discretion, such sums as may be necessary to pay them, and such transfers shall be made upon the authority of this chapter. At the next tax levying period, provisions shall be made for the expenses of the court. [99 v. 199, § 30.]

§ 2233. **When child is in temporary or permanent care and custody.** § 1672. If the court awards a child to the care of an institution, association, or a state board in accordance with the provisions of this and other chapters, the judge shall in the award or commitment designate whether it is for temporary or permanent care and custody.

Limitation of temporary care. If for temporary care, the award or commitment shall not be for more than twelve months, and before the expiration of such period the court shall make other disposition of the matter, or recommit the child in the same manner. During such period of temporary care the in-

stitution, association or state board to which such child is committed shall not place it in a permanent foster home, but shall keep it in readiness for return to parents or guardian whenever the court shall so direct.

Require permission to place in home. At any time during such temporary custody the institution or board to whom such child is committed, may, whenever there is an opportunity to place such child in a foster home by adoption, request the court to determine whether such commitment should be modified to include permanent care and custody.

Permanent care may place in home. Whenever a child is committed to the permanent care of an institution, association or a state board, it shall ipso facto come under the sole and exclusive guardianship of such institution, association or state board, whereupon the jurisdiction of the court shall cease and determine, except that such institution, association or board, to which such child is permanently committed may petition said court to make other disposition of such child because of physical, mental or moral defects.

Procedure in adoption. Such institution, association or state board may place such child in a foster family home and shall be made a party to any proceedings for the legal adoption of the child. Assent on the part of such institution, association or state board shall be sufficient to authorize the judge to enter the proper order or decree of adoption. In a similar manner the court may award a child to the care or guardianship of an individual, but such individual shall not place such child in the care of another person or assent to adoption except upon order of said juvenile court; such guardianship shall not include the guardianship of any estate of the child.

Monthly report by juvenile court to board of state charities. For the purpose of information and co-operative supervision the juvenile court shall report monthly to the board of state charities the names of children committed to institutions and individuals; provided that such report shall not include a child coming under the supervision and custody of the court but permitted to remain with parents or guardian. The board of state charities shall prepare and furnish suitable blanks for such reports. [108 v. Pt. I 260.]

§ 2234. Commitment temporarily or permanently.

This is a recent amendment and is now a requirement of all commitments. If the commitment is temporary, which shall not be for more than twelve months, the court shall make some other disposition of the child or re-commit the same. During the time of this temporary commitment, the institution must keep the child in readiness to return it when the court orders. If the

opportunity is presented to the institution to place it in a foster home by adoption, the juvenile judge shall be notified and the court shall determine whether the temporary commitment shall be made a permanent one. If the commitment is a permanent one, then the institution becomes possessed of the sole control of the child, and the jurisdiction of the court shall cease, except because of physical, mental or moral defects it may petition the court to make some other disposition of the child. The institution then places the child in a foster home and has it adopted there.

The court may place the child with an individual, but such individual can not have the child adopted except on a special order of the court.

§ 2235. Agreement with incorporated institution for care of child. § 1673. The parents, parent, guardian or other person or persons having the right to dispose of a dependent or neglected child may enter into an agreement with any association or institution, incorporated under any law of this state which has been approved by the board of state charities as provided by law, for the purpose of aiding, caring for or placing in homes such children, or for the surrender of such child to such association or institution, to be taken and cared for by such association or institution, or put into a family home. Such agreement may contain any and all proper stipulations to that end, and may authorize the association or institution, to appear in any proceeding, for the legal adoption of such child, and consent to its adoption. The order of the judge made upon such consent shall be binding upon the child and its parents, guardian or other person, as if such persons were personally in court and consented thereto, whether made party to the proceeding or not. [103 v. 864 (876.)]

§ 2236. Agent of certain institutions, duties of. § 1674. The chief officer of the boys' industrial school, and of the girls' industrial school, and the manager of any other institution to which juvenile delinquents may be committed, shall, each, maintain agents of such institution, who shall examine the homes of children paroled for the purpose of reporting to such chief officer or manager, whether they are suitable homes, and assist children paroled or discharged from such institution in finding suitable employment, and maintain a friendly supervision over paroled inmates.

Compensation. Such agents shall hold office subject to the pleasure of the chief officer or manager making the appointment and shall receive such compensation as the Ohio board of administration may determine. [103 v. 864 (876).]

§ 2237. Judge may require report from institution. § 1675. At any time the judge may require from an association receiving or desiring so to receive children, such reports, information and statements as he deems proper and necessary. He may at any time require from an association or institution, reports, information or statements concerning any child or children committed to it by him, under the provisions of this chapter. [103 v. 864 (877).]

§ 2238. Associations of other states. § 1677. No association of another state, incorporated or otherwise, shall place a child in a family home within the boundaries of this state, either with or without indenture or for adoption, unless such association shall have furnished the board of state charities with such guaranty as it may require that no child having a contagious disease, deformity, feeble mind or vicious character, shall be brought into this state by such association or its agents, and that such association will promptly receive and remove from the state, a child brought into the state by its agents, which shall become a public charge, within the period of five years thereafter. [103 v. 864 (877).]

§ 2239. Penalty. § 1678. Whoever violates any of the provisions of section 1677 shall be imprisoned in the county jail not more than thirty days, or fined not less than five dollars or more than one hundred dollars, or both, in the discretion of the judge. [103 v. 864 (877).]

§ 2240. Religious belief. § 1679. The judge in committing children shall place them, so far as practicable, in the care and custody of an individual holding the same religious belief as such child or its parents, or with some association which is controlled by persons of like religious faith as such child or its parents. [99 v. 202, § 37.]

§ 2241. How chapter construed as to industrial schools. § 1680. Nothing herein shall be construed to repeal any provision of law relating to the boys' industrial school or the girls' industrial school. [99 v. 202, § 38; 103 v. 864 (877).][70]

§ 2242. When child is charged with felony. § 1681. When any information or complaint shall be filed against a delinquent child under these provisions, charging him with a felony, the judge may order such child to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance before the court of common pleas at

[70] See §§ 2083 to 2100 G. C., as to Boys Industrial School and §§ 2101 to 2119 G. C., as to Girls Industrial School, and notes and forms in Patterson's Wilson's Cr. Code.

the next term thereof. The same proceedings shall be had thereafter upon such complaint as now authorized by law for the indictment, trial, judgment and sentence of any other person charged with a felony. [99 v. 202, § 39.]

§ 2243. Binding over to court of common pleas.

The previous section is not mandatory but rests in the discretion of the juvenile judge whether he shall proceed under the juvenile law, or require the persons charged to appear before the Court of Common Pleas to answer for the offense he has committed.

In such cases the child's welfare becomes subordinate to that of the State as protector of the peoples' common welfare. If the crime charged is a heinous one and the child of sufficient years of discretion to know the nature of the offense, and there is a probability of his commission of the act, and the surrounding circumstances are of an unmitigating character, the court can do nothing less than to bind him over to the grand jury. However, if the act is of a mild type, and the child may be reclaimed and become a useful member of society, the court would be justified in not making the order. It is one of the many instances where wisdom is a very essential element of the judge of the Juvenile Court.

§ 2244. Form—Journal entry—Binding over to common pleas.

[*Title.*]

This day this cause came on to be heard upon the evidence and was submitted to the court, and upon due consideration the court finds that the defendant is probably guilty of the commission of the act against the laws of the State of Ohio as set forth in the complaint filed herein, and the same is a felony under the laws of Ohio; it is therefore ordered that ....., the defendant herein enter into a recognizance in the sum of $....., with good and sufficient surety for his appearance before the Court of Common Pleas of ..... County, Ohio, at the first day of its next term, or in default thereof, he be committed to the jail of ..... County, Ohio, there to remain until discharged by law.

§ 2245. Form of recognizance, etc.

State of Ohio, ... County, ss.

Be it remembered that on the ..... day of ....., 19..., ..., E. F. and C. D. personally appeared before me, and jointly and severally acknowledged themselves to owe the State of Ohio the sum of $..... [..... dollars] to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to-wit: The condition of this recognizance is such that if the above bound E. F. shall

personally be and appear before the Court of Common Pleas of ..... County, Ohio, on the first day of the next term thereof, then and there to answer to the charge of ..... and abide the judgment of the court, and not depart without leave, then this recognizance shall be void; otherwise it shall remain in full force and virtue in law.

Taken and acknowledged before me on the day and year above written.[71]

§ 2246. Fees and costs, how paid. § 1682. Fees and costs in all such cases with such sums as are necessary for the incidental expenses of the court and its officers, and the expense of transportation of children to places to which they have been committed, except the fees of the court and the fees and expenses of the sheriff and his deputies, shall be paid from the county treasury upon specifically itemized vouchers, verified by oath and certified to by judge of the court. [99 v. 202, § 40; 108 v. Pt. II 1203 (1218).]

§ 2247. Chapter to be liberally construed. § 1683. This chapter shall be liberally construed to the end that proper guardianship may be provided for the child, in order that it may be educated and cared for, as far as practicable in such manner as best subserves its moral and physical welfare, and that, as far as practicable in proper cases, the parent, parents or guardian of such child may be compelled to perform their moral and legal duty in the interest of the child. [99 v. 202, § 40.]

§ 2248. Jurisdiction additional. § 1683-1. The judge designated to transact the business arising under the jurisdiction conferred in this chapter shall have jurisdiction of all misdemeanors against minors, and of offenses prescribed in sections nine hundred and twenty-eight, six thousand three hundred and forty-four, six thousand three hundred and forty-five, six thousand three hundred and seventy-three, twelve thousand six hundred and sixty-four, twelve thousand six hundred and sixty-six, twelve thousand seven hundred and eighty-seven, thirteen thousand and thirty-one, thirteen thousand and thirty-five, and thirteen thousand and thirty-eight. In all such cases any person may file with the clerk of the judge exercising the jurisdiction an affidavit, setting forth briefly, in plain and ordinary language, the charges against the accused, and he shall be tried thereon, and in such prosecutions an indictment by the grand jury or information by the prosecuting attorney shall not be required. The judge shall forthwith issue his warrant for the arrest of the accused, who, when arrested, shall be taken before said judge, and tried according to the provisions of this chapter, and, if found guilty, shall be punished in the manner provided for by law. [102 v. 425.]

[71] See §§ 13552 and 13553 G. C., for forms and mittimus.

§ 2249. Misdemeanors against minors, etc.

Previous sections conferred on the Juvenile Court jurisdiction in respect to delinquent, neglected and dependent minors,[72] and others who contributed to or were responsible for such conditions.[73]

The previous section confers jurisdiction on the Juvenile Court over other misdemeanors committed by minors.

A previous section 1659 (§ 2215), required that when a minor under eighteen years of age was arrested he should be taken to the Juvenile Court. This allows certain matters to be originally brought on an affidavit filed in the Juvenile Court, and proceedings shall then he had as in cases of delinquency. Not all misdemeanors may be thus heard; the statute enumerates those that may.[74]

[72] § 1642 G. C., § 2156.

[73] § 1644 G. C., § 2160; § 1646 G. C., § 2164; § 1645 G. C., § 2162; § 1651 G. C., § 2159.

[74] § 928 G. C., does not describe any offense and therefore must be a misprint or mistake. It probably means § 944, which seems previously to have had this number and provides that no person shall employ a boy under fourteen, etc. § 6344 G. C. relates to pawnbrokers taking property from a minor or a person intoxicated; § 6345 to same employing a person under sixteen years of age as a pawnbroker; § 6373, to secondhand dealers purchasing from minor any article mentioned in chapter relating to junk shops, between 9 p. m. and 7 a. m.; § 12664 to careless distribution of samples containing poisonous drugs to a minor; § 12666, to selling poisons to a minor; § 12787, to midwife failing to report diseased eyes in infant; § 13031, keeping house of ill-fame and harboring child therein; § 13035, selling obscene literature; § 13038, mailing or delivering same to child.

Under the recent law the truants from school are to be tried by the Juvenile Judge. See § 7774 G. C. [109 v. —].

CHAPTER CX.

MOTHER'S PENSION.

§ 2250 Who entitled to (§ 1683-2).
§ 2251 Persons who may receive.
§ 2252 Amount allowed
§ 2253 Conditions of allowance.
§ 2254 Additional requirements.
§ 2255 Form application for support.
§ 2256 Journal entry preliminary examination.
§ 2257 Form report of preliminary examination.
§ 2258 Journal entry allowance.
§ 2259 Order to auditor.
§ 2260 Journal entry discontinuance.
§ 2261 Journal entry extending allowance.
§ 2262 Journal entry refusing allowance.
§ 2263 When allowance shall cease (§ 1683-4).
§ 2264 Disposal of funds (§ 1683-5).
§ 2265 To whom act does not apply (§ 1683-6).
§ 2266 Attempts to obtain by fraud (§ 1683-7).
§ 2267 Record of proceedings (§ 1683-8).
§ 2268 Appeal and error.
§ 2269 Form detailed record, etc.
§ 2270 Provisions for tax levy (§ 1683-9).
§ 2271 Commissioners may transfer surplus (§ 1683-10).

§ 2250. Mother's pensions, who entitled to. § 1683-2. For the support of women whose husbands are dead, or become permanently disabled by reason of physical or mental infirmity, or whose husbands are prisoners or whose husbands have deserted, and such desertion has continued for a period of three years, when such women are poor, and are the mothers of children not entitled to receive age and schooling certificate, and such mothers and children have a legal residence in any county of the state for two years, the juvenile court may make an allowance to each of such women as follows:

Allowance, etc. Not to exceed thirty-five dollars a month when she has but one child not entitled to an age and schooling certificate, and if she has more than one child not entitled to an age and schooling certificate, it shall not exceed thirty-five dollars a month for the first child and ten dollars a month for each of the other children not entitled to an age and schooling certificate.

Length of order. The order making such allowance shall not be effective for a longer period than six months, but upon the expiration of such period, said court may, from time to time, extend such allowance for a period of six months or less.

Visitation of homes and reports. Such homes shall be visited from time to time by a probation officer, the agent of

an associated charities organization, or of a humane society as the court may direct, or in the absence of such probation officer, society or organization in any county, the sheriff of said county shall make such visits as directed by the probate court; provided that the person, other than the sheriff, who actually makes such visits, shall be thoroughly trained in charitable relief work, and the report or reports of such visiting agent shall be considered by the court in making such order for relief. [106 v. 436; 103 v. 864 (877); 109 v. 70.]

§ 2251. Person entitled to receive.

The previous and the following sections have for their primary object the welfare of the child. It is a recognition of the fact that the home is the proper, and other conditions being equal, the best place for a child to be reared; that the mother's control is better than the State's, and the first requirement then of the law is that the person entitled to receive the pension must be a mother, and that the child is not entitled to receive an age and schooling certificate. This certificate is granted to minors over sixteen years of age.[1]

The next requisite is that the person must be one whose husband is dead, or permanently disabled, or a prisoner, or has been guilty of desertion for three years. The statute would evidently include the mother of an illegitimate child.

The next essential is that mother and child must have a legal residence of two years' duration in the county, and the last is that the mother must be poor. The word "poor" as here used does not mean that she must be destitute, or own no property whatever. It means that she has not sufficient property at his disposal to give to her children a proper home with the use of proper efforts on her part towards that end. Purposely a wide discretion is here allowed the judge.

§ 2252. Amount allowed.

The amount allowed, if there is but one child within the limited age, is thirty-five dollars per month, and not to exceed ten dollars per month for each additional child. This runs for six months at a time, subject to repeated extension of six months; when the child reaches the age of legal employment, it ceases. It may be changed or cut off at any time by order

[1] § 7766 G. C.

of the court. The amounts above stated are maxims; the court may fix any amount thereunder. The court can only properly perform his duties when he acquaints himself with all the surrounding circumstances, and bearing in mind the welfare of the child and society in general. The next section gives further conditions under which the pension can be granted.

§ 2253. Conditions of allowance. § 1683-3. Such allowance may be made by the juvenile court, only upon the following conditions:

Living with mother. First, the child or children for whose benefit the allowance is made must be living with the mother of such child or children;

Mother working, etc. Second, the allowance shall be made only when in the absence of such allowance, the mother would be required to work regularly away from her home and children, and when by means of such allowance she will be able to remain at home with her children, except that she may be absent for work for such time as the court deems advisable;

Mother proper person. Third, the mother must in the judgment of the juvenile court be a proper person, morally, physically and mentally for the bringing up of her children;

Allowance necessary. Fourth, such allowance shall in the judgment of the court be necessary to save the child or children from neglect and to avoid the breaking up of the home of such woman;

Benefit of child. Fifth, it must appear to be for the benefit of the child to remain with such mother;

Preliminary examination. Sixth, a careful preliminary examination of the home of such mother must first have been made under the direction of the court by the probation officer, the agent of an associated charities organization or humane society, or in the absence of such probation officer, society or organization in any county, the sheriff of such county shall make such investigations as the court may direct, and a written report of the result of such examination or investigation shall be filed with the juvenile court, for the guidance of the court in making or withholding such allowance. [106 v. 436; 103 v. 864; (878).]

§ 2254. Additional requirements.

In addition to the matter heretofore mentioned in section 2250 (§ 1683-2), make the following as conditions upon which the relief may be granted:

First, the child must be living with the mother.

Second, it can only be made when, if it were not for such allowance, the mother would have to work regularly from home and children, and with such allowance she will be able to remain at home. The court may allow her to be absent a certain portion of the time at his discretion.

Third, the mother must be a proper person morally, physically and mentally to train and bring up the child.

Fourth, the allowance must be necessary to save the child from neglect, and to avoid breaking up the home of the mother.

Fifth, it must be for the benefit of the child to remain with such mother.

Sixth, a careful preliminary survey must have been made, of the home of such mother, by the probation officer, or some other designated official.

I have gone over these statutory matters in detail because, they are essential, and the judge should make no order until they are all shown to exist. Another provision exists in a subsequent statute.[2]

§ 2255. Application for support of indigent mother of young Children.

Probate Court, ... County, Ohio.

To the Probate Court of said County:

The undersigned hereby makes application for partial support as provided by law, on the ground that her huusband, ..., and said applicant being poor and the mother of ["children" or "a child"] not entitled to receive an age and schooling certificate, and said mother and children being legal residents of this county for two years last past.

Said mother alleges furthermore as follows:

First—The child or children named herein are living with her, the said mother and are as follows:

Name of Child	Age of Ghild	Schooling, Etc.

Second—In the absence of such allowance, she the said mother would be required to work regularly away from her home and children.

.....

The State of Ohio, ... County.

The above named ....., being first duly sworn, says that the facts and allegations in the foregoing application contained, are true as she verily believes.

.....

Sworn to before me and signed in my presence, this ..... day of ....., 19...

.....,Probate Judge.

2 § 1683-6.

§ 2256. Journal entry—Order for preliminary examination.

In the matter of Support of [Alleged indigent mother of young children].

This day came ....., and made application for Partial Support under Sec. 1683-2 of the General Code. The court directs that ..... make a careful preliminary examination of the home of said ..... as required by Sec. 1683-3, and make to the court a written report thereof.

.....

.....

.....

§ 2257. Report of preliminary examination.

Probate Court, ... County, Ohio, ..., 19...

To the Honorable Probate Court:

As directed by you we have made a careful preliminary examination of the home of ....., living at .....

We find that her husband .....

We also find further as follows:

First—The said applicant is the mother of ..... children not entitled to an age and schooling certificate and who are living with her; and that both she and the said children are and have been legal residents of this county since ....., 19...

Said children as to age, etc., are as follows:

Name ....., Age ....., Schooling, etc. .....

.....

.....

Second—In the absence of an allowance by the court, the mother would be required to work regularly away from her home and children; and by means of an allowance of ..... dollars a month she will be able to remain at home with her said children.

.....

.....

Third—As to her moral, physical and mental fitness for the bringing up of her children we find .....

Fourth—The allowance is necessary to save the child.. from neglect and to avoid the breaking up of the home of said woman.

.....

.....

Fifth—It will ..... be for the benefit of the said child.. to remain with the mother.

.....

.....

Sixth—Further circumstances as to said home are as follows:

.....

.....

.....

.....

.....

§ 2258. Journal entry—Allowance.

[*Title.*]

A written report was this day filed in the court in pursuance of the order heretofore made for a careful preliminary examination in this case as required by law.

Upon consideration thereof it appears to the court that the husband of said ..... and that she is poor and is the mother of ..... children not entitled to receive an age and schooling certificate, and that said mother and children have been legal residents of this county for two years last past. Said case also fulfills the conditions prescribed by section 1683-3 of the General Code.

Therefore the court allows to said mother for the benefit of her said ..... children, the sum of ..... dollars per month. It is ordered that a certificate issue to the county auditor for the monthly payment of said allowance.

.....

§ 2259. Form—Order to county auditor.

Probate Court, ... County, Ohio, ..., 19...

To the Auditor:

This is to certify that pursuant to the provisions of the law for support of indigent mothers of young children the Probate Court has this day made an order upon its journal for paying an allowance of ..... dollars per month from date hereof for the period of ..... months, to ..... residing at ....., for the benefit of her ..... children.

You are therefore authorized to issue your warrant upon the county treasury, each month during said period, for said allowance, as provided by section 1683-9 of the General Code.

....., Probate Judge
By ..... Deputy Clerk.

§ 2260. Journal entry—Order discontinuing allowance.

[*Title.*]

This day it appearing to the court that .....
.....
.....

It is ordered that the allowance heretofore made to ..... be and hereby is discontinued. The county auditor will therefore cease the issue of warrante under the former order made herein.

....., Judge.

§ 2261. Journal entry—Order extending allowance.

[*Title.*]

It appearing that the allowance made to ..... under date of ....., 19..., to continue for a period of ..... months, expired ....., 19...; it is ordered that said allowance be and hereby is extended for the period of ..... months from the date of such expiration. The county auditor will therefore issue his warrant on the county treasurer each month as heretofore ordered, during such extended period.

....., Judge.

§ 2262. Journal entry—Orders on refusing allowance.

[*Title.*]

This day this case came on for hearing, and the written report of the preliminary examination of the home of said ....., heretofore directed to be made, being filed herein, and the court having examined said applicant and considered said report, and having heard all the evidence and testimony, and being fully advised in the premises, doth refuse to make the allowance asked for, and the application therefor is dismissed without prejudice and without record.

.....

§ 2263. When allowance shall cease. § 1683-4. Whenever any child shall reach the age for legal employment, any allowance made to the mother of such child for the benefit of such child shall cease. The juvenile court may, in its discretion, at any time before such child reaches such age, discontinue or modify the allowance to any mother and for any child. [103 v. 864 (878).]

§ 2264. Disposal of fund when amount insufficient. § 1683-5. Should the fund at the disposal of the court for this purpose be sufficient to permit an allowance to only part of the persons coming within the provisions of this act, the juvenile court shall select those cases in most urgent need of such allowance. [103 v. 864 (878).]

§ 2265. To whom act does not apply. § 1683-6. The provisions of this act shall not apply to any woman who, while her husband is imprisoned receives sufficient of his wages to support the child or children. [103 v. 864 (878).]

§ 2266. Attempt to obtain allowance by fraud—Penalty. § 1683-7. Any person or persons fraudulently attempting to obtain any allowance for a person not entitled thereto, shall be deemed guilty of a misdemeanor and on conviction thereof, shall be punished by a fine of not less than five nor more than fifty dollars, or imprisonment in the county jail, for a period of not less than two months, or both. [103 v. 864 (878).]

§ 2267. Record of proceedings. § 1683-8. In each case where an allowance is made to any woman under the provisions of this act, a record shall be kept of the proceedings, and any citizen of the county may, at any time, file a motion to set aside, or vacate or modify such judgment and on such motion said juvenile court shall hear evidence, and may make a new order sustaining the former allowance, modify or vacate the same, and from such order.

Appeal, error. Error may be prosecuted, or an appeal may be taken as in civil actions. If the judgment be not appealed from, or error prosecuted, or if appealed or error prosecuted,

and the judgment of the juvenile court be sustained or affirmed, the person filing such motion shall pay all the costs incident to the hearing of such motion. [103 v. 864 (878).]

§ 2268. Appeal and error, etc.

At any time any citizen of the county may file a motion to set aside or modify an order that the court has made. When such motion is filed, the court shall hear the same on evidence, and make whatever order it sees fit to make. From this order any interested party may appeal, or take it up to the next higher court, the same as in any other civil action. This matter is not very clear; probably if the case is heard by a juvenile judge selected from the Probate Court, then the provisions of Sec. 11206, G. C. (§ 39), would control the appeal. If the cause is heard by a juvenile judge selected from the Common Pleas Court, then the provisions of Sec. 12224, G. C., would control. If error, then either Secs. 11643, G. C., or 12247, G. C. I assume that this will be very seldomly used in the right of appeal or error. It seems to be more of a saving provision than anything else.

Record, etc. The court should keep a record of the proceedings. This means that the application, and the orders of the court should be placed on the records of the court; for the information of the court a detailed statement made out and filed with the papers would be of much value. It might be in the following form:

§ 2269. Detailed statement and record conditions.

No. .....

GROUNDS FOR APPLICATION.

1. Resident of state for ..... years.
2. Resident of county for ..... years.
3. Husband is dead, dying on ..... day of ..... at .....
4. Husband permanently disabled for work by reason of physical incapacity.
5. Husband permanently disabled for work by reason of mental incapacity.
6. Husband is a prisoner at ..... sentenced from ..... county on ....., 19..., and no support received therefrom.
7. Husband deserted on ....., 19..., at ....., Ohio, and last place of residence was .....
8. Mother is poor and unable to support child.

(Reasons alleged marked X)

DESCRIPTION OF HOME.

Frame, brick ..... story house ..... rooms. Rent ..... per month. Own, buying home. Home reported in ..... condition when officer called. Should sanitary officer call? Neighborhood surroundings ..... Home influence .....

FAMILY HISTORY.

..... Father, Residence ..... Birthplace ..... Nationality ..... Attends ..... Church, Intemperate ..... Criminal ..... Age ..... Occupation ..... Reputation ..... Income $..... per ..... Employer ..... Uses wages for ..... Ever arrested ..... Charge of ..... If living, where now ..... Physical condition ..... Mental condition ..... Mother — Birthplace ..... Maiden name ..... Nationality ..... Church ..... Intemperate ..... Criminal ..... Age ..... Occupation ..... Reputation ..... Income $..... per ..... Employer ..... Uses wages for ..... Ever arrested ..... Charge of ..... Married before ..... To whom ..... Divorced when and where ..... Physical condition Mental condition ..... Moral condition ..... Boarders ..... Character of ..... Should mother be allowed to work away from home and children? ..... Why ..... Where does mother spend evenings? ..... Attend picture shows ..... Is mother of saving habits? ..... Pay bills promptly .....

CHILDREN.

Do any work ..... Names ..... Where employed ..... Wages $..... per ..... Any live away from mother ..... Do any contribute to support of mother? Who ..... Amount $..... per ..... Have any of children ever been arrested for crime? ..... Have any been adjudged neglected, delinquent or dependent children? Names of such .....

PROPERTY.

Real or personal property owned by father, mother, children ..... Is outside assistance received now? ..... Who from? ..... Related as ..... Any property in expectancy, or remainder for father, mother, children .....

VISITS MADE.

Date ..... by .....
Date ..... by .....
Date ..... by .....

ALLOWANCE.

Date ..... $..... for .....
Modified ....., 19... Discontinued ....., 19... Extended ....., 19...

§ 2270. Provisions for mothers' pensions—Tax levy. § 1683-9. It is hereby made the duty of the county commissioners to provide out of the money in the county treasury such sum each year thereafter as will meet the requirements of the court in these proceedings. To provide the same they shall levy a tax not to exceed one-fifth of a mill on the dollar valuation of the taxable property of the county. Such levy shall be subject to

all the limitations provided by law upon the aggregate amount, rate, maximum rate and combined maximum rate of taxation. The county auditor shall issue a warrant upon the county treasurer for the payment of such allowance as may be ordered by the juvenile judge. [103 v. 864 (879); 108 v. Pt. I 624.]

§ 2271. County commissioners may transfer surplus. (§ 1683-10.) § 1. For the purpose of providing a sum which will meet the requirements of the juvenile court until the proceeds of the tax required to be levied under the provisions of section 1683-9 of the General Code, shall become available, any board of county commissioners may transfer from any surplus moneys in the county treasury to the credit of any fund therein to a fund for the use of the juvenile court under the provisions of sections 1683-2 to 1683-9, inclusive, of the General Code, the creation of which for such purpose is hereby authorized. The moneys so transferred shall be paid as provided in section 1683-9 of the General Code, upon the order of the juvenile judge, under allowances made either before or after this act shall become effective. [104 v. 199, § 1.]

INDEX.

(References are to sections.)

A.

ABANDONMENT —
Of appropriation, proceedings by corporation, 1726
when presumed, 1725
Of child, 1906
What roads may be abandoned, 2001
ABATEMENT —
Action by guardian of idiot, etc., does not abate by death, removal, etc., 1521, 1355, 1383, 1487
ABSENT FROM STATE —
Rights of persons, to contest will, 1112
ABSOLUTE LEGACY, 680
ABSTRACT OF TITLE—
To be furnished by guardian to court, when, 1323
ACCEPTANCE —
Of assignment presumed, 1553
Trust can not be renounced after, 1553
ACCOUNTANTS —
Examination of under oath, 733
ACKNOWLEDGMENT —
Probate judge may take, of deeds, 13
Of deeds of assignment necessary to convey real estate, 1550
Of wills, 1034
ACCOUNT OF ADMINISTRATOR, ETC.—
See ADMINISTRATOR AND EXECUTOR.
Appeal from order settling, 39
Appeal, 747
Amount of sale bill, 711
Ancillary, 749
Court cannot excuse, 702
Credits entitled to, 720
Compelled to render, 742
who may, 742
when may, 742
Chargeable with what, 710, 717
of insolvent estates, 992
with property retained or consumed, 717
not chargeable with what, 719
Consequence of failure to render, 741
Duty to, 702
Duty of probate judge to examine, 734
Decrease not affected by, when, 718
Error, 747
Examination on oath as to, 703, 733
Exceptions to, further time to file, 729
Executor, etc., of deceased insane or incompetent executor, to render when, 707
Executor, etc., with the will annexed, duties of, 703
Exceptions, 736
how made, 736
form of 737

(References are to sections.)

ACCOUNT OF ADMINISTRATOR, ETC.—*Continued*
Exceptions, who may file, 314
Final receipt, 797
Final settlement, 231
what is, 231
Filing first account, when, 703, 728
subsequent account, 703
entry on, 728
Guardian of insane or incompetent executor, etc., to render when, 707
Goods and chattels not included, 712
Governed by equitable principles, 740
Hearing when no exceptions are filed, 734
entry, 735.
Impeachment of, 744
Increase not permitted to profit by, 718
Insolvent estate, how accounts, etc., 992
Interest charged in, 715
Joint, 709
Mistakes in former may be corrected, when, 742
Not opened after time limit, 746
Notice of filing, 729
costs of, 729
form of, 709
entry and order of publication, 731
importance of, 732
must be in English language, 732
cannot be collaterally attacked, 732
Opened for error, 747
Opened up after settlement, 743
how, 743.
absence of party, 744.
correction of errors and mistakes, 745
what matters cannnot be opened up, 745
Opened after eight months, 746
Object of, 702
Oath to, 726
form of, 727
Probate Court cannot review foreign, 187
Proceeds of real estate, 714, 810
Profit and income, 716
Preparation of, 725
inventory consulted, etc., 725
prior account consulted, 725
itemized statement for extra compensation, 725
itemized statement of attorney, 725
Records of, what to contain and when to be made, 15947 G. C.
Reference of, 739
Reference to commissioner, 738
Removal of trustee does not oust Court of jurisdiction to pass upon account, 232
Rendered by two, allowed on oath of one, 709
Rights and credits of decedent, 713
Rents, 716
Successive administration, 708
Statement in lieu of, 748
form of, 748
Trial of exceptions, 739
nature of, 739
jurisdiction of, 739
evidence in, 740

(References are to sections.)

ACCOUNT OF ADMINISTRATOR, ETC.— *Continued.*
Time extended, 705
Time of filing first account, 83, 124, 703
subsequent accounts, 703
on death, insanity, etc., of executor, etc., 703
Time allowed to collect assets, 706
Tombstone allowed on settlement of, 651
Vouchers to be filed for all payments made, 721
when and what items allowed without vouchers, 723
shall not exceed two hundred dollars in aggregate, 723
Voucher, 722
what is proper, 722
affidavit to, 724
form of, 724
Where removed or resigns, 229, 231
When to file, 703
Where to be filed, 704
When can be opened, 742
ACCOUNT—
Assignees:
See ASSIGNMENTS.
Appeal from order settling, 39
Contents, 165-3
Costs of notice filing, 729
Enforcement of filing and settlement, 1573
Examination of assignee as to, 733
Exceptions to, further time for, 729
Filing, time of, 1653
Jurisdiction of probate court, 27
Notice of filing to be published, 729
Settlement on resignation, removal or death, 1573
Guardians and trustees:
See GUARDIANS.
Appeal from settlement of, 1493, 39
Compelled to render, 1362
Deceased or insane, how account settled, 1499
Examination under oath, 733
Exceptions to further time to file, 729
Failure to render after notice, effect, 1367
Female guardian on marriage must settle, 1356
Jurisdiction of probate court over, 27
Notice of filing to be published, 729
costs of, 729
Of person and estate, must render, when, 1367
Of idiot, lunatic, imbecile, etc., must settle, 1513
Probate judge or clerk can not make, for guardian, 7
Reference of, 1492
Review of settlement, when and how, 1493, 1298
Settlement, final, except when, 1493
Superseded guardian must settle, 1354
Time of rendering, 1367, 1293
When probate judge interested, settled in Common Pleas, 9
ACCRETIONS—
Administrator responsible for, 718
ACTION—
Appeals, 39
Appropriation of property by municipal corporations, 1750
by private corporations, 1679
Assignment of creditors:
Abatement, none as to pending suit, 11151 G. C.

(References are to sections.)

ACTION — *Continued.*
Bond, action on, limitation, 4984, 11226 G. C.
Deliver effects to successor, failure to, 1573
File and settle account, failure to, 1573
Fraudulent conveyance, to set aside, 1580
See ASSIGNMENTS.
notice given, how, 1580
how creditors may become parties, 1580
Liens, to adjust, 1618
Limitation of, on rejected claim, 1628
Trustee may compel delivery of trust effects, 1572
Action by executor or administrator:
Against persons concealing or embezzling assets, 395
Asking direction of court in matters respecting estate, 33
For injury by wrongful death. See Wrongful Death.
Land fraudulently conveyed, may bring action to recover, when, 823
May sue without joining party in interest, 11244 G. C.
Mortgage, may bring action to foreclose, 388
Preceding executor or administrator, may be brought against by, when, 157
Revivor of actions by, et seq., 11401 G. C.
Sale of real estate to pay debts, 813
Sale of equitable interest of deceased in land, 825
Action against executor or administrator:
Administrator *de bonis non*, liable to, when, 619, 620
Assets, received after two years, action to be brought within one year after notice of receipt, 615
Bond of, when may be brought against, 262
Cause of action accruing after two years, to be prosecuted within one year, 613
Claims not due in two years, suit on, against executor within six months, when, 580
Suit on, against executor, when; on bond, 581
on bond of heir, when, 581
Creditors may sue an estate reported insolvent after three years, when, 991
must bring against, within two years from the time of giving bond, 613
when to be brought against by, on disallowed claim, 561
when to be brought against by, in general, 611
Distribution, may be brought against to enforce order of, 761, 783
Insolvent estate, when may be brought against executor or administrator of, 985
limitation of action against, when claim disallowed, 971
Limitation of action against new administrator when former failed to give notice of appointment, 620
begins to run from time of granting letters, 150
how effected by failure to give notice of appointment, 548
in case of special administrator time begins to run from the granting of letters in usual form, 150
time for bringing extended in case of death, removal, etc., of executor or administrator, 618
Revival of, against, what does not constitute, 622, 624
Right of action accruing after two years, barred in one year after accruing, 613
Special administrator, action cannot be brought against, by creditor of deceased, 150
Successor to executor or administrator liable to, when, 623
Venue of action against, Code of Civil Procedure, 11299 G. C.

(References are to sections.)

ACTION — *Continued.*
Waste may be brought, 628
Action for injury by wrongful death:
See WRONGFUL DEATH.
Executor or administrator bring the action, 536
For whose benefit, 536
Liability of person or corporation, 534
Limit of damages, 536
Limitation of action, 535, 536
Power of executor, etc., to settle amount to be paid before or after suit, 536
apportionment of amount among beneficiaries, 536
When death caused by wrongful act in another State, etc., 535
Action against heirs, legatees, etc.:
Bond, when to be brought on, given by heir, etc., for payment of claim due two years after administration bond given, 581
pleadings in such case, 582
See LIMITATION OF ACTIONS.
Creditors to proceed against all in one action, 590
Creditors may bring, after settlement of estate, when and how, 585, 593
Defendants, not to be dismissed for want of, 592
Direction in matters respecting estate may be brought, 33
Estate of heir, etc., liable to suit of creditor of deceased from whom property received, when, 589
Limitation of action against, 587
Parties; heirs, etc., may be made to action by executor or administrator to sell land, 833
Action on bond of executor or administrator:
See BONDS.
Allowance of claim only *prima facie* evidence of its validity in, 277
Costs, how awarded in certain cases, 276, 261
Creditors may bring, when, 262
Court in which to be brought, 261
Defense which may be made, 1398
Heir, legatee, etc., may sue, when, 265
In case of unfaithful administration, 255
Limitation of action, 11226 G. C.
Parties, who to be made, 261
Succeeding executor or administrator may sue, 157, 31, 278
Sureties may be made parties to, to enforce order of distribution, 783
When court may authorize suit to be brought, 269
Guardian and trustee:
Foreign, may obtain property of non-resident ward by, 1480
Guardian must appear and defend suits against ward, 1383
may bring action, asking direction of court, etc., 33
Of guardian of idiot, etc., 1521
See GUARDIANS.
Of minor ward to review settlement, 1493
where action may be brought, 1493
Sale of real estate of ward, 1405
of idiot, etc., 1522
Survivor of, 385
Trustee of non-resident minor, idiot, etc., liable to, 1277

ADJUSTMENT, 456
See DESPERATE CLAIMS.

ADEMPTION, 685
See LEGACIES.

(References are to sections.)

ADMINISTRATION —
Creditor, when entitled to, 114, 170
Definition, 55
Officiating without, 61
Letters testamentary and of administration may be granted and revoked by Probate Court, 27
See LETTERS OF ADMINISTRATION.
See LETTERS TESTAMENTARY.
authority of, extends throughout state, 72
county, must issue from, in which deceased was domiciled, 72
issue, with will annexed, when, 100
jurisdiction in matters relating to, denied to other courts, 72
Probate Court has exclusive jurisdiction in granting, 27
probate judge, not to issue to, 9
time within which, letter granted, 64
Not granted as of right after twenty years, 64
Not required at common law, 54
Necessity for, 55
Partnership assets, on death of partner, 417, 437
When judge interested, 9
When there ought to be none, 56
When there need be none, 57
Will, letters testamentary on, may issue to whom, 71
When does not exist as of right, 64
application on such, 65
notice, 65
ADMINISTRATION BY TRUST COMPANIES—
Administrator may act as, 353
Act, when company can, 347
Agent, may act as, 351
Banking act, part of, 342
Bond, when not required, 353
Bond, when required, 353
Capital required, 343, 354
Charter must permit, 342
Compelled to act, not without its consent, 353
Compliance with law before acting, 347
Consent, before compelled to act, 353
Court may order investigation, 355
Court may order money deposited in, 350
Deposit required, 343
Deposit with state treasurer, 354
Empowered to act as agent, 351
Examination of company expenses, 346
Examination of company, court may order, 346
Executor, may act as, 353
Expense of examination, 346
File certificate with tax commission, 345
Foreign, entitled to act, when, 347
when may retire, 348
when may be administrator, 344
license for, 344
From whom moneys received, 349
Fund, reserve required, 360
Guardian, may act as, 353
not of person, 353
Has same right as natural person, 352
Historical, 342
Investment of money held by, 357
court may order, 355
trust funds, 359

(References are to sections.)

ADMINISTRATION BY TRUST COMPANIES — *Continued*
Law, compliance with, 347
first in Ohio, unconstitutional, 342
License, foreign must have, 344
May hold title to real estate, 353
May accept trust, 343
Mingling of securities prohibited, 358
Moneys held on terms agreed, etc., 349
Money, how invested, 357
Money deposited on order of court, 350
from whom may be received, 349
Notice of retirement, 348
Officers compelled to answer questions, 356
Power to act as agent, 351
Person, can not be guardian of, 353
Probate court may appoint to act:
as administrator, 353
as assignee, 353
as executor, 353
as guardian, 353
as receiver, 353
as trustee, 353
Publication of notice to retire, 348
Retirement from state, notice, 348
Reserve fund required, 360
Right rests on statute, 342
Securities, mingling forbidden, 358
Sign papers in court, may, 356
Trust-fund, investment, 359
Trusts, may manage, 351
Will to govern, 357

ADMINISTRATOR AND EXECUTOR —
Account, may be compelled to, in case estate is insolvent, when, 992, 702, 749
See ACCOUNTING.
property retained or consumed by, must account for in double its appraised value, 717
Account, appeal may be taken from order settling, 39
compelled to render, when, 741
charged with what, in, 710
must render in eighteen months, 703
when to render subsequent, 703
oath, may be examined on, as to, 703, 733
rendered by two or more joint, may be allowed on oath of one, 709
rendered when, of deceased or insane executor, 707
unclaimed money may be invested by, on order of Court, 786
vouchers to be produced by, on settlement of, 721
what may be allowed in, without, 723
Action for wrongful death, 533, 542
who must bring, 536
Probate Court to make appointment, 541
Action, direction asking, may be brought by, 33
against by creditors, 613
for damages for wrongful death, how brought by, 536
may settle for, 536
on claim not due, 581
when death caused in another State, 535
may be brought by, without joining real party in interest, Code Civil Pro., 1383
successor to, when and how brought against, 623
pending suits, to prosecute, 162
Acts done before appointment, 62

(References are to sections.)

ADMINISTRATOR AND EXECUTOR — *Continued.*
Administrator appointed in what order, 114
duty of probate judge with respect to appointments of, 114
Administrator continuing business of partnership, 436
Administrator of deceased or insane administrator, must file account, 160
Administration unfaithful, what shall be deemed, 255
liable to damages for, 255
Acts after removal, 230
Adverse party, incompetency to testify against, C. C. P., 5242, 11495 G. C.
Affidavit in proof of claim, when may require, 557
Appeal from order to enforce distribution, 785
bond for, need not give, 43, 1779
may be prosecuted by, 12228 G. C.
Application to be filed before appointment of; what to contain, 114
Appointment of administrator, 118-127
Appointment of executor, 91-92
Appointment as, does not discharge debt of, due testator, 389
must charge himself with such debt, 389
must distribute same as part of personal estate, 389
Appraisers, duty of with respect to certificate of, 286
Appraisement, must serve notice of time and place of making, 288
Arbitration, 455
when may, claim in favor of estate, 455
of claims, 594-606
Assets, collections of, in one year, 440
See ASSETS.
belonging to, 363-393
contingent debts and claims, and claims not due, may with the approval of the Court be set aside, and the residue of the estate distributed, 751
care and management, 506-532
See ASSETS, CARE AND MANAGEMENT.
disbursement of, administrator may plead when, 669
distributees to give bond to pay claims in suit, or not yet due, 751
emblements are, 369
extension, limitation of, period of, 415
further time can not be allowed, when, 448
new, received after return of first inventory, duty of as to, 311
payment of claim of administrator of estate, not to be retained for, 631
proceeding when assets concealed or embezzled, 395, 414
proceedings when more time required for collection, 445
affidavit required in such case, 446
received after two years, paid out, how, 415
Are trustees, 1250, 1287
Bond, action on, limitation of, as to, 607
See BONDS.
administrator required to give, 124
administrator appointed during minority of executor must give, 93
executor required to give; its conditions, 83
when not required to give, 83
on appeal, 11227 G. C.
for stay of execution, 12268 G. C.
different bond when executor is residuary legatee, 57
sale of land, when bond required before, 873
additional bond may be required, 875
separate or joint may be taken when, 86

(References are to sections.)

ADMINISTRATOR AND EXECUTOR — *Continued.*
special administrator, required of, 133
executor, etc., may prosecute bond of special, 141
surety, released, administrator, etc., to give additional bond, 243, 252
indemnifying bond to surety, when, 253
Citation to executor, 101
form of, 101
entry ordering, 102
Claim of, against estate, to have no preference, 631
See CLAIMS OF EXECUTOR AND ADMINISTRATOR.
allowance of, to be presented to Probate Court for, 633
Compounding, 450-455
application for, 452
hearing of, 453
order of compromise, 454
notice of presentation of such claim, to give, how, 633
rejected must be sued on within six months, 609
See PRESENTATION OF CLAIMS.
payment of such claim, not to retain assets in, when, 631
Cannot revive claim barred by statute of limitations, 614, 608
Commissioner, administrator may act as, to audit and allow claims, when, 963
Contingent claims, 569
See CLAIMS NOT DUE.
Compensation, allowed what, 654
See COMPENSATION OF ADMINISTRATOR.
Compromise with debtor of estate may, when and how, 450
Creditors, when may sue, 611
surety of creditor may compel suit, 12192 G. C.
Cannot be guardian, 1331
Chargeable with debt due decedent, 390
Choses in action, 385
Damages, action for, for wrongful death, how brought by, 536
may settle for, and how, 536
See WRONGFUL DEATH.
Debts of deceased, in what order to pay, 647
See PAYMENT OF DEBTS.
Distinction between, 108
Debt, discharge of, in will, not valid, when, 391
Debt of is asset, 390
Debts due from estate, when liable for, 628
may pay debts without becoming personally liable when and how, 667
may pay before due when and how, 570
not liable for debts remaining uncollected without his fault, 719
Deceased executor, etc., administrator of, must file account in six months, 707
Decedent's real contract completed by, 523, 528
Distribution, account of, 795-798
See DISTRIBUTION.
Decrease of estate, not liable for, 718
Deed of partnership, 439
Disbursements of assets, administrator may plead, when, 669
Distribution of money, 755-785
See DISTRIBUTION.
Discretion, may exercise, as to order in which articles are sold, 488
Distinction between trustee and, 1251
Diligence required, 442

(References are to sections.)

ADMINISTRATOR AND EXECUTOR — *Continued.*
Distribution; after order of, how payment enforced, **761**
appeal in action to enforce, 785
effect of judgment after order of distribution, **777**
of assets in kind, when, 751
of estate, duties as, 921
served how, in action to enforce, 761
Distribution in kind, 750-754
See DISTRIBUTION.
Dower, duties as to, 12009 and 12016 G. C.
See DOWER.
Duty to bring suits, etc., 441
Duty to collect assets, 440, 449
Emblements, may enter on lands to possess, **370**
See EMBLEMENTS.
Equitable interest in real estate, may petition for sale of, **825**
Evidence of settlement, when may give, 671
Extra compensation, 659
Executor of executor can not administrator estate of decedent, **94**
Executor as surviving partner, 433
Executor continuing business of partnership, 435
Executor renounces, administrator appointed, 100
Foreign, 186-200
See FOREIGN ADMINISTRATORS AND EXECUTORS.
Foreign will, duties of, as to, 1125, 1132, 169
See FOREIGN WILLS.
Funeral expenses, may pay before letters issued, 70, 649
See FUNERAL EXPENSES.
Guardian, administrator, etc., not eligible as, when, 1331
Good will of business, 382
Guardian must make out account of, etc., 1499
Homestead, set off, for decedent's family, 867
Increase of estate, not to profit by, 718
Indemnifying bond to surety, must give, when, 253
Insolvency of estate, may be compelled to account in case of, when, **992**
Insolvent, when may represent an estate as, 670
liability of administrator in case of, 990
notice when estate is insolvent what must be given, 965
suit against administrator when estate is insolvent, when, 985
to what extent liable in such case, 990
when not required to declare, 669
Interest on claims paid, 672
Inventory, must take oath to, 302
to return within three months, 303
removal for failure to return, 306
to retain a copy of and send original to Probate Court, 300
Invest remaining funds, when and how, 786
Judgment against, when found guilty of concealing property of decedent, 408
forfeits compensation, when found guilty of concealing, 408
lien, such judgment a lien upon real estate, 408
against administrator, after order of distribution, its effect, 777
transcript of, to obtain and file, when and how, 413
Joint or co-administration, 201-207
Lands, administrator may enter on, to possess emblements, 370
Lands devised to be sold, one executor may sell, if two or more appointed and neglect to act, 107
Legacies, to sell lands for payment of, 819, 674-701
See LEGACIES.

(References are to sections.)

ADMINISTRATOR AND EXECUTOR — *Continued.*
Legatee, when executor is residuary, different bond required, 57
Lease, cannot, 801
Liability of for debts due from estate, liable for, when, 628
failure to give notice of appointment, for, 550
insolvent estates, in case of, 990
payment of debts without personal liability, 667
Liability of executors, etc.:
Account, neglect to file, 741, 703
See TORTS.
Administrator *de bonis non*, 621, 623.
Assets received after two years, 615
for assets in hands of, only when estate insolvent, 990
Bond, liability on, 255, 277
Chargeable with double value of property consumed, etc., 717
Claims accruing after two years, 613
Concealing property of estate, 408
Damages for unfaithful administration, for, 255
Debts due from estate, liable for, when execution returned unsatisfied, 628
to suits of creditors, 611
when not liable, 611
not liable for debts uncollected without his fault, 719
See DILIGENCE.
recovered against, after order of distribution, 774
when may pay without becoming personally liable for deficiency of assets, 667
See ASSETS.
Decrease of estate without fault not liable for, 718
See ACCOUNTS.
Final discharge exonerates from, unless, etc., 795
Inventory, for neglect to return, 303
Mortgaged premises selling without paying off mortgage, 902
Notice of appointment, for failure to give, 550
Promise to pay decedent's debt, 607
See STATUTE OF FRAUDS.
Resignation not to effect previous liability, 229
Sale bill, neglect to return, 491
Sale of personal property, without proper security, 484
Sale of personal property not liable for loss, when, 485
Taxes, liability for payment of, etc, 511, 1392
Loss on sale of personal property, not responsible for, when, 485
Letters of administration, see LETTERS OF ADMINISTRATION.
Letters testamentary, see LETTERS TESTAMENTARY.
Marriage, no disqualification for executrix or administratrix, 27, 81, 115
May discharge mortgage, 387
May foreclose mortgage, 388
Minor may be admitted as co-executor, on attaining majority, 93
Minority of executor, administrator may be appointed during, 93
May bring action to construe, 34
Mortgage, may foreclose, how, 388
cannot mortgage premises, 801
Must collect claim, before barred by statute, 444
Mortgaged premises, may take possession of, 386
release of mortgage on payment of debt, 387
to be seized in trust of, for persons entitled to redemption money, 387
Negligence in collecting, 443, 1287

(References are to sections.)

ADMINISTRATOR AND EXECUTOR — *Continued.*
Not required to pay claim on allowance of court, when, 580
Notice; appointment; liability for failure of give notice of, 550
creditors, to, 544, 621
how to proceed when not given, 548
insolvency of estate, notice of, 965
liability for omission to give, 551
omitted; petition to publish, 548
sale of land, of, 883
to executor or administrator that he is named in will, 1070
when and how must give, 544
Nuncupative will, duties as to, 1166
Order of removal, 229
Office of, not to expire with limitation of time, 449
Officiating without appointment, 61-70
Partnership assets, 416-439
Partition proceedings by, when action for is pending, 1880
See PARTITION.
prior partition, not barred from bringing action by, 1884
Part payment take valid existing claim out of statute of limitations, 608
Perpetuate evidence of distribution, may, how, 795
Payment of debts, 646
See PAYMENT OF DEBTS.
Personal property, to sell, what and when, 470
Payment to heir before final settlement, 673
Petition by to complete real contract of decedent, 523
Plead disbursement of assets, when he may, 669
full administration of estate, when he may plead, 671
Powers of administrator *de bonis non*, 151-160
Powers of, before letters issue, 70
during contest of will, 95
may borrow money, 96
application, 97
form of, 97
Probate, must produce will for, 1072, 1079
Probate Court cannot order administrator to allow claim, 610
Payment of claims not due, 576
Property specifically bequeathed when may deliver, 474
Property conveyed to defraud creditors, 383
Presentation of claims not due, 569-583
Prove amount applicable to claim, he may, 990
Presentation of claims, 552-568
See PRESENTATION OF CLAIMS.
Purchasing at their own sale, effect, 492
Real estate; action by, for recovery of fraudulently conveyed or to avoid such conveyance, 823
See SALE OF REAL ESTATE.
limitation of, 822
proceedings for authority to sell, where to begin, 813
successor to continue if executor or administrator die during, 835
when to begin, 816
remedy when sale invalid, 902
to subject fraudulently conveyed to sale, 822
will authorizing sale, no order required, 802
Referees may agree to submit claim to, when, 594

(References are to sections.)

ADMINISTRATOR AND EXECUTOR—*Continued.*
Rejection of claims, 552-568
See PRESENTATION OF CLAIMS.
Reject claim on requisition of heir, etc., when, 561
Release of surety, 243, 252
See SURETY.
Removal of, co-executor may continue to act on, 213
predecessor, on removal of, administrator may be appointed, 213
Return of sale, must make, how 890
Resignation, 210
Revocation of letters, 208-232
Revivor of action, by and against, 1813 G. C.
Revivor of judgment, 627
Road materials, duties and rights as to, 799
Sale of real estate; may begin proceedings for, when, 816
See SALE OF REAL ESTATE.
bond required of, before sold, 873
by Court proceedings, 810-906
additional bond, Court may require, when, 875
equitable interests, may petition for sale of, 825
fraudulently conveyed, 822, 823
legacies for payment of, 819
less than appointed number may make sale of, 107
notice of sale, when and how given, 883
return of sale, must take, how, 890
summons may be served by, when, 838
Sale of personal property, 485
See SALE OF PERSONAL PROPERTY.
Securities; in what may invest trust funds, 514
Security for costs need not be given by, when, 441
Service on non-resident by publication, 840
Special administrator, action, commenced by, regular may be admitted to prosecute, 141, 128-150
Sale of desperate claims, 456, 468
See SALE OF DESPERATE CLAIMS.
bond required of, 133
citation and attachment may be had against, when, 142
executor may prosecute bond of, 142
powers, duties, etc., of, 137
cease when, 141
Successor, action may be brought against, when and how, 623
may bring suit on bond of predecessor, 157
prosecute pending actions, 162
take possession of assets and effects, 157
Sureties; administrator to give additional bond on release of, 243, 252
must give indemnity bond to, when, 253
required on sale notes, two or more, 483
Surety for, how made party to judgment against, 11652 G. C.
Time within which claim collected, 445
Taxation, must list property, 663
Testamentary trustee, 1250
Taxes, lien of, for taxes advanced, 511, 663
on personal property, 95
on lands, 95
payment of, 663
Testify, party shall not when adverse party claims exceptions, 11495 G. C.
Tombstone for decedent, 651
Termination of authority by completion of trust, 231

(References are to sections.)

ADMINISTRATOR AND EXECUTOR — *Continued.*
only when, 231
how terminates, 231
Time within which will be appointed, 64
Transfer of actions from Probate to Common Pleas Court, 779
Trust, when renounces duty of Probate Court, 100
See TERMINATION OF TRUSTS.
Venue of actions against, 607
Will, executor party to action to contest of, 12080 G. C.
When need not be appointed, 55, 56, 57
Where will has been established, 164, 96
When not liable to creditors, 614

ADMINISTRATOR *DE BONIS NON* WITH THE WILL ANNEXED.
Appointment of, 162
Definition, 161
Must give bond. 162
Powers of, 164

ADMINISTRATOR *DE BONIS NON* — See ADMINISTRATOR AND EXECUTOR.
Application, essentials, 156
Appointment of, in what cases, 152, 306
does not revive cause of action previously barred, 622
Conveyance of land sold by predecessor, to make, 835
may be required to give additional bond, 835
Can be appointed before account of former administrators passed upon, 154
Definition, 151
Duties and powers of, 157
in contest of will, 95
Inventory when not required, 160, 281, 282
Liable for assets in the same manner as predecessor, 623
Limitation of action against, 618-620
extension of limitation, 619
May sue former administrator individually on bond, 157, 158, 310
leave of court need not be obtained, 158
account need not be passed upon, 158
Must be estate to administer, 153, 154
May annul fraudulent sale, 159
Must give bond, 160
Must give notice of appointment, 160
Not liable for warranty of predecessor, 159
Notice of appointment, when and how given, 621
effect of failure to give, 548
when former executor, etc., fails to give, 620
Recovery of assets, 158
To whom letters granted, 155
Within what time appointed, 154
Who may secure appointment, 153

ADMINISTRATOR WITH THE WILL ANNEXED—See ADMINISTRATOR AND EXECUTOR.
Acts of previous executor valid, 107
Application for appointment, 104
Action, may prosecute and defend brought by predecessor, 162
Appointed in what cases, 100, 152, 306
Appointment of, if will found after administration granted, 162
Bond of, and its conditions, 83, 105
of predecessor, may bring suit on, when, 157, 310
Contest of will, powers and duties of during, 95

(References are to sections.)

ADMINISTRATOR WITH THE WILL ANNEXED — *Continued.*
Convey land sold by predecessor may, when, 835
Creditors, liability to be sued by, 618
Citation of executor, 101
application for, 101
entry ordering, 102
form of to take or renounce, 103
Definition, 99
Foreign will, powers and duties of administrator under, 169, 1132
Land; sold by predecessor, may convey when, 835
Liability to be sued by creditors, 618
Minority of executor, may be appointed during, unless, etc., 93
Must give bond, 104
Powers, rights and duties, 106, 309
real estate, when ordered to be sold, 107, 819
Personal trust cannot be exercised by, etc., 106
Sell land under will, 802
When will is broken duties cease, 99
ADMINISTRATRIX —
See ADMINISTRATOR, ETC.
Marriage does not, 81
Extinguish authority, 79
ADMISSIONS —
Not to preclude executor, etc., contesting claim against estate, when, 277
ADOPTION OF CHILD —
By married or single person, 1888
By stepfather, 1890
how consent of wife ascertained, 1893
order of court, 1895
effect of order, 1898
Consent of child, 1894
Consent of parents, 1894
Definition, 1887
Entry of, 1897
Effect of order, 1898
Extra territorial effect, 1899
Hearing, 1896
Heir, adoption of child as, 1902
property of adopting parent descends, how, etc., 1898
Must be strictly followed, 1887
Purely statutory, 1887
Petition for, 1892
where filed, 1889
form, 1892
Power to revoke order, 1901
Rights of inheritance, 1898, 1900
Who may, 1889, 1890
Who may be adopted, 1891
ADVANCEMENT —
A gift to constitute irrevocable, 929
What constitutes, 930
a purchase presumably is, 930
intention controls, 930
When presumed, 929
To be accounted for, 928
Applies to realty and personalty, 929
How proven, 931
declarations of grantor, 931
relation of parties, 931.

(References are to sections.)

ADVANCEMENT — *Continued.*
Where greater or less than share, 932
Exists on presumption of equal affection to all children, 928
Considered part of estate, 928
When wholly real or wholly personal, 933
Definition, 929
Small gifts for support not, 931
If value expressed in deed, 934
Heir not required to refund, 932
Kind of assets, 365
Compensation of administrator on, 655
Considered in settling with child absent, born after execution of will, or reported dead, 1065, 1210

ADVERTISEMENT — See NOTICE.
For sale of land by executor, etc., 883
of personal property, 479, 495
Of property of insolvent debtor by assignee, etc., 1602

AFFIDAVIT — See OATH.
See FORMS.
Appraisers, in proceeding to sell minor ward's real estate, 1421
in making inventory of decedent's estate, 290
Appropriation proceedings, proof of service by publication, 1692
Assignment for creditors, proof of claim, 1632
attorney's fees, 1642
compensation, extra, 1642
inventory of assignee, etc., 1594
to obtain private, 479, 495
to obtain service by publication, 840
time, further to collect assets, 445, 446
unknown, name and residence of defendant, 838
vouchers, when items allowed without, 723
will, of administrator that none exists, 114
Executors, and administrators, account of executors, etc., as to correctness, 703
where two or more executors, etc., 709
application for appointment, 114
appraisers of personal estate to discharge duties, 290
of real estate, 863
compensation for additional, 654
insolvent estate, of claimant, etc., to claim against, 1008
to remedy omission, to appeal from decision of commissioners, 1008
inventory of executor, etc., annexed to proof of claim, 557
before what officers, 557
publication, proof of, of notice of appointment, 547
for constructive service, 840
sale, before confirmation of private, 882
sale bill, 489
Fees paid to predecessor for services performed by probate judge, 1588 G. C.
Guardians, etc., account, 1367
inventory, 1367
statement of ward's estate, 1323
as to value of mortgage to secure bond, 1323
private sale, 882
publication, service by, 840
Orphan asylum, to send vagrant child to, 1906
Sale, before confirmation of, private, 882
Schedule of debts, of assignee, etc., to, 1594

(References are to sections.)

AFFIRMATION —
Of commissioners' proceedings in county road appeals, 1791
AGE —
When wardship ceases, 1354
When ward may choose guardian, 1327
When ward may make will, 1020
When ward may marry without guardian's consent, 1997
When ward may marry, 1997
Lease to determine when ward arrives at, 1445
To be stated in petition for sale of ward's lands, 1410
Within which ward may be bound to apprenticeship, 1370
Child cannot act as executor until it becomes of, 93
AGENT —
Employment of, 660
AGREEMENT —
To arbitrate, 594 *et seq.*
To distribute in kind, 750 *et seq.*
In dower, 958
ALDERMAN —
Proceedings against, guilty of misfeasance or malfeasance, etc., 2006
ALIEN —
See NATURALIZATION.
May hold land, etc., 935
Heirs of, may inherit lands, 935
Will of, effect of record of, 1130
ALIENATION —
Restraint of, 1204
ALLOWANCE —
Appeal from Probate Court as to, 39
Claim against estate of by executor, etc., 557, 609
See CLAIMS OF EXECUTOR.
by Probate Court of claim due executor, 631, 641
due after two years, not conclusive, when, 580
See PRESENTATION OF CLAIMS.
prima facie evidence only of validity of allowance of in suit on bond, 277
refusal to indorse a rejection, 609
does not preclude right to contest, when, 277
against insolvent debtor's estate, 1632
to be indorsed by assignee, etc., 1628
of compensation to assignee, etc., 1642
See ASSIGNMENT.
Guardian to receive none for his services, when, 1367
See GUARDIAN.
Time to collect assets, how obtained, 445, 446
when not allowed, 448, 448*a*
Widow and children to for year's support, 324
See WIDOW'S ALLOWANCE.
record of, to for year's support, 324
of what to consist, 324, 325
to be stated in schedule separate from inventory, 324
may be increased or diminished by Court, 333
a preferred claim, 647
not barred by election to take under will, 1221
on sale of real estate by executor, etc., 816
ALTERATION —
Effect of, of will by deed, etc., 1059
See REVOCATION OF WILLS.

(References are to sections.)

ALTERATION — *Continued.*
when operates as revocation, 1059, 1060
Of State or county road, appeal from order, 1785
township road, 1805
Allowed, making new parties in proceedings by creditors against heirs, etc., of deceased debtors, 592
AMERCEMENT —
Of officer, refusing to serve or return process, 2010
or pay over money, 2010
proceedings against, 2010
AMICABLE PARTITION —
See PARTITION.
ANCESTOR, 908
ANCESTRAL PROPERTY, 908
See DESCENT.
ANCILLARY ADMINISTRATION —
Application for, 173
form of, 174, 175
Definition, 165
Difference between principal and, 167
Estate situate in different States, 185
Form of application for letters, 179
Form of bond, 180
Form of letters, 181
Not favored, 165
Notice required, 176
Order for appointment, 178
Payment of debts and distribution, 184
Personal estate distributed according to law, domicile, 185
Powers and duties, 183
Real estate distributed according to law where property situate, 185
When appointed, 168
Where appointed, 171
Who appointed, 172
Within what time appointment made, 172
ANCILLARY GUARDIANS —
See GUARDIAN.
ANIMALS—
Appeal for injured, 1996 et seq., G. C.
ANNUITY—
For estimating value of widow's dower, 2133
What is, 374, 2136
Certain, 2136
In possession, 2136
Interest on, 694
Legacy in nature of, 692
Tables, 2015, 2024.
When may be assigned, 1253
ANNUAL CROPS, 368
See EMBLEMENTS.
ANSWER—
Of guardian *ad litem*, 845
Of widow waiving assignment of dower by metes and bounds, etc., 846
Of wife of assignor waiving assignment of dower, 1602
Of defendant in action for sale of land, 846
ANSWER AND CROSS-PETITION—
Of creditor in suit to set aside fraudulent conveyance, 1580
ANTENUPTIAL CONTRACTS—
As to widow's allowance, 327
As to dower, 947

APPEAL—
Generally:
Amendments allowed on, 42
Animals, injured by dogs, 1996
Appointment of guardians, 1173
how effects, 1515
Bond, when must be given, 44
to whom payable, 46
when filed, 45
amount of penalty, 47
form of, 47
Contempt, 1994
Claim not due, 583
Claim of executor, 642
Ditch appeals:
See DITCH APPEALS, 1850
Exceptions to inventory, 317
Foreign will, 1123
From order of probate of will, 1153
Error may be prosecuted at same time, 40
From Probate Court on lunacy takes up whole case, 39
Guardian's sale of real estate, 1431
Guardian's accounting, 1495
Guardian must be appointed before, 1342
Guardian of lunatic, 1515
Hearing on, dismisses error, 52
Habeas corpus, 1975
In distribution of personalty, 785
In real estate proceedings, 906
In aid of execution, 1950
Lies from a final order, 40
Notice of, 45
must be in writing, 45
Only exists when allowed by statute, 40
Party not in interest must give bond, 44
Presumption is that trustee take up in that capacity, 45
Proceedings certified back, 51
Probate of wills, 1116
Questions to be considered, 42
Removal and resignation, 232
Removal of assignee, 1575
Road appeals:
See ROAD APPEALS, 1784
Removal of assignee, 1575
Second not allowed, 42
Sheep claim appeals, 2115
Suspends execution of judgment during pendency of, 40
Spoliated will, 1153
To exception of account, 736
Transcript, 49
party interested must file, 50
Trial on, 42
What may be appealed, 40
Who may prosecute appeal, 41
Widow's allowance, 340
Appropriation of property by cities and villages:
Appeal of Common Pleas, 1777
Bond, 1778
when not required, 1779
Married woman's liability, 1779
Notice of appeal, 1778
Original papers may be used, 1781
Transcript, etc., probate judge to furnish, 1780

APPEAL — *Continued.*
Assignment for creditors:
Account, from order settling of assignee, 39
Appeal to Common Pleas, 39
Bond, 43
when not required, 43
Original papers may be used, 49
Proceedings in Common Pleas, etc., 51
Real contracts, completion of, 39
Sale of property for payment of debts, 39
Transcript, when to be filed, 49
Trial in Common Pleas, 51
Executor and administrator:
Account, from order settling, 39
Allowance to widow, from order increasing or diminishing, 39
embezzling assets, 39
Bond, 43, 641, 1004
when not required, 43, 1779
Distribution, proceedings to enforce, 785
Insolvency, 1010
appeal to Circuit Court, 785
Insolvency, from decision of commissioners, disallowing claim, 1004
bond, 1004
failure to appeal, how remedied, 1008
when petition to be presented, 1008
Inventory, on hearing exceptions to, 312
Of claim of executor, etc., against estate, 641
Proceedings in Common Pleas, 51
Proceedings against persons suspected of having embezzled assets, etc., 39
Real contracts, for completion of, 39
Record of will destroyed, contest of, 1157
Sale of real estate, for payment of debts, 39
Transcript, when to be filed, 49
Will, from refusal to admit to probate, 1116
how appeal perfected and proceedings in Common Pleas, 1117
in proceedings to contest supplied record of, 1157
Guardians and trustees:
Account, from order settling, 1493, 39
Appointment of guardians or trustees for lunatics, etc., 39
Bond, 43
when not required, 43, 1779, 1787
Distribution, enforcement of order of, 785
Proceedings in Common Pleas, etc., 51
Real contracts to complete, 39
Sale of real estate for payment of debts, 39
Transcript, when to be filed, 49
Trustees' accounts, 1297
Bank deposits:
To recover unclaimed, 9869 G. C.
Ditch:
See DITCH APPEAL.
Sheep:
See SHEEP APPEAL.
Fire marshal:
See FIRE MARSHAL APPEAL.
Road:
See ROAD APPEALS.
Ditch appeal:
Action to enjoin, 1874f
Actual benefit may be shown, 1874b
Answer need not be filed, 1861, 1863
Assessment, action to enjoin, 1874f
action to recover, 1824d

(References are to sections.)

APPEAL — *Continued.*
Assessment appealed from, 1852
Auditor to file transcript, 1861
Bond, 1850
Construction and appeal, 1850
Construction not stopped, when, 1874a
County commissioners, jurisdiction, etc., 1850
Compensation appealed from, 1852
Court shall separate issues, 1868
trial by, 1868
Damages, appeal from, 1852
Defendant, who is, 1859
Dismissal, appeal from, 1850
Docketed, how, 1857
Equity to be done, 1874d
Error, not suspended judgment when, 1874
when not enjoined for, 1874f
proceedings in, 1873
governed by rule in civil cases, 1873
who made parties, 1873
who deemed parties, 1873
Evidence in action to recover assessment, 1874d
Filing transcript, 1862
Finding for improvement, 1852
Final order, what deemed, 1851
what is, 1852
Forms, notice of appeal, 1855
Historical, 1850
Injunction, when granted, 1874f
when not, 1874g
Issue, how made up, 1863
Joinder of interested party, 1861
Judgment, when not suspended, 1874
motion for, 1870
transcript after, 1872
Jurisdiction, Probate Court, 1850
Common Pleas, 1850
Jury, trial by, 1866
verdict of, 1867, 1868
Location, view of, 1861
Manifest error before injunction, 1874d
Motion for new trial, 1870
New trial, 1871
motion for, 1871
Notice of appeal, 1855
when owner has none, 1874e
put on journal, 1853
Owner may recover, when, 1874b
when no notice, 1874c
Plaintiff, who is, 1859
Pleadings not required, 1861
Perfection of appeal, 1857
Persons who may appeal, 1854
Proceedings in error, 1874
Proceedings, when stayed, 1874a
Questions for appeal:
amount of assessment, 1852
compensation, land taken, 1852
damage sustained, 1852
dismissal of petition, 1852
finding for improvement, 1852
Statement of matter of appeal, 1861
form of, 1862
filed in court, 1859
Stay of proceedings, etc., 1874a

(References are to sections.)

APPEAL — *Continued.*
Tax, when owner may recover, 1874b
evidence in action, 1874d
Taxation of costs, 1870
Trial by court, 1865
by jury, 1866
governed by rule in civil cases, 1864
procedure of, 1864
Time of filing appeal, 1857
Transcript, auditor to file, 1861
after judgment, 1872
View of location, 1867
Verdict by jury, 1868
by court, 1865
matters pertaining to, 1869
What deemed final order, 1851
When owner may recover assessment, 1874b
When petition dismissed, 1857
Who may appeal, 1853
Appeal to Circuit Court:
Proceedings to enforce distribution, 785
APPEAL BOND—
See APPEAL, 43.
Appropriation of property by municipal corporation, 1778
who may appeal without, 1779
Ditch, county, 1833
Road, county, 1787
state, 1787
who may appeal without, 1787
APPEARANCE, 843
See SALE OF REAL ESTATE.
APPLICATION —
See FORMS.
Appropriation of property by private corporations, 1679
municipal, 1750
Assignment for creditors, appointment of additional trustees, 1561
to continue assignor's business, 1602
examination of assignor as to honesty of assignment, etc., 1585
Executor's and administrator's, for appointment, 114
for sale of desperate claims, 456
Guardian of insane ward, for authority to make long lease, 1527
of foreign, for authority to sell real estate, 1481
Habeas corpus, writ of, 1955
Partnership, by surviving partner to appoint appraisers, etc., 417.
Proceedings in aid of execution, after return, 1911
before return, 1920
APPOINTMENT —
Of attorney for party under disability in condemnation proceedings, 1694
Of executor or administrator, notice of, 544
affidavit as evidence, 546
gives jurisdiction, 543
failure to give, how remedied, 548
proof of publication, 547
liability for failure to give, 550
object and purpose, 543
form of, 545
Of assignee or trustee of insolvent estate, notice of, 1557
Of guardian. See Guardian.

(References are to sections.)

APPORTIONMENT —
See ANNUITIES.
See RENTS.

APPRAISEMENT —
See INVENTORY.
Assignment for creditors, 1594
See ASSIGNMENTS.
return of, 1594
real estate not to be sold for less than two-thirds of, 1602
when personal property may be sold at less than two-thirds of, 1602
real estate, without State, none required of, 1594
Decedent's personal property, 281
See APPRAISERS.
will may direct none to be made, 470
Court may notwithstanding require, 470
when to be made, 281
may include real estate by order of Court, 299
Decedent's real estate, when included in inventory, 299
See SALE OF REAL ESTATE.
when appraisement of to be made, 299, 856, 825
how appraisement made when land in two or more countries, 857
of dower, 857
when no dower is assigned, 856
return of, 863
when Court may set aside and order new, 880
Guardian's sale of ward's lands, 1418, 1425
See GUARDIANS.
lease of, 1438, 1528
Partner, on application of surviving, 417
to be filed but not recorded, 417

APPRAISERS —
See INVENTORY.
Assignment for creditors, appointment, 1594
when justice may appoint, 1594
duties of, 1594
return of inventory and appraisement, 1594
Decedent's personal estate, appointment, oath and duties, 290
appointed how, 284
justice may appoint when property is out of county, 284
or in case of sickness or negligence, 285
form of appointment of, by justice, 286
in whose presence to act, 292
must sign inventory, 300
set down each item separately, 292
fees, 301
Decedent's real estate, appointment, 857
See SALE OF REAL ESTATE.
qualifications, 857
oath and duties, 857, 863
duty in assignment of dower, 857
how appointed to fill vacancies, 861
when land is in more than one county, 857
certificate of appointment, 861
return of, in writing, 863
can not purchase, 889
compensation, 872
Fees of, 301, 872

(References are to sections.)

APPRAISERS — *Continued.*
Guardians and trustees, appointment of for sale of ward's land, 1418
See GUARDIANS.
qualifications, 1418
oath, 1421
for lease of ward's land, 1438, 1528
duties of, 1438, 1528
Partner, on application of surviving, 417
Partnership assets, 418, 420
APPRENTICE —
Wards may be bound out on approval of Probate Court, 1370
APPROPRIATION PROCEEDINGS —
Two distinct parties cannot join as plaintiffs, 1686
APPROPRIATION OF PROPERTY —
General provisions:
Attaches to every kind of property, 1662
Additional servitudes, 1670
telephone poles in sidewalks are, 1670
poles for electric light are, 1670
pipes for natural gas are, 1670
railroad in highway is, 1670
poles for electric railway are not, 1670
sewers in street is not, 1670
electric railway in city is not, 1670
interurban on highway is, 1670
when change of grade may be, 1670
Benefits, 1672
general definition, 1672
cannot be considered, 1672
special, 1672
definition, 1672
what constitutes, 1672
instances, 1672
Compensation, 1671
meaning of, 1671
in constitutional sense includes both compensation and damages, 1671
should be adequate to cover all loss sustained, 1671
Constitutional provisions, 1664
reason for two sections, 1664
County road, 1786–1806
Definition of power, 1663
Distinction between and taxation, 1662
Evidence, 1673
general rules apply, 1673
burden of proof rests on land owner to prove value, 1673
witness may give opinion, 1673
form of question, 1673
sales of similar property, 1673
taxes returns, 1673
expert not necessary, 1673
is the view, 1710
Guardian cannot dedicate ward's real estate, 1398
How grant to exercise construed, 1666
examples of, 1666
must strictly come within granted power, 1666
Original jurisdiction of Probate Court, 1662
Power rests upon what, 1663
Pleadings not required, 1679

(References are to sections.)

APPROPRIATION OF PROPERTY — *Continued.*
Taking without right, 1669
choice of remedies, 1669
what is, 1669
whatever abridges, destroys or curtails use of property is, 1669
construction of tile ditch is, 1669
running sewage in natural water course is, 1669
What and how much may be taken, 1668
every kind of property may, 1668
rules for, where property already appropriated, 1668
only so long as the public uses it, 1668
an easement or fee simple may be, 1668
not more than the law provides, 1668
land under water may be, 1668
owner of the fee retains trees, shrubs, etc., 1668
also right of spring, 1668
Who may exercise power, 1665
legislature determines necessity, 1665
Court determines amount of compensation, 1665
an individual or corporation may, 1665
When may be exercised, 1667
only for a public use, 1667
is a question for the Courts, 1667
difficulty of defining public use, 1667
examples of what are, 1667
By cities and villages:
Appeal to Common Pleas, 1777
proceedings same as in Probate Court, 1777
but corporation not required to give notice of application, 1777
corporation can not appeal, 1782
by guardian, executor, etc., 1779
by married woman, 1779
Application to Court, 1750
essentials of, 1751
form of, 1752
precipea for witnesses, 1752
filing, 1753
notice form of, 1755
when to be heard, 1756
Bond to pay damages by any person interested, 1772
for appeal, 1778
when not required, 1779
when execution of order suspended on error, 1776
Building partly on land taken, 1763
Compensation, how assessed, 1763
when building partly on land to be taken, 1763
Concurrence of two-thirds of council necessary for condemnation, 1749
Costs, 1770
effect of filing written offer to confess judgment for stated amount, etc., 1770
Distribution of funds, 1769
Empaneling jury, 1761
Entry on preliminary questions, etc., 1759
Error, review of proceedings on, 1773
when execution of order may be suspended, 1776
when right to take effect not affected by review, 1776
Forms, 1750, 1754, 1758
Guardian *ad litem* for infants, 1756

(References are to sections.)

APPROPRIATION OF PROPERTY — *Continued.*
Inquiry to be had at time fixed, 1759
Court to fix time for, 1758
Jurisdiction of Common Pleas and Probate Courts, 1750
Jurisdictional questions, 1757
Jurors, how drawn, 1760
sworn to make whole inquiry, etc., 1765
but may render verdict as to part, 1765
view of premises by, 1762
Maps, plats, etc., may be required of corporation, 1761
Married woman's liability on appeal, 1779
Mortgagee, when entitled to notice, 1754, 1755
New trial, motion for, 1773, 1774
Notice of application, service of, 1754
Notice of intention to, 1778
Notice of resolution declaring intention to appropriate, when and how served, 1749
of appeal, 1778
Open and close, 1763
Owner, doubt as to, effect, 1771
Original papers may be used in Common Pleas, 1781
Ordering jury, 1759
Payment of deposit, 1767
adverse claimants required to interplead, 1767
no delay from doubt of ownership, 1771
must pay in six months, 1783
Possession, time and manner of delivery, 1769
no delay from doubt of ownership, 1771
must take in six months, 1783
when petition in error filed, 1776
Purposes for which appropriations may be made, 1749
Resolution of council declaring condemnation necessary, 1749
notice of, when and how given, 1749
Statute must be strictly followed, 1748
Trial, 1764
Transcript to be furnished on appeal, 1780
when to be filed, 1780
Verdict, 1763
when structure partly on land sought to be taken, 1763
confirmation of, 1775
election of owner to remove or accept value, 1763
effect of failure to make election, 1763
form of, 1766
return of, 1766
may be returned as to part, 1765
View of premises, 1762
By private corporation:
Abandonment by corporation, 1725
when presumed, 1725
judgment against corporation, 1725
what is, 1726
when action may be brought for costs and expenses, 11061 G. C.
Amendments, may be allowed, 1684
Appropriations can only be made, when, 1676
Attorney appointed for absent parties, etc., 1694
fees in such cases, 1694
fees in case of abandonment, 1725
Common pleas has jurisdiction, when, 1682, 1733

(References are to sections.)

APPROPRIATION OF PROPERTY — *Continued.*
Compensation, how assessed when structure partly on land sought to be taken, 1715
Conflicting claims not to be passed upon, 1728
but to be adjudicated in Common Pleas, 1729
such proceedings a civil action, 1730
to be determined by Court or jury, how, 1730
Costs and fees, how taxed, etc., 1746
when costs may be apportioned, 1746
on new trial granted, 1718
of more than three witnesses on same point, 1713
on abandonment, 1725
in proceedings to condemn unfinished road-bed railroad, 1732
judgment for expenses against corporation, 1725
Cost bill expense of view to be taxed in, 1708
Director's individual liability on judgment against corporation, 1725
Distribution of proceeds, 1727
entry where there are no conflicting claims, 1727
Error when may be prosecuted, 1721
Evidence, none to be given before jury viewing premises, 1708
witnesses may be examined after return of jury, 1713
burden of proof on corporation, 1695
Fees, 1746
Interurban railway included, 1675
Insane person, appropriation of property of, 1677
application by guardian for authority to convey, 1677
Jurisdiction, exclusive, of Probate Court, 27
of Common Pleas, when, 1682, 1733
Jurisdictional questions to be first determined, 1695
Jury, how drawn, 1701
fees not taxed against plaintiff, 1701
impaneling, 1703
challenges, how vacancies filled, 1704, 1705
entry for, 1702
entry empaneling, 1709
entry appointing attorney, 1709
oath of, 1706
order to draw, 1702
order to empanel, 1702
qualifications when tried in Common Pleas, 1722
view of premises by, writ for, 1707
is it evidence, 1710
verdict of, 1716
who to be present, 1708
return of sheriff, 1708
expense of view to be taxed in cost bill, 1708
no evidence to be given, 1708
must strictly comply with statute, 1674
Minor, appropriation of property of, 1678
entry ordering conveyance, 1678
deed, form of, 1678
guardian may file application for authority to convey, 1677
form of, 1678
notice of application, 1677
entry ordering, 1678
form of, 1678
New parties, may be made, 1684
New trial, 1718, 1717
conducted according to provisions governing first, 1718

(References are to sections.)

APPROPRIATION OF PROPERTY — *Continued.*
proceedings on, 1718
Probate Judge to retain amount of verdict if new trial granted, 1718
verdict, how paid after second trial, 1718
costs of second trial, how and by whom to be paid, 1718
Nature of proceedings, 1683
Notice by land owner or school officers when corporation takes land without condemnation proceedings, 1735
Petition for appropriation, 1679
filing of, 1689
essentials of, 1686
form of, 1688
in what Court to be filed, 1679
where land is located, 1680
entry on filing, 1689
in what county, 1681
may include all parcels in county sought to be taken, 1679
must contain what, 1679
by land owner, etc., when land taken without condemnation proceedings, 1735
by party claiming interest in property or money arising therefrom, 1729
Petition in error, either party may file, 1720
but corporation may enter on property sought to be appropriated, how, 1720
proceedings in Common Pleas, 1722
in judgment reversed, how trial conducted, 1722
when had in Common Pleas, 1722
Parties, 1687
all interested should be, 1687
Possession, when and how corporation may have, 1723
entry when deposit made, 1724
judge to enter on record an order of possession when money is paid, 1723
and may issue process to put corporation in possession, when, 1723
when land taken without condemnation proceedings, 1735
Preliminary questions, when to be heard, 1696
existence of corporation, how shown, 1697
right to make appropriation, how shown, 1698
inability to agree, what is, 1699
necessity for appropriation, who to determine, 1700
finding on, 1701
Reversal of condemnation, Common Pleas to retain cause for trial, etc., 1722
School lands, how appropriated, 1747
money arising therefrom, how disposed of, 1747
proceedings when taken without condemnation, 1735
Separate trial, who entitled to, 1711, 1712
Service by publication may be issued, when, 1692
Sheriff, judge to deliver copies of petition, etc., to, 1708
Structure partly on land sought to be appropriated, how compensation assessed, 1715
owner may elect to retain structure or accept value fixed, 1715
when election not made in time specified retention presumed, 1715
when owner elects to take value structure belongs to corporation, 1715
Summons, its command and service, 1690

(References are to sections.)

APPROPRIATION OF PROPERTY — *Continued.*
every interested party should have, 1691
must be made as law provides, 1691
served and returned as in civil action, 1690
strict construction of law applied, 1691
record of proceeding must show, 1691
when no service made, new writ may issue, 1690
service by publication, 1692
affidavit for, 1693
when corporation takes land without condemnation proceedings 1742
Time of trial, adjournment, etc., 1685
Trial, how conducted, 1711
may be adjourned and continued, 1685
owner of separate parcel, etc., entitled to separate trial, 1711
shall hold affirmative on trial, 1711
on reversal of judgment in Common Pleas, 1722
Unfinished road bed of railroad may be condemned, 1731
answer of defendant company, 1731
service by publication, 1731
judgment and costs, 1732
in what Courts such proceedings may be begun, 1733
case may be taken out of its order, 1733
proceedings in error may be begun directly in Supreme Court, 1733
provisions as to viewers not to apply, 1733
sworn statement of president of intention to complete road, 1733
twenty-five per cent. of cost of completion to be expended within a year, 1733
Verdict and confirmation, 1719
form of verdict, 1716
confirmation of verdict, 1719
When appropriations can be made, 1676
When Probate Court cannot, 1728
When Probate Judge interested, 1682
proceedings to be commenced in Common Pleas, 1682
special term of, 1682
and to be conducted according to provisions of this chapter, 1682
When corporation takes land without condemning it, 1735
notice by land owner of school officer to corporation, 1735
petition on failure of corporation to act, 1735
summons in such case, 1742
judgment and execution, 1742
when injunction may issue against corporation, 1744
When provisions of chapter do not apply, 1675
Witnesses, examination of before jury after its return to Court, 1713
costs of calling more than three on same point, 1713
When land owner may compel, 1734
demand of description of property, 1739
motion for injunction, 1745
notice to corporation, 1738
procedure, 1743
petition essential of, 1740
form of, 1741
summons, 1742
When corporation may be enjoined, 1744
Where action brought, 1737
Who may bring action, 1736

(References are to sections.)

APPROVAL — See CONFIRMATION.
See PARTITION.
See DOWER.
Of bonds by Probate Court, 238
Of assignee.
See ASSIGNMENTS.
Of Court, on sale of desperate claims, etc., by assignee, 1611
ARBITRATION —
Agreement to refer, 598
form, 598
Award has no judicial force, 595
Claims in favor of estate, 455
Claims against estate, 594–606
Confirmation of award, 606
Duties of justices of peace, 598
Duties of Probate Judge, 600
Doubtful claims against estate may be referred, 594
procedure when claim is less than one hundred dollars, 597
when it exceeds one hundred dollars, 599
proceedings, powers and compensation of referees, 602
report of referees, 602
proceedings of Court on, 602
Filing of award, 605
Guardian may submit, 1382
Hearing, 603
Insolvent estates, reference of disallowed claims, 969
costs awarded, 972
judgment on award, 973
Notice and oath to referees, 601
Order of reference, 600
Referee's power, etc., 602
Witnesses how procured, 604
When may, 595
ARREST —
See ARRESTS.
See CUSTODY OF WILL.
Proceedings in aid of execution, 1911
ASSENT —
To distribution of notes, bonds, etc., in kind of decedent's estate, 751
ASSESSMENT —
Administrator should pay on stocks when, 522
Notice is served on executor, 506
See APPEAL.
See TAXATION.
ASSETS —
See CLAIMS, ETC.; DEBTS, ETC.
See ADMINISTRATOR AND EXECUTOR.
Arbitration, 455
when may, 455
Administrator *de bonis non* entitled to possession of, 157
liable for new, 623
Administration, what not deemed for purpose of, 320
Appraised and sold though will forbids it, 470
Advancements, kind, 365
Chattel mortgage, when, 365
Oil, when; straw, when, 368.
Cannot be retained by executor, etc., in payment of his own debt, 631
Collection of, 440-449
affidavit necessary, 446
administrator's duty, etc., 440
duty to bring suit, 441
diligence required, 442
negligence in, 443

(References are to sections.)

ASSETS — *Continued.*
statute of limitations, 444
extensions of time, 445–448
when further time can not be allowed, 448
when further time will be allowed, 448*a*
Concealed or embezzled, 394–415
nature of proceedings, 394
object of, 394
like bill of discovery, 394
Court having jurisdiction, 397
complaint, 398
form, 400
parties, 399
ordering citation, 401
commitment to jail, 403
examination of accused, 407
trial, 409, 410
verdict, 411
judgment, 412
Compounding claim, 450, 455
who may, 450
authority to, 451
application for, 452
hearing, 453
order to compromise, 454
Care and management, 506, 532
preservation of property, 506
notes given by administrator, 507
employment of attorney, 508
when allowed, 509
fees allowed, 510
taxation of, 511
custody of funds, 512
failure of bank, 513
investment of funds, 514
when to be made, 515
insurance, 517
carrying on business, 518
carrying out contracts of deceased, 519
contracts not binding, 520
mortgages, 521
stocks, 522
completion, contract for sale of land, 523
nature of proceeding, 524
parties, 525
petition, 526
notice, etc., 527
form of deed, 531
Discovered after return of inventory, proceedings, 311
Debt of executor or administrator, 350
Debt of heir is, 393
Definition, 363
Distribution of notes, bonds, etc., in kind, 751
of insolvent estate, 1011, 988, 989
Dividends, 978, 1289, 374, 692
Emblements to be, in hands of executor, etc., 369
Foreign executor, etc., duty of as to, 188
wasting may be required to indemnify distributees, 193
Gain and loss, 1290
Insolvent estate, distribution among creditors of, 1011

(References are to sections.)

ASSETS — *Continued.*
Inventory of decedent, 281, 303
to include all, 298
when further assets come to executor's hands, 980
disposition of surplus, 988, 989
of residue after paying contingent claim against, 984
Life insurance is, 380
Marshaled in conformity to will, 832
when devised property taken to pay debts, 1209
Mortgaged premises considered as, 386
New assets after return of first inventory, 311, 616
Not to be retained by executor, etc., in payment of his claim, 631
Non-resident's administration of, 170
Order of payment, 647
Partnership, 416, 439
Partnership real estate, 438
Principal and income, 1288
Preferred debts exhausted in payment of, 671
Property specifically bequeathed, 474
Real estate, when considered personal, 438
Received after two years go to creditors, 615
Retention of to pay claim not due, 577
Surplus to be paid into Court, on non-resident decedent, 170
Sale of desperate claims, 456, 468
disposition of, 456
jurisdiction of Court, 457
application for, 458
notice for, 459, 460
proof of notice, 461, 462
public sale of, 463, 467
private sale, 466, 467
effect of order of sale, 468
Sale of personal property, 469, 505
See SALE OF PERSONAL PROPERTY.
Time to collect, 440
may be extended, 445, 446
when can not be extended, 448, 448*a*
What are, 365, 393
fixture, 365
wood, 366
manure, 367
emblements, 368
rent of farm land, 371
rents generally, 372
leases, 373
annuities, 374
dividends, 374
copywrights, 375
patents, 375
pension money, 376
trust property, 377
money on deposit, 378
fire insurance money, 379
life insurance money, 380
mutual benefit insurance, 381
goodwill of business, 382
property conveyed to defraud creditors, 383
proceeds of real estate, 384
choses in action, 385
debt of executor, 390
debt from heir or legatee, 392
not possessed by deceased, 393

(References are to sections.)

ASSETS — *Continued.*
widow's allowance, 393
fruit, 366
fence, 366
unfinished structure, 366
What deemed, 320
Wrongful death, etc., 533
is not in ordinary sense, 533
Assignment for creditors:
To be converted into money, 1602
Guardian and trustee:
Received from administrator, etc., to be adjusted, etc., 1367
retained with approval of Court, 1367

ASSIGNEE —
See ASSIGNMENT.
ASSIGNMENT FOR CREDITORS —
ASSIGNMENT —
Insolvent corporation, when made 1547
Appeal from order settling, 39
Contents of report, 1653
Examination of assignor and assignee as to, 1585, 732
Exceptions to, 1653
further time to file, 729
How filing and settlement of enforced, 1573
Jurisdiction of Probate Court over, 27, 1544
Notice of filing and hearing, how and by whom given, 1653, 729
costs of, 729
On resignation, removal or death of assignee who shall file, and settle, when, 1573
Time for filing, 1653
hearing, 1653, 729
settling, 1573
Application for appointment, 1553
entry, 1555
Action:
Common Pleas to deliver property, 1572
to settle question of lien, 1618
Fraudulent conveyance, action to set aside, 1580
notice of by creditors, 1580
how creditors made parties, 1580
Liens, action to sell real estate and settle, 1618
Limitation of action on rejected claim, 1628
Sale of real estate, action for, 1618
in Common Pleas, when, 1618
Successor may proceed on bond of assignee to compel delivery of trust effects, 1573
Trustees may compel delivery of trust property by, 1572
in what Courts, 1572
Appointment:
Of assignee, 1546
trustee, 1559, 1564
Notice of, 1557
When property fraudulently assigned, 1580
Appraisement and Inventory:
Appraisement must be filed within 30 days, 1593
Appointment of appraisers, 1594
when justice may appoint, 1594
qualification of, 1595
Homestead, etc., to be set off by appraisers, when and how, 1598
Inventory, 1594

(References are to sections.)

ASSIGNMENT FOR CREDITORS — *Continued.*
when to be filed, 1594
Personal property not to be sold for less than two-thirds, etc., 1610
Real estate not to be sold for less than two-thirds, etc., 1610
subject to re-appraisement, 1610
without the State need not be appraised, 1594
Return of appraisement, 1597
Schedule of debts to be filed, when, 1594
When part of estate in another county, 1594
What must be appraised, 1596
Assets, to convert, 1602
Assignee, qualification, 1553
must be within ten days, 1553
acceptance presumed, 1553
may carry on business, 1587
liability of, 1588
application for order to, 1589
form of application, 1590
entry permitting, 1590
Assignments in contemplation of insolvency:
Assignments made in contemplation of, shall inure to benefit of creditors, 1570
Trusts arising thereunder must be administered as herein provided, 1579
Assignee may complete sales of real estate, 1591
Assignee, duties similar to trustee and receiver, 1542
Assignments to defraud, etc., creditors:
Conveyances made to hinder, delay or defraud creditors, void, how, 1580
administered upon as in other cases of assignment, 1580
Court not administering trust, or on failure to give notice copy of certified judgment to be certified to Probate Court, 1580
which shall then, on its own motion, appoint a trustee, 1580
who shall administer trust; how, 1580
distribution, creditors entitled to priority in, when, 1580
notice, publication of, in such case, 1580
surplus, creditors failing to answer, share in, 1580
trustee, Probate Judge to appoint, after conveyance declared void, 1580
Bail:
Assignee heretofore appointed may be required to give, 1576
Removal for failure to give, 1576
Bond:
Action, 1573
Appeal, 43
Assignee's, 1546
additional, when required, 1546
form, 1554
Failure to give, cause for removal, 1559, 1572
Form of, 1554
Fraudulent conveyance, to secure costs of suit to set aside, 1580
New bond on application of sureties, 1562
discharges sureties on original, 1562
On requisition to reject claims, to pay costs, 1635
Trustee's, 1572
Business of assignor:
See CARRYING ON BUSINESS.
When Court may order to be carried on by assignee, 1587
Common Pleas Court, jurisdiction of, 1545
only where power of Probate Court inadequate, 1545
Collection of assets, 1602

(References are to sections.)

ASSIGNMENT FOR CREDITORS — *Continued.*
diligence required, 1603
Claims:
Account of, to be filed, 1653
when to be filed, 1652, 1654
what it should contain, 1655
form of, 1656
entry and order of notice, 1657
hearing, 1658
exceptions, 1659
dividend ordered, 1659
notice to creditors of dividends, 1660
report of payment, 1661
form of, 1661
entry on, 1661
Affidavit, to be filed with before allowance or payment, 1632
Bond, assignee or creditor must give when filing requisition, 1635
Secured by mortgage, 1631
Chattel mortgage, 1608
application for allowance, 1608
entry, 1608
creditors notified, 1608
Costs may be allowed, how, 1628
Creditors must file their claims when and how, 1629
Desperate, sale or compromise of, 1602
Disallowance of, on requisition of creditor, 1635
though previously allowed, 1635
bond of creditor, 1635
notice of disallowance, 1635
procedure on, 1636
where to be entered, 1638
when suit must be entered, 1637
Distribution in proportion to amount of, 1579
only on allowed claims, 1629
must be according to law of domicile, 1654
Dividends, payment of, 1653
report of payment, and of those remaining uncalled for and unpaid when due, 1653
notice to owner of unpaid dividend, 1653
distribution of unpaid dividends, 1653
on what amount, etc., 1631
of dividends reserved for claims disallowed or held under advertisement, 1653
Examination of claimant under oath by assignee, 1632
Fraudulent, power of Court to prevent allowance or payment of, 1585
Fraudulent conveyance, in action to set aside, creditors cross-petitioners to set forth amount of, etc., 1580
Indorsement by assignee, etc., of rejection or allowance, 1628
Judgment against assignee on rejected claim, how awarded, 1628
Laborer's wages, what preferred, 1647
Preferred claims, 1647
payment of, 1640
cost of administration, 1641
lien holder not to be charged with, 1641
commission of assignee, 1642
ordinary services, 1643
extraordinary services, 1644
affidavit to, 1644
attorney fees, 1644

(References are to sections.)

ASSIGNMENT FOR CREDITORS — *Continued.*
itemized bill, 1645
affidavit to, 1645
lien existing at time of assignment, 1646
by statute, 1647
taxes, 1648
affidavit when services performed by others, 1642
labor claims, 1649
operative, 1649
labor liens, 1650
rights between various, 1651
Presentment for allowance, when, 1628
when to be presented, 1629
effect of failure to, 1629
should be within six months, 1629
allowed how, 1634
what to be presented, 1630
contingent, 1630
secured by mortgage, 1631
entitled to dividend on, 1631
how presented, 1632
in writing, 1632
affidavit, 1632
and affidavit that services were performed, etc., 1642
form of, 1633
rejected, how, 1634
Rejected, when action to be brought, 1628
Report of assignee and when to be filed, 1628
Report of, filed, 1639
form of, 1639
Surety may present and prove, 1632
but dividend must be paid to owner, 1632
when owner proves claim, 1632
Taxes, preferred claims, 1647
Validity of not affected by determination of Court, as to, in election of trustee, 1564
Wages due operatives preferred claims, 1647
Compensation of assignee:
See above PREFERRED CLAIMS.
Commissions usually allowed, 1642
Extra for carrying on assignor's business, 1587
Further allowance for extraordinary expenses and services, 1642
and reasonable counsel fees, 1642
whether performed by assignee or not, 1642
but bill of items must be filed for further allowance, 1642
by statute, 1647
Maladministering not entitled to, 1643
No allowance for expense of employing auctioneer, unless, etc., 1644
Corporation:
Can not give preferences, 1581
May assign, 1547
Creditors may elect, 1564
Costs:
Fraudulent conveyance, in action to set aside, when creditors to secure, 1580
Of contesting claim when disallowed on requisition of creditor, etc., 1635
Of notice of filing accounts, 729
Rejected claim, of action on, 1628
Effect of order and issue of letters, 1556

(References are to sections.)

ASSIGNMENT FOR CREDITORS — *Continued.*
Definition, 1542
Death of assignee or trustee:
Account, legal representative must file, 1573
Court may appoint successor, 1561
Duties of assignee, 1578
similar to trustee and administrator, 1578
Deed:
Acknowledgment necessary to convey real estate, 1550
Form of, 1550
Should be filed in recorder's office, 1552
Time of delivery of assignment to be indorsed on, 1546
Where must be filed, 1551
Wife's answer as to dower has same effect as, of release, 1600
When takes effect, 1551
Distribution:
Cannot be made before eight months, 1614
Only on allowed claims, 1659
partnership, 1659
Assignee bound by Court's, 1659
Must be according to law of domicile, 1542
Dividends: See above PREFERRED CLAIMS.
By whom and when declared, 1653
Notice of making and time and place of payment, 1653
Report of payment, and of those remaining uncalled for and unpaid to be made when, 1653
New notice to owners of unpaid, 1653
distribution, when not demanded within twelve months thereafter, 1653
Of dividends reserved for claims disallowed or held under advisement, 1653
Dower, assignment of, 1600
Effect of bankrupt act, 1543
Exempt Property:
Excepted unless expressly waived, 1598
From levy, 1598
Homestead, etc., to be set off by appraisers, when and how, 1598
five hundred dollars in lieu of, 1601*a*
petition for allowance, 1600
Wife's property excepted, 1598
Examination of assignee, 1585
procedure, 1586
Foreign assignment:
Does not affect real estate in Ohio, 1542
Of Ohio land, superior to subsequent foreign attachment, 1542
Of personalty, superior to subsequent attachment of Ohio debtor, when, 1542
When deed takes effect, 1546
How made, 1550
Incumbrances, to pay on order of Court, 1618
Liens:
Action in Common Pleas to marshall, and quiet title, 1618
decree and order of, 1618
report of proceedings certified to Probate Court, 1618
sale of real estate on, 1618
Assignee takes subject to, 1592
Assignment does not affect priority of, 1631
Probate Court to order payment of in order of priority, 1618
Letters, form of, 1556

(References are to sections.)

ASSIGNMENT FOR CREDITORS — *Continued.*
Mortgage:
Claims secured by, 1631
Rights of assignee in respect to, 1549, 1608, 1592
Notice:
Accounts, filing and hearing, 729
Appeal, of intention to, 43
Appointment of assignee, etc., 1557
Disallowance of claim on requsition of creditors, etc., 1635
Dividend, of making and paying, 1653
to owner of unpaid dividend, 1653
Fraudulent conveyance, of action to set aside, 1580
Form of, 1557
Of appointment, 1557
Sale of assigned property, 1625, 1601
Trustee, of time and place for election of, 1564
Property that may be assigned, 1549
homestead rights reserved, 1549
subsequent services of assignor not, 1549
goods *in transitu* not, 1549
lease, etc., 1549
Partnership:
Partner can not make assignment for firm unless, etc., 1547
Sole surviving insolvent partner can assign, 1547
Where there are joint and separate assets, 1659
Assignment of individual members after dissolution, 1547
Probate Court jurisdiction, 1544
is exclusive when, 1544
cannot hear action to set aside, 1544
Removal:
Election of trustee, 1565
to qualify, 1560
Election by creditors, 1570
entry, 1571
form of petition, 1566
entry ordering citation, 1567
form of citation, 1568
hearing, 1569
entry, 1569
For failure to file assignment or give bond, 1559
to give new bond on application of surety, 1562
to appear when cited or give bail, 1576
Appeal and error, 1575
Procedure, 1563
Power of Court as to, 1562
Settlement must be filed by assignee on, 1573
Trustee appointed, 1572
Rights of insolvent debtor, 1572
Resignation:
Of assignee or trustee, when and how, 1561, 1573
Raising, 1577
form of application, 1577
entry ordering, 1577
Sale:
Application for of personal property, 1607
form, 1607
entry, 1607
Appeal, none lies from order refusing to confirm, 906
Appraisers, appointment, 1594

(References are to sections.)

ASSIGNMENT FOR CREDITORS — *Continued.*
when part of property is in another county, 1594
return of inventory and appraisement, 1594
Assignee can not purchase at, 889
Claims in favor of estate may be sold, when, 1611
Confirmation of, 1594, 1613
Contemplation of insolvency void, 1579
how set aside, 1580
what sufficient causes, 1581
burden of proof is upon person assailing, 1581
presumed fraudulent when, 1582
who should bring action, 1583
in what Court brought, 1584
Desperate claims, 1611
Dower not extinguished by, 1600, 1601
answer of wife to contingent right of, 1600
Election of husband or wife to be endowed out of proceeds of sale, 1600
when Court to order sale free of contingent, etc., 1601, 1618
Homestead exemption not affected by provisions with respect to, 1618
How to be sold, 1605
Of real estate, 1617
petition should always be filed, 1617
nature of action, 1619
where brought, 1620
parties, 1621
form of petition, 1622
procedure, 1623
laying out of town lots, 1624
notice of, 1625
return of, 1626
confirmation, 1626
Liens, action to settle, 1618
Notice to lien holders, 1607
Notice of, 1624
of personal property, 1609
Price for which real estate to be sold, 1625
limitation as to not to apply to land out of State, 1610
Public, of personal property, 1609
conduct of, 1609
when not sold, 1611, 1612
application for resale, 1612
entry, 1612
report of sale, 1614
confirmation, 1614
Private, when property may be sold at, 1610
affidavit as to making, 882
price at which property to be sold, 1610
property not sold at, offered at public auction, 1611
Return of sale to be made, when, 1613
Terms of sale, on what to be made, 1625, 1606
When and what must be sold, 1604
When may order sale to be made, 1601
Town lots, when petition seeks to have laid out, 1624
Schedule of debts must be returned with inventory, 1597
Successor of, Probate Judge to appoint, 1561
Taxes:
A preferred claim, 1647
Trustees elected by creditors:
Application for election, how made, 1564

(References are to sections.)

ASSIGNMENT FOR CREDITORS — *Continued.*
Bond, trustee to give, when and how, 1564
Court may approve choice, 1564
Creditors may elect, when and how, 1564
Notice to creditors of meeting to elect trustee, how, 1564
Number of creditors required to be present, 1564
Number of creditors required for choice of trustee, 1564
Proceedings of meeting, how conducted, 1564
Record to be kept, 1564
Title to be conveyed to insolvent debtor, 1574
Trustees appointed by Probate Court:
Bond, trustee to give, when and how, 1572
Failure to give bond held to be a declination, 1572
Order to put new trustee in possession of property, Court may enforce, 1572
Real estate, assignee and debtor shall convey to trustee, 1574
Taking possession of property by another under lien or execution, 1592
right of lienor retained, 1592
Time:
When assignee to file and produce assignment in Probate Court, 1546
When assignment to take effect, 1546
Who may make, 1547
not required to be in failing circumstances, 1547
when member of partnership may, 1547
corporation may, 1547
surviving partner, 1547
Who may be assignee, 1548
Wife of assignor:
Real estate of, excepted, 1598
Real estate, wife to be made party to proceedings to sell, 1600
answer, may file, asking for value of her contingent right of dower in money, 1600
effect of answer, 1600
mortgage proceedings when wife has executed a joint mortgage with husband, 1601
proceedings when husband executed alone, 1601
provisions of Sec. 6350f as to the right of wife of assignor made applicable to proceedings to sell encumbered real estate, 1618

ASSIGNMENTS TO AVOID ARREST —
See REVISED STATUTES.
Accounts, Probate Court to settle, 27
appeal from order settling, 39
examination of commissioner under oath as to, 733
notice of filing and hearing, 729
cost of, 729

ASSIGNMENTS WITH INTENT TO DEFRAUD, ETC., CREDITORS —
See ASSIGNMENTS.
Action of creditor to set aside, 1580
Appointment and duties of trustee, 1580
"By a Court of competent jurisdiction," 1584
Evidence of fraud, etc., 1581
Notice of action by publication, 1580
"Or procured by him to be made," 1582
Parties to action, 1580
answer of, when to be filed, 1580
costs to secure, 1580
Pleading, 1586
What Court to administer trust, 1580

(References are to sections.)

ASSIGNMENTS WITH INTENT TO DEFRAUD, ETC., CREDITORS — *Continued.*
proceedings when Court does not administer or notice not given, 1580
What is a fraudulent conveyance and what is not, 1582, 1581
Inure to equal benefit of all, 1579
How preferences may be given, 1582

ASSIGNOR —
Incompetent to testify, when, 11495 G. C.

ASYLUM —
Orphan asylum, 1906
Admission of patient to, 1999
Affidavit for admission to, 1999

ATTACHMENT —
Power of Probate Judge to issue, 17, 1976
Property exempt from, 1598
Heir's interest may, 590
Against person guilty of contempt of Court, 1980
Administrator's commission cannot, 655
Against executor or administrator failing to return sale bill, 303
or to file account, 741
When administrator or executor may file petition in error to reverse order discharging, etc., 11867 G. C.
Attendance of witnesses, 20

ATTESTATION —
Definition, 1041
Of wills, 1034, 1040
Presumption as to, 1106
Form of clause, 1041, 1106
Administration of estate when Probate Judge interested as, 9

ATTORNEY —
Attorney Fees:
Administrator may act, 508
Appointment in appropriation proceedings, 1694
Appointment of to file motion for contempt, 1982
Employment generally, 508
Estate not primarily liable therefor, 509
Employment of by guardian, 1402
Employment of by ward, 1519
For what services allowed, 508, 509
Fees allowed, amount, 510
how stated in account, 725
In assignments, 1644
affidavit to claim, 1644
Must be for benefit of estate, 511
Must represent assignee's creditors at meeting to elect trustees, 1564
Notice to, on application to admit lost will to probate, 1144
Priority of, 508
When charged to beneficiaries, 508
Court passes upon account, 508
When to share with litigant, 509
Preferred claims, when, 509
Court does not determine amount, 510
Probate judge or deputy not to act as, 7
Should employ in real estate sale, 829
When not allowed, 509
When allowed, 509

AUCTION —
See Sale of Real Estate.
Assignee's sale must be at, when, 1602
Executor's, etc., sale of personal property at, 479, 495
See Sale of Personal Property.

AUCTIONEER —
See Sales of Personal Property.

(References are to sections.)

AUCTIONEER — *Continued.*
No allowance to assignee for expense of employing, unless, etc., 660
See SALE OF REAL ESTATE.
AUDITOR —
in road appeals generally, 1787, 1789
in county ditch appeals, 1850
concerning property of unknown decedent, 2862 G. C.
Probate Judge to report fees to, when, 545, 3046 G. C.
Proceedings on complaint against for neglect of duties, 2121
AUTHENTICATED COPIES 17a—
Of foreign wills, 1132, 169

B.

BANK—
Liability of trustee, executor, etc., for loss of money deposited in, 578
See MONEY ON DEPOSIT.
Unknown banking depositors and deposits annual report to Probate Judge, 509
BANKRUPTCY—
Effect of on insolvency, 1543
State laws as to exemption followed, 1543
BANS—
When to be published before marriage, 2117
BASTARDS—
See GUARDIANS.
Capability of as to inheritance, 936
When legitimated, 937
BEDS —
Widow and children entitled to, 320, 322
BENEFITS —
Assessment of, compensation for property condemned irrespective of, 1706
Special, 1672
General, 1672
BEQUEST —
Charitable, when valid, 1028
See CHARITABLE USE.
Debt, bequest of to executor to be construed as a specific legacy, 391
Definition, 1013
Land, sale of to pay, when, 819
Legatee must pay back, when, 159
Specific, exempt from sale unless required for payment of debts, 1208, 1209, 470
See PAYMENT OF LEGACIES.
to witness void, when, 1044
how delivered to legatee, 474
See LEGATEE.
when paid within two years, 696
See RESIDUARY LEGATEE.
Who may make, 1018
BIBLE —
Widow and children entitled to, 320
BILL OF EXCEPTIONS —
See ERROR.
Allowance of, signing, 11564 G. C.
In proceedings on allowance of claims of executor, etc., 641

(References are to sections.)

BILL OF ITEMS —
To be filed and verified to entitle assignee to extra compensation, 1642
BIRTHS —
Statistics of to be kept by Probate Judge, 2014
BLIND —
May make will, 1023
BOARD OF EDUCATION —
Duties of in establishing joint sub-districts, 2013
BOARD OF EQUALIZATION —
Proceedings on refusal of witness to appear or answer before, 2014
BOND —
Administration of estates:
Accepting forged bond, 239
Action on administration bond, 255
by creditors, 262
legatee or distributee, 265, 269
succeeding administrator, etc., 278
in what courts, 261
Administrator's, 124, 86, 93, 105, 114
additional required, when, 95, 873, 875, 248, 258
distinction between, and new, 258
corporation may give, 241
administrator *de bonis non*, 95-124
foreign administrator, 199, 200, 190
refunding, 192
to secure distributee, 194
special administrator, 133, 134
with the will annexed, 105
Action in what Courts, 261
Appeal, 43
when need not be given, 44
when must file, 45
to whom payable, 46
amount of penalty, 47
form, 48
Appeal of executor's, etc., claim against estate, 43, 641
Claim against estate, requisition of heir, 561
creditor, when may sue on, 262
Distributees to give bond to executor, etc., to return assets, when, 751
Construed strictly, 259, 237, 234, 236
Executor's, 83
additional, executor must give when, 95, 873, 875.
conditions, 83
cannot act without, 71
creditor, when may put in suit, 262
legatee, widow, etc., may put in suit, when, 265
form of, 84
when need not be given, 85
liable on, when executor is, 255
may be separate, 86
in what courts action on, may be brought, 261
not required when so provided in will, 83
when required nevertheless, 83
residuary legatee, bond of when executor is, 57
form of, 58
liability on, 59
not to discharge lien on testator's property unless, 60
suit on, 310, 262-277

(References are to sections.)

BOND — *Continued.*
such bond not to discharge liens on testator's property except, 60
when sells more land than necessary for payment of debts, 873
when liable on, 255
where to be filed, 86
when is residuary legatee, 57
widow, etc., may put in suit, when, 265
Filed in Court taking same, 86
Probate Court, 238
Foreign executor, etc., to give bond, when, 199
to give further bond to account for surplus when he sells more land than necessary, etc., 200
refunding bond may be required by of heirs, when, 190
may be required to indemnify sureties, 193
Heirs, bond of to creditor for payment of claim not due in two years, 581
action on such bond, 581
bond of for rejection of claim against estate, 561
Joint or co-administrator, 202
Joint or several, 86, 1271
Judge not liable for judicial act, 14
Non-resident, administrator may be granted on estate of, 170
New bond, when required, 875, 248–250
removal for failure to give, 243, 252
sureties on, 250
Limitation of action on, 4984 R. S.
Legatee's for delivery of property to, 474, 475
payment of legacy within two years, 696
when executor is residuary legatee, 57
Reduction of bond, 259a
Requirement of, 233
Sale of land, to account for surplus, 873
additional may be required, 875
by foreign executor, etc., 199, 200
by persons interested to prevent sale, 826
Sureties, bond to indemnify, must be given, when, 253
order takes effect when, 248
examination, 242
number of, 241
liability on different bond, 251
application for indemnity, 254
form, 255
how sureties may be released, 243
notice, 247
cause for release, 243, 244
need not be named in body of, 236
liability generally, 259
when liable, 259
not discharged by death, 259
acts done *colore officii*, 259
when sureties insufficient, new bond may be required, 248
form of application, 245
valid if one sign, 236
order of removal, 247
qualifications of sureties, 86, 240, 241
signing conditional bond, 236
Where to be signed, 237
Appeal:
See APPEAL.
Appeal bond, 43

(References are to sections.)

BOND — *Continued.*
amount of penalty, 47
form, 48
In road cases, 1787, 1805
county ditch case, 1833
to whom payable, 46
township ditch case, 1857
when need not be given, 44
when must file, 1806
Appropriation of property, etc.:
By interested parties, 1772
For appeal, 1778
by guardian, executor, etc., 1779
Appointment without voidable, 233
Approval and custody, 238
Assignment for creditors:
Action on to compel settlement of accounts, 1573
Assignee's, 1546
effect of failure to give, 1559
Court may require additional, 1546
New, on application of sureties, 1562
To pay costs on application of assignor or creditor to reject claim, 1635
To secure costs of suit to set aside fraudulent conveyance, 1580
Trustee's, 1572
effect of failure to give, 1572
Filing, 238
Guardians and trustees:
Additional, by guardian of insane person, when, 1528, 1398
Appeal, 43
when not required, 43
Foreign guardian of foreign idiot must give, 1483
Non-resident minor ward, of guardian, 1481
Not invalid for informality, 1337
One for two or more wards, 1338
Sale of real estate, additional before, 1422, 1522, 1334
Testamentary, 1310
Testamentary, when not required, 1310
Trustee of non-resident,
of non-resident lunatic, etc., 1277
when wife appointed, of idiot, etc., 1512
Conditions of, 236
Liability of judge in accepting, 239
Miscellaneous:
Bond company's approved by Probate Judge, 241
Legatee to give refunding, 696
Official bonds, duties of Probate Judge as to in absence of prosecuting attorney, 2920 G. C.
Partner, surviving to give on taking assets, 427, 429
Probate Judge's, 14
Prosecuting attorney's approved by Probate Judge, 2911 G. C.
Requisition not to allow claim, 564
Road appeals, 1787, 1805
Penalty, amount, 240
Signed in blank, 235
See APPEAL BOND.
Sureties on, how released, 243
qualifications, 86
Trustee, testamentary, 107
when not required, 1256

(References are to sections.)

BOND — *Continued.*
when required notwithstanding provisions of will, 1256
removed by Court for not giving, 1258
separate or joint may be taken, 1264
under foreign will, 1268
when Probate Court appoints, 1271
appointed by foreign Court, 1269
on non-resident lunatic, 1277
To whom made payable, 234
To secure claims not due, 578
form of, 579
To prevent sale of real estate, 826
form of, 828
Reduction of, 259a
Suit on, 260-279
procedure remedy, 260
remedy is statutory, 260
what authorizes suit, 260
jurisdiction of, 261
by creditor on liquidated demand, 262
kind of creditors claim, 263
when can bring suit, 264
legatee may bring when, 266
distributee may bring when, 266
widow may bring when, 266
at what time may be brought, 237
on unliquidated demand, 268
Court must authorize, 269
application for leave, 270
form of, 271
entry, 272
notice, 273
hearing, 274
entry granting leave, 275
defence in suit on, 276
suit by succeeding administrator, 278
time within, must be brought, 279
Executors, etc., and guardians to invest, in what, 1367, 514
Of insolvent debtor, must be sold when and how, 1602
Inventory of decedent's estate, to contain particular statement of, 296
not to be sold, when, 470
may be distributed in kind, when, 751

BOOK ACCOUNTS —
How inventoried, 295

BOOKS —
Delivery of to trustees of insolvent, how enforced, 1572
Widow and children entitled to, what, 320

BOYS' INDUSTRIAL SCHOOL —
Committal and discharge of youths to, 2128

BROTHER —
See DESCENT —
Inheritance of real and personal property by, 915, 917, 920, 921

BURIAL OF DECEDENT —
See FUNERAL EXPENSES.
Expenses a preferred claim, 647

BUSINESS —
See CARRYING ON BUSINESS.
When assignee may carry on, of assignor, 1587

(References are to sections.)

C.

CANAL —
Appropriation of private property for, 1749
CANCELLING —
Revocation of will by, 1049
See REVOCATION OF WILL.
CARRYING ON BUSINESS —
Carrying out contracts of deceased:
Growing timber, 519
Parties to proceed with same, 519
Indefinite contract not enforced, 519
By guardian, 1379
By admr., 518
By extr., 435
CARE AND DILIGENCE, 506 *et seq.*—
See ASSETS.
CAPACITY —
See WILLS, 1018
See TESTAMENTARY CAPACITY.
Appropriation of private property for, 1749
not confined to land within the corporation, 1749
what land can not be taken for, 1749
CERTIFICATE —
Of appointment of appraisers of decedent's real property, 861
to be returned with appraisement, 861
of decedent's personal property, 286
to be returned with inventory, 286
Of Probate Court to executor, when proceedings for partition commenced and deficiency of assets found, 1880
Of Probate Court's approval binding out ward, 1370
See GUARDIAN.
Of deposit of will in Probate Court, 1067
CERTIFIED COPY—
Authenticated, 17a
Of appointment of foreign trustee, 1269
Of foreign will, effect, 1119
Of will and order of probate, effect, 1110, 1111
Of order of Probate Court setting aside will to be filed in Common Pleas on appeal, 1117
of foreign court setting aside will to be filed, in what Probate Court, 1133
CHALLENGES —See JURY.
In condemnation cases, 1704
In road appeals, 1808
In county ditch cases, 1864
CHARGE UPON LAND —
By will, not deemed a revocation, 1058
devisee take subject, 1058
See DEVISEE.
Dower especially assigned, to be, 870
CHARITABLE USE —
Gifts to receive liberal construction, 1030
What are, 1030
Bequest to, when valid, 1028, 1030
When applies, 1028
Object of statute, 1030
CHATTEL MORTGAGE —
Assets when, 365
Cannot be foreclosed, 388
In assignments, 1601, 1592
Unfiled void as to creditors, 388, 365
CHILD—See HEIR, INFANT, GUARDIAN, WILL,
Absent to have portion of estate when will made, 1064

(References are to sections.)

CHILD — *Continued.*
Adoption of, 1888, 1898
See ADOPTION OF CHILD.
Advancements made to, 928, 934, 1065
See ADVANCEMENTS.
Apprenticeship of, 1370
See GUARDIAN.
Action in *habeas corpus.*
See HABEAS CORPUS.
Bastard, right of inheritance, 936
legitimated, when, 937
Can not act as executor until of age, 93
Can not be separated from mother, when, 9
Damages for death by wrongful act, 534, 536
See WRONGFUL DEATH.
Descent and distribution to, 915
Distributive share, 938
may be attacked, 759
See DISTRIBUTION.
Effect of birth of, after execution of will, 1062, 1064, 1210
Entitled to be present at making of appraisement, 292
to one year's allowance for support, 324
to what personal property of decedent, 320, 322
to full share of testator's estate, when absent born after execution of will, or erroneously supposed to be dead, 1064
contribution in such case, 1064, 1210
Improvement of real estate, 1530, 1533
Lease of real estate, 1525, 1527
Posthumous, inherits, 941
Right to contest will, 1112
to contest supplied record of will, continues, till, etc., 1157
Rights of, under foreign will, not included until, etc., 1133
Sale of real estate, 1522
Vagrant, or incorrigible, sent to asylum, etc., 1906
proceedings, 1907
entry, 1908
order child committed, 1909
When incompetent to testify, 11493 G. C.
CHILDREN'S HOME —
Vagrant or incorrigible child may be sent to, 1906
CHOSES IN ACTION —
Are assets, 385
Damages for right of way, 385
Debts of executor, 389, 390
Debts of heir, 392
Judgments are, 385
Mortgaged premises, 386
Tort does not survive, 385
Vendors lien, 388
CITATION —
Assignee of, to give bail in case of unsettled assignments, 1576
Executor, etc., of to return inventory, 303
additional inventory, 311
to return sale bill, 491
to render an account, 741
to compel settlement of insane or deceased guardian, 1499
for failure to return sale bill, 491
to render account of insolvent estate, 992

(References are to sections.)

CITATION — *Continued.*
to compel distribution, 761
service and return, 761, 774
Forms, 101, 1984, 768, 401, 304, 1073
Officer of municipal corporation guilty of misfeasance, etc., 2006
Person of, to attend settlement of trustees, etc., 1294
Person of, suspected of concealing, etc., assets of estate, 395
Person of, to produce papers or give evidence relative to lost record. 12345 G. C.
Special administrator of, to deliver over property to executor, etc., 142
Trustee of, non-resident minor, etc., 1294
Widow or widower of, to make election under will, 1215
Will, to enforce production of for probate, 1072, 1077
See CUSTODY OF WILL.

CITY —
Appropriation of private property for, 1750 *et seq.*
See APPROPRIATION OF PROPERTY.
Devise or bequest to, when valid, 1028
Guardian may invest in bonds of, 1367

CITY SOLICITOR —
To be furnished with copy of complaint against municipal officer, 2006
to appear on behalf of complainant, 2006

CIVIL DEATH —
Administration cannot be granted on, 109

CLAIMS NOT DUE —
See PRESENTATION OF CLAIMS.
Allowance not conclusive, 580
Action by heir, 581
Appeal and error, 583
Contingent claims, 572, 569
when should be presented, 569
Form of application, 573
How presented, 573
Notice, 574
Order of Court, 575
Ordering claim paid, 576
Ordering assets retained, 577
Ordering giving bond, 578
form of, 579
When to be paid by administrator, 570
When allowed by Court, 571
What included, 572

CLAIMS UNPAID AT SETTLEMENT —
Creditor need not present claim, etc., 584
Estate in hands of heirs liable, 585
how suit brought, 586
Estate of heir liable after his death, 589
Heir to contribute, etc., 587
Heirs contribution, 593
Insolvency of heir, 591
Suit against all heirs, 590

Claims in favor of estate:
See ASSIGNMENT.
See PAYMENT OF DEBTS OF DECEDENT.
Death by wrongful act, for, 534, 536
Desperate, when may be sold, compounded or filed in court, 456, 463
notice of application to Court for sale, 459

(References are to sections.)

CLAIMS UNPAID AT SETTLEMENT — *Continued.*
notice of sale, how given, and how sale made, 463
Discharge of in will against executor, effect, 391
Mortgage, when secured by, 387, 388
See SECURED CLAIM.
Naming person executor, not to extinguish, 389
Neglect to collect or pay, unfaithful administration, 255
Sale of, 470
what must not be sold, 470
Time for collecting, 440
may be extended, 445, 446
when can not be extended, 448, 448*a*
See ASSETS.
CLAIMS AGAINST ESTATE—
See PRESENTATION OF CLAIMS.
Allowance of, indorsement of, 558
refusal to indorse a rejection, 449
does not preclude disputing validity of, when, 277
of claims not due in two years, 571
Barred, when, 622
See STATUTE OF LIMITATIONS.
Bond to pay, to prevent sale of land, 826
claim not due in two years, 571
Contested in suit on administration bond, 277
Contingent, of insolvent estate, provisions for, 982
when such debt becomes absolute, 983
Contribution, when devised or bequeathed property taken to pay, 1207
except when will otherwise provides, 1208
Costs of suits, against whom taxed, 629
disallowed at instance of creditor or heir, 561
disallowed claims against insolvent estate, 972
Deficiency of assets, when may proceed to pay, without being liable for, 667
Discharged from payment of, on proof of disbursement of assets, when, 669
Disputed, when action to be brought on, 609
Doubtful, may be referred to arbitrators, 594
See ARBITRATION.
proceedings when claim does not exceed one hundred dollars, 597
when it exceeds one hundred dollars, 599
report of referee, 602
proceedings of Court on report, 602
Executor, etc., claims of, not entitled to preference, 647
See CLAIMS OF EXECUTOR.
not to retain assets in payment of, when, 631
such claims to be presented to Probate Court for allowance, 633
notice of such claims, 633
exceptions and appeal, 641
Insolvent estates, action against executor or administrator, 985
appeal from decision of commissioners, 1004
See INSOLVENT ESTATES.
omission, how remedied, 1008
allowance not to disturb prior distribution, 1010
appointment of commissioners to audit, 993
barred, if not presented as prescribed, 987
commissioners may examine claimants, etc., under oath, 1000
contingent debts, provisions for, 982
when they become absolute, 983
costs of suit on disallowed claim, 972
disallowed claim may be referred, 969

(References are to sections.)

CLAIMS AGAINST ESTATE—*Continued.*
if not referred, creditors to commence suit or barred, 971
Court or referee to award costs, 972
how judgment rendered, 973
Of executor, etc., against estate not entitled to preference, 631
not to retain assets in payment of, when, 631
such claims to be presented to Probate Court for allowance, 632
notice of such claim, 633
exceptions and appeal, 641
Order of payment, 647
when to be paid ratably, 647
restriction on order of payment, 647
liens not affected, 666
Preferred, what are, 647
See PAYMENT OF DEBTS.
not affected by solvency or insolvency, 671
if assets exhausted in payment of, executor, etc., may plead that he has fully administered, 671
Presentation when residue insufficient to satisfy, 670
Proof of, how required, 557
before whom oath may be taken, 557
expenses of, by whom paid, 557
Provisions as to, not due within two years, 571
Referees, compensation of, how paid, 602
Rejected, when action to be brought on, 609-971
executor or administrator to act when commissioners not appointed, 963
limitation of action on disallowed claim, 971
when creditor may sue after three years on claim not presented, 991
list of claims to be filed, 967
notice to creditors by executor, etc., 965
form of notice, 966
presentment, time allowed for, to commissioners, 998
to executors, etc., 967
Interest, debts not due paid on rebate of, 570
Joint contract, estate liable on as if joint and several, 624
Liens not affected by § 6090 providing for manner of application of assets, 666
Limitation of action by creditors, 613
proviso as to claims accruing after two years, 613
assets received after two years, 615
claims not due in two years, when disputed, 580
claims disputed or rejected by executor, etc., 609
of insolvent estate, 971
when rejected at instance of heir or creditor, 561
what deemed a rejection, 609
at instance of heir or creditor, 561
Requisition on executor, etc., to reject, who may file, 561
Revivor of barred claim, 622
See STATUTE OF LIMITATIONS.
appointment of administrator *de bonis non* does not revive, 622
Right of action, when accrues after two years, 571
See LIMITATION OF ACTIONS.
Court with consent of creditor may order discharge of such claim, when, 571
Undevised real estate first to be applied, to pay, 1206
When whole estate to be administered does not exceed twenty dollars, 152

(References are to sections.)

CLAIMS UNPAID AT SETTLEMENT — *Continued.*
When not due, how paid, 570
See ASSIGNMENTS.

CLAIMS OF EXECUTOR OR ADMINISTRATOR —
Application to Probate Court, 636
form of, 636
entry and notice, 637
notice of to non-residents, 638
Allowance of claim, 640
entry, 640
Appeal, 641–643
form of bond, 644
Cannot retain assets in payment of, 631
Claim barred by statute, 632
Character of proof required, 639
Court has jurisdiction to determine, 633
own affidavit not sufficient, 639
Creditor may ask Court to disallow, 645
Error, 642
For services rendered to estate by others, 645
For advances made to legatees, subrogated to their rights, 632
Kinds of debts due, 637
Need not where under $50, 634
Pays debts in excess of assets at his peril, 632
Probate Court to pass on, 633
Proceeding is an action, 633
Where claim over $50, 635

CLERGYMEN —
May solemnize marriages, how, 1997

CLERK —
Duties of on sale of decedent's personal property, 487–489
of deputy clerk of Probate Court, 11
See DEPUTY CLERK.
can not practice law, 7
Probate Judge may appoint, 11
Probate Judge may perform duties of, 11
of Common Pleas, when Probate Judge is interested, 9
of Common Pleas, on appeal, 51

CLOCK —
When widow and children entitled to, 320

CLOTH —
What widow and children entitled to, 320

CODICIL —
Construction of with will, 1176
Definition, 1174, 1052
Depends on will, 1174
Execution, 1175
Form of, 1179
Origin of, 1174
Probate of, 1082–1178
Revocation, 1175
Republication of will, by, 1177
Stealing, destroying or secreting, how punished, 12451 G. C.
Term "will" includes, 1033
Will revoked by, 1052, 1049
Will construed to include, 1033

COLLATERAL ATTACK —
Only such as is not on record, 4
Appointment of trustee cannot be raised, 4

COLLECTION OF ASSETS —
See ASSETS.

(References are to sections.)

COLLATERAL ATTACK—
Probate of will not subject to, 1114
Judgment of Probate Court can not be, 1319, 3, 22, 42, 90, 1316, 1339, 1508, 1999, § 208.
COLLECTION OF CLAIMS—440 *et seq.*
See Assets.
COMITY —
See Foreign Administration.
COMMISSION —
Court may apportion commission between joint executors, 207
When entitled to, 655
See Compensation of Administrator.
Assignee's or trustee's, 1642
Executor's or administrator's, 654
To take deposition of witness to will, 1146 — 1101
To take widow's election as to will, 1231
COMMON PLEAS COURT —
Action where Probate Judge interested, 10
See Appeal.
Appeal to, 39
from refusal to admit will to probate, 1116, 1117
Award of arbitrators, effect of judgment in Common Pleas on, 602
Claim of executor, etc., against estate, 641
Injunctions granted in Probate Court, 25
Jurisdiction in action asking direction of Court respecting trust, etc., 33
when favored, 34
account, to compel filing of in action on assignee's or trustee's bond, 1573
to compel foreign executor, etc., to account, 190
to review settlement of guardian's account, 1493
appropriation of property by municipal corporation, 1750
by private corporation, when, 1682, 1733
bond, action on administration, 261
on assignee's or trustee's, 1573
distribution, to enforce order of, 781
in assignments, 1545
foreign executor, etc., to compel to account, 190
fraudulent conveyance to set aside, 823–1580
injury by wrongful death, action for, 534
liens in action for sale of real estate by executor, etc., to adjust, 814
by assignee, 1618
proceedings by creditors against heirs, etc., after settlement, 585–587
to condemn unfinished road bed of railroad, 1733
sale of land by executor, 813
and recover lands fraudulently conveyed, 822
by guardian, 28
by assignee of insolvent debtor to adjust liens, 1618
when Probate Judge interested, 9, 1682
May determine payment of legacies, 34
May ascertain title, 34
May order payment of year's allowance, 34
May construe trust, 33
Powers of depend on statute, 19
Powers and duties as to foreign executors, etc, 10764 G. C.
as to award of arbitrators, 599, 602
Party invoking must show interest, 34
Rules of, to be observed by Probate Court so far as applicable, 32
Receivers appointed in Probate Court, 36

(References are to sections.)

COMMON PLEAS COURT — *Continued.*
Transcript of judgment of Probate Court delivered to clerk of. and execution issued on, when, 413
When will give relief, 34
COMMON PLEAS JUDGE —
When may act for probate judge, 10a
COMPENSATION OF ADMINISTRATORS —
Administrator's and executor's, 654
effect of, provided by will, 654
of special administrator, 137
of administrator, etc., of deceased guardian, 1499
Advancements, 655
Cannot be reached by attachment against administrator, 655
Distribution in kind, 655
Double, 657
Extra, 659
when allowed, 659
not for ordinary services, 659
employment of help, 660
clerical services, 660
caring for estate, 660
auctioneer, etc., 660
attorney, 660
See ATTORNEY.
statement in account, 725
Failing to render account, to receive none unless, etc., 83, 124
Fixed by will, 657
Fixed by agreement, 657
How calculated, 656
Joint administrators, 207, 658
division of, 207, 658
entitled to equal when, 658
action by one against other, 658
Property set apart to widow, 655
Real estate covered by mortgage, 655
Stated in account, 725
Uncollectible debt, 655
Unfaithful administrations, etc., 655
When entitled to, 654, 655
COMPENSATION OF GUARDIANS —
See GUARDIANS.
COMPENSATION OF ASSIGNEE —
See ASSIGNMENTS.
COMPENSATION—
Appropriation of property for ditch, county, 1852
municipal corporation, 1763
private corporation, 1676, 1671
roads, 1822
Trustee's, 1299, 1642
Assignee's or trustee's, 1642, 1587
Commissioner of insolvent estate, 1012
COMPLAINT—
See FORMS.
Against municipal officer guilty of misfeasance, etc., 2006
county auditor, 2006
When assets of estate are concealed, embezzled, etc., 395
COMPLETION OF CONTRACTS —
By administrator, 523
By assignee, 1591
See CONTRACTS.

(References are to sections.)

COMPOUNDING DEBTS, ETC.—
See ASSETS.
By executor, etc., 450, 456
Guardian may, 1382
COMPROMISE —
See ARBITRATION.
Of desperate claims by executor, etc., 456, 463
See DESPERATE CLAIMS.
by assignee of insolvent debtor, 1602, 1611
Of insane widow's dower by guardian, 1523
CONCEALING, EMBEZZLING ASSETS, ETC.—
Proceedings against persons suspected of, 395, 414
See ASSETS.
conveyance to evade proceedings void, 415
examination to be in writing, 405, 406
imprisonment for disobeying citation, 402
judgment of Court, 408
lien of judgment, 408
prosecuting attorney to attend to judgment in favor of State, 414
transcript to be filed in Common Pleas and execution issued, 413
CONCURRENT JURISDICTION — 28
When Courts have, 28
See JURISDICTION.
CONDEMNATION OF PROPERTY —
See APPROPRIATION OF PROPERTY, 1674, 1675
Condemnation of road material, 1833
CONDITIONS—
See CONSTRUCTION OF WILLS.
CONFIRMATION —
Of sale of real estate by executor, etc., 890
See SALE OF REAL ESTATE.
by assignee of insolvent debtor, 1613
by guardian, 1429
Of viewer's or reviewer's report in road appeals, 1797
CONSENT —
See GUARDIANS.
Of parent or guardian to marriage of minor, 1997
See PARENT.
Of creditors of insolvent debtor that business be carried on by assignee, 1587
Of guardian, etc., to sale of land, 838
See SALE OF REAL ESTATE.
Of parents to adoption of child, 1888
CONSERVATOR —
Powers of foreign, of idiot, imbecile, etc., 1483
CONSOLIDATION —
Of appeals in county ditch cases, 1850
Road appeals, 1825
CONSTABLE—
Amercement of, guilty of misconduct, 2125
To attend court, serve process, etc., 2125
CONSTITUTIONAL PROVISIONS—
As to establishment of Probate Court, 3
jurisdiction of Probate Court, 18
appropriation of property, 1664
CONSTRUCTION—
Of "living" and "died" under statutes of distribution and descent, 940
Of term "will" in statute, 1033
Inheritance tax law, 2015

(References are to sections.)

CONSTRUCTION OF WILLS—
Where Probate Court may give, 20n
Agreement as to, 1180
All parts to be construed in relation to each other, 1180, 1181
Action to obtain, 33
After acquired property, 1191
Assets, how marshaled by claimants under will, 1209
Claim appointing debtor executor does not discharge, 389
Contribution when devised property taken to pay debts, 1206–1213
Contest of foreign not allowed in this State, 1133
Construed as an entirety, 1171
Children construed, 1193
Contribution when devised or bequeathed property taken to pay debts, 1207
Court of Equity will not reform, 1180
Devise for life, remainder to heirs in fee, 1188
Devise in, how affected by debts by testator, 1026
Domicile controls when, 1118, 1016
Definition, 1180
Declarations of testator, 1187
not admissible to affect construction, 1187
admissible in fraud, undue influence, 1187
admissible to show state of testator's mind, 1187
made to scrivener not, 1187
Devise not to lapse by death of devisee, 1194, 1195
Descendants' construed, 1201
Disinheriting heirs, 1202
how, 1202
not by implication, 1202
not by doubtful words of exclusion, 1202
not of undevised real estate, 1202
Extrinsic evidence, 1185
admissible when, 1185
not admissible where no ambiguity, 1185
patent ambiguity, 1185
latent ambiguity, 1185
Wigram's Rules, 1185
Entire will construed as a whole, 1181, 1182
Estate directed to be sold, death of executor, 1053
Estate vests, though in control of trustee, 1190
Executors, when one or two or more qualifies or survives, how
Express provisions to prevail, 1180
powers, 107.
Fee passes without word "heirs," 1189
Foreign, effect of setting aside, 1133
Heir, how construed, 1196
as used in will, flexible term, 1196
Intestacy never presumed, 1181, 1182
Irreconcilable clauses, 1180
Issue construed, 1197
offspring synonymous, 1197
Intention to prevail, 1182
Intention, rules as to, 1182
must be expressed in will, 1182
general, control, 1182
express, control, 1182
words ordinary meaning, 1182
clearly expressed controls doubtful, 1182
punctuation not authority, 1182
will upheld as far as practicable, 1182
some meaning to be given, 1182
extraneous facts may aid but not control, 1182
child not to be disinherited by doubtful construction, 1182
Location controls dispositon of real estate, 1118

(References are to sections.)

CONSTRUCTION OF WILLS — *Continued.*
Life estate with power of disposal, 1193
constructon of power, 1193
Lapsed bequest, 1195
when does not, 1195
Next of kin construed, 1199
Operation and, 1133
Purchaser without knowledge of foreign will, protected, 1133
Property acquired subsequent to making will passes, 1191
Presumption and person making will intends all his property to pass, 1191, 1192
Provision against contesting, 1203
valid in Ohio, 1203
Parol evidence, 1186
admissible when, 1186
not admissible to alter, detract from or add, 1186
See INSTANCES IN TEXT.
Perpetuities, 1031
Relation construed, 1200
Repugnancy, rules as to,, 1183
must arise on face of will, 1183
charge on land not to sale of land, 1183
not except from necessity, 1183
general and specific word, 1183
last portion controls, 1183
Restraint of alienation, 1204
fee cannot be, 1204
against execution, 1204
against partition, 1204
Restraint of marriage, 1205
absolute, 1205
remarriage, 1205
to certain person, 1205
for divorce, 1205
Rules of, 1181
to ascertain intention, 1180
domicile controls personalty, 1181
location, realty, 1181
technical words not necessary, 1181
speaks from what date, 1181
heir how dininherited, 1181
not by negative words, 1181
extrinsic evidence not admissible to vary, 1181
Court looks at all circumstances, 1181
absurdity of devise, 1181
not strained to bring within, 1181
favor nor disfavor, 1181
ordinary sense of words, 1181
presumption as to technical words, 1181
subsequent events, 1181
independent devises, 1181
presumption as to taking effect, 1181
Record, must be offered for, when, 1133
Rights of persons under disability as to, 1133
Sale of lands under authority of will, who may make, 107
See SALE OF REAL ESTATE UNDER POWER.
Statutory meaning of certain words, 1033
Supplication of words, 1184
by intendment, 1184
by reference, 1184
by codicil, 1184
transposition, 1184
Shelley's Case, rules in, 1189
does not apply to wills, 1189
point never strained to bring within, 1189

(References are to sections.)

CONSTRUCTION OF WILLS — *Continued.*
law favors a fee to an estate tail, 1189
intent governs, 1189
Term "will," 1033
Undevised real estate to be applied to payment of debts instead of devised personal property, 1206
Vesting of estates, 1190
law favors, 1190
equitable vest how, 1190
devise for life, 1190
devise for years, 1190
controlled by intent, 1190
With codicil, 1176
When under will, 1190
When clear and obvious, nothing to construe, 1180
Where open to, 1180
Whole estate to pass, 1192
examples, 1192
Words construed,
Words of survivorship, relation to, when, 1190.
Words given ordinary meaning, 1182
See DEFINITION.
CONTEMPT OF COURT —
Appeal, 1994
Commitment, form of, 1990
Court may enforce sale, 889
Definition, 1976
Discharge of party, 1992
form of, 1992
Error, 1994
Entry appointing attorney to bring action, 1982
Entry ordering summons, 1984
Entry ordering attachment, 1984
Form of summons, 1985
Form of attachment, 1985
Final judgment, 1993
Form of charge, 1983
Imprisoned till order obeyed, 1989
Inherent, 1976
In presence of judge, 1978
entry, 1978
Jurisdiction of Probate Court, 1976
Kinds of, 1977
Mittimus, what should contain, 1990
Not in presence of judge, 1979
Power to enforce order in proceeding in aid of execution, 1935
Punishment if found guilty, 1988
form of entry, 1988
Power of judge to punish, 17
Property vests when, 1190
Punishment for, 1980
Right of accused to bail, 1986
bond to satisfaction of clerk, 1986
Trial, 1987
cannot demand jury, 1987
cannot be tried on affidavits, 1987
What are, 1980, 1979
Written charges should be filed, 1981
When party fails to appear, 1991

CONTEST OF WILL—§§ 12079-12087 G. C.
Acts of testator when to be shown, 1187
Common Pleas can not appoint receiver, 1113
who may, 1113

(References are to sections.)

CONTEST OF WILL — *Continued.*
Duty of judge on notice of, 1113
Of foreign, cannot be made in this State, 1133
Uncontested, probate after two years binding, 1112
saving of rights of infants, insane persons, etc., 1112
Of supplied record of will, 1157
limitation and saving of right, 1157
Powers of executors, etc., during, 95

CONTINGENT CLAIMS —
Distribution will not be striven for, 569

CONTINGENT DEBTS —
Against insolvent estate of decedent, provisions for, 982, 983

CONTINGENT DOWER —
See DOWER.
Contingent Legacy, 695

CONTINGENT REMAINDER—
Definition, 1033
Continuing business, 1589

CONTRACTS —
Between guardian and ward, 1399, 1497
Completion by guardian, 1398
Carrying out deceased, 519
Dower waived by, 946
Distinction between and will, 1014
For sale of real estate, 523
nature proceedings, 524
parties, 525
petition, 526
notice, 527
order of deed, 528
hearing, 529
entry, 530
form of deed, 532
heir may enforce, 532
Liability of estate of deceased on joint, 624
Not binding, 520
Of insolvent debtor, 1611
Power of ward to make after finding of guardianship, 1511
after notice of, 1519, 1538
Will to make, 1032

CONTRIBUTION —
Among heirs, devisees, etc., to raise portion of child dead, born after execution of will, etc., 1064, 1210
to raise portion of devisee witness to will, when, 1044
when devised or bequeathed property taken to pay debts, 1207
except when will otherwise provides, 1208
portion of child, born after execution of will or supposed to be dead, subject to, 1210
if any liable to are insolvent, how others to make up deficiency, 1211
such cases may be determined in a single action, 1212
or adjusted, etc., upon order of sale to pay debts, 1213
Among heirs, devisees, etc., to pay claims after settlement of estate, 587
effect of provisions of will, for, 587
limitation of action by creditors, 587
estate of any heir, etc., liable after his death, 589
when two or more liable, creditor may proceed against all in one action, 590
effect of insolvency, etc., of heir or devisee, 591
liable to indemnify others, 593
how indemnity recovered, 593

CONVEYANCE —
See DEED, FRAUDULENT CONVEYANCE, GIFT, SALE.
To hinder, delay or defraud creditors, void, 1530

(References are to sections.)

CONVEYANCE—
See DEED, FRAUDULENT CONVEYANCE, GIFT, SALE.
To hinder, delay or defraud creditors, void, 1530
To avoid proceedings against persons suspected of concealing, etc., assets of estate void, 415
Of real estate of decedent, sold to pay debts, 890
On judgment for specific performance of real contract, 528
Will, how affected by conveyance of testator, 1057, 1059

COOKING UTENSILS—
Widow and children entitled to, 320

COPYRIGHTS—
Pass to administrator, 875

COPY—
See CERTIFIED COPY.
Assignment of to be filed in Court, 1546
Authenticated, 17a
Will, appeal from Probate Court, copy of the order rejecting will sent to Common Pleas, on, 1117
authenticated copy of, and of order of probate in another county, effect of, 1111
certified copy of record of, effect of, 1110
destroyed, authenticated copy of, may be admitted to probate or record, 1154, 1157
See SPOLIATED WILLS.
foreign copy of, may record here, 1119
sale of lands, copy of will to be exhibited to Court on, 832

CORPORATION—
Appropriation of property by municipal, 1750 *et seq.*
private, 1674, 1675
Assignment by, 1547
can not give preferences, 1579
How stock of sold by executor, etc., 502

CORPSE—
Cannot be disposed of by will, 649

COSTS—
Administration of estates:
Accounts, notice of filing, 729
in action for not filing, 276
Action for wrongfully causing death, deducted from damages, 536
Appeal from decision of commissioners of insolvency, etc., 1004
Bond, to pay costs of contesting claim, 561
to pay debts and prevent sale, 826
of executor, in action on, 261
amount of recovery in action on administration bond for not filing account, 276
when defendant to recover costs, 276
Claim rejected at instance of heir or creditor, 561
Distribution in action to enforce order of, 774, 777
Insolvent estate, on appeal from commissioner's rejection of claim, 1004
compensation of commissioners paid as part of, 1012
on reference of disallowed claim, 972
Inventory, hearing exceptions to, 312
Liability of executors, etc., for, 629
Preferred claim, 647
Reference of claim, 602
of insolvent estate, 972
Rejected claim, how paid on judgment against executor, 561
Sale of real estate, application of money to pay, 903
must be set out in petition for, 830
bond to pay, and prevent sale, 826
when order of sale objected to, 854

(References are to sections.)

COSTS..*Continued.*
Security for, when executor, etc., not required to give, 441
Surety of executor, etc., applying for release, 243

Appropriation of property:
See DITCH APPEALS, ROAD APPEALS, ETC., *infra.*
By municipal corporations, 1770, 1777
By private corporations, 1713, 1723, 1682, 1732
new trial, who to pay costs of, 1718
unfinished road bed, costs in proceedings to appropriate, 1732
view of property, expense of taking taxed in bill of, 1708
when costs may be apportioned, 1746
when action may be brought against corporation for, 1726*a*

Assignment for creditors:
Accounts, of notice of filing, 729
Fraudulent conveyance, in action to set aside, 1580
Rejected claim, suit on, 1628
When claim disallowed on application of assignor or creditor, 1635

Guardian and ward:
Guardianship, letters or, cost of issuing, how taxed, 1338
Tax title of ward, guardian tendering release of, provision as to costs, 1395

COUNCIL —
Concurrence of two-thirds necessary for condemnation of property, 1749
Proceedings on complaint against members guilty of misfeasance, etc., 2006

COUNSEL —
See ATTORNEY.

COUNTERCLAIM —
To be set forth in affidavit to claim against insolvent estate, 1632

COUNTY —
Authenticated copy of will filed in other, effect, 1119
Devise or bequest to, when valid, 1028
Guardian may invest in bonds of, 1367
Where actions against executor, etc., guardian and trustee may be brought, 607

COUNTY AUDITOR —
See AUDITOR.

COUNTY COMMISSIONERS —
See COMMISSIONERS.

COUNTY DITCH APPEALS —
See APPEAL, 1833.

COUNTY INFIRMARY —
See INFIRMARY.

COUNTY ROAD APPEALS —
See APPEAL, 1787

COURT —
See COMMON PLEAS, PROBATE COURT, SUPERIOR COURT, INSOLVENCY COURT.

COURT HOUSE —
Plans, etc., of, approved by Probate Judge, 2348 G. C.

COW —
Widow and children entitled to, or what else, 320.

CREDIT —
Given by executor, etc., in sales of personal property, 482, 483

CREDITS —
See ACCOUNTS.
To be returned in inventory and administered, 83, 124

(References are to sections.)

CREDITORS —
See PRESENTATION OF CLAIMS.
Administration of estates:
Ancillary administration, 170
Bond, Court may authorize suit on bond of executor, 269
when creditor may sue on, 262, 264
Desperate claims may be filed for benefit of, 456
Direction of Court may be asked respecting estate, 33
Distribution may compel, when, 761
Disallowed claims, when suit on to be brought against administrator, 971
Insolvent estate of decedent, creditors of barred from recovering if claim not presented, 987
when estate is declared probably insolvent, creditors have six months to present claims, 967
Heir subrogated to share of, 759
Inventory, may be present at taking, 292
may compel filing of, 303
Letters of administration, 122
Lien on personal property when not affected, 666
Legacy to, 688
Limitation of action by, 613
as to claims accruing after two years, 613
assets received after two years, 615
when administrator *de bonis non* appointed, 618
extension of limitation, 619
claims not due in two years, 580
on rejected claim, 609, 561
See LIMITATION OF ACTIONS.
May ask Court to allow claim for services rendered administrator, 645
Proceedings on complaint against person suspected of concealing assets, 395, 414
Proceedings against heirs, etc., after settlement, 585
Refund, not compellable to when debt presented to executor, etc., after one year, 670
Requisition on executor, etc., to reject claim, 561
Suit on bond by, 264
When to be paid *pro rata*, 647
When entitled to administration, 114, 170
When may be paid before debt due, 570, 571
When executor, etc., liable to suit of creditor, 611
When may sue on administration bond, 262
Assignment for creditors:
Assignment preferring, inure to the benefit of all, 1579
to hinder, delay and defraud, void, 1580
Limitation of time for filing claims, 1628
of action on rejected claim, 1628
May carry on assignor's business when, 1587
Removal of assignee on application of, 1559
CROPS—
See EMBLEMENTS.
Assets in hands of executor, etc., 369
See ASSETS.
Purchaser may enter premises to gather, 370
Sale of, what may be deferred, 470
CROSS-PETITION —
Of creditor in action to set aside fraudulent conveyance, 1580
CURTESY —
See DOWER.

(References are to sections.)

CUSTODY —
See WILLS.
Of files, etc., of Probate Court, 11
Or minor, by guardian of person and estate, 1366

D.

DAMAGES —
See APPROPRIATION, ETC.
For appropriation of property, 1671
ditch, county, 1852
municipal corporation, 1763
private corporation, 1715*a*
roads, county, state and township, 1812, 1822
For death by wrongful act, 534
refusal to produce will, 1079
unfaithful administration, 255
DEAD BODY—
Disposition of property found on, 2859 to 2864 G. C.
DEAF PERSON —
May make a will, 1023, 1018
DEATH —
See WILLS, PROBATE OF WILLS, LETTERS OF ADMINISTRATION.
See GIFTS *causa mortis*.
Administration not granted unless party dead, 109
Action for injury by wrongful, 534, 535
See WRONGFUL DEATH.
for whose benefit and by whom to be brought, 536
limit and distribution of damages, 536
limitation of action, 536, 535
power of executor, etc., to settle amount to be paid, 536
when death caused by wrongful act in another State or county, 535
Assignee's, Court must appoint trustee, 1561
See ASSIGNMENT.
legal representative must settle account, 1573
Executor's or administrator's when and by whom final account may be rendered, 707
of sole executor, administration with will annexed, to be granted, 94
of estate directed or devised to be sold, 107
when there are two or more executors, 107
Guardian's, executor, etc., to settle account, 1499
Presumption of, 109
Surety's of non-resident on bond, of executor, etc., releases, 243
Trustee's, of non-resident executor, etc., to render final account, 1295
Ward's to terminate lease, unless, etc., 1445
of one of several wards, effect, 1445
lien of tenant for improvements, 1445
of imbecile ward to terminate lease, unless, etc., 1525
lien of tenant for improvements, 1525
DEBTS—
See LIFE ESTATE.
See PAYMENT OF DEBTS.
See CLAIMS, PRESENTATION OF.
Debt barred can not be set off against interest of heir, 798a
Heirs chargeable with, 393
Turning over notes in payment, 648n
DEBTOR—
Legacy to, 689
DECEDENT'S ESTATE—
See LETTERS TESTAMENTARY.
See LETTERS OF ADMINISTRATION.

(References are to sections.)

DECISION — See JUDGMENT.
DECLARATIONS —
Testator not admissible to affect construction of will, 1187
Admissible to show state of mind, 1187
In gifts *causa mortis*, 1248
DECLINATION —
By widow or next of kin, of administration, 114
See LETTERS OF ADMINISTRATION.
By trustee of insolvent estate, 1572
DECREE — See JUDGMENT.
DEED —
See FORMS.
Assignment for creditors, 1550
See ASSIGNMENTS.
Assignee's of insolvent debtor, 1602
Executor's or administrator's, under power of will, 107
See POWER.
under order of Court to sell land, 890
See SALE OF REAL ESTATE.
when survivor puchases partnership property, 437
See PARTNERSHIP ASSETS.
on completion of decedent's real contract, 528
See CONTRACTS.
guardian's, on sale of ward's land, 1429
See GUARDIANS.
releasing insane widow's dower, 1523
releasing ward's tax title, 1395
Testator's, affects will how, 1058, 1060
Trustee's, for non-resident minor, etc., 593
DEED OF GIFT —
See DESCENT.
Order of descent of real estate, where title came by, 915, 918
What constitutes, 910
See GIFTS *causa mortis*.
See WILLS.
DEFENSE —
Of infant by guardian *ad litem* — 1384
Of insane person by guardian, 1384
In action on administration bond for not filing account, 276
DEFINITIONS —
Administrator with the will annexed, 99
Administrator, 108
Administrator *de bonis non*, 151
Ancillary administration, 165
Administrator *de bonis non* with the will annexed, 161
Assets, 363
Advancements, 929
Attestation, 1040
Annuity, 374
Absolute legacy, 680
Adeemed legacy, 685
Ancestor, 908
Ancestral property, 908
Assignment, 1542
Adoption, 1887
Bequest, 1013
Clearly and manifestly in will, 1191
Continuing business, 1589

(References are to sections.)

DEFINITIONS — *Continued.*
Contempt, 1976
Codicil, 1174, 1052
Construction of wills, 1180
Contingent claim, 569
Contingent legacy, 679
Conditional legacy, 680
Cumulative legacy, 681
Disputed claim, 560
Demonstrative legacy, 677
Distribution, 755
Descent, 907
Dower, 943
Devisor, 1013
Devisee, 1013
Descendants, 1201
Domicile, 74
Executor, 68
Emblements, 368
Eminent domain, 1662
Foreign will, 1118
Foreign administrator, 186
Fraudulent conduct, 223
Fixture, 365
Freehold, 373
Gifts *causa mortis*, 1240
Gifts *intervivos*, 1240
Guardians, 1305
General benefits, 1672
Gross neglect of duty, 221
Good will of business, 382
General legacy, 676
Heirs, 1196
Habitation, 74
Habitual drunkenness, 220
Habeas corpus, 1951
Imbecile, 1503
Insane delusion, 1022
Insanity, 1022, 1503
Interested person, 737, 1142
Intestate, 110, 907
Incompetency, 222
Inventory, 280
Imbecility, 1022
Issue, 1197
In rem, 543
In personam, 543
Joint will, 1170
Joint or co-administration, 201
Judicial act, 239
Lunatic, 1503
Last sickness, 1160
Legacy, 1013
Legatee, 1013
Legal heirs, 1196
Legal representative, 912
Lapsed legacy, 683
Last illness, 652
Last, as applied to wills, 1139
Ministerial act, 239
Name, 2129
Nuncupative wills, 1158

(References are to sections.)

DEFINITIONS — *Continued.*
Next of kin, 1199, 913, 121
Operative, 1649
Public charity, what is, 1029
Public use, 1667
Partition, 1879
Personal property, 364
Power, 907
Rejected claim, 560
Real chattels, 373
Relation, 1200
Revocation of wills, 1048
Residence, 74
Real estate, 1409
Special benefits, 1672
Special administration, 128
Sound mind and memory, 1021
Senile demetia, 1022
Specific legacy, 675
Spoliated will, 1134
Satisfied legacy, 686
Testament, 1013
Testator, 1013
Trusts, 1250, 1361
Taking property without right, 1669
Vested legacy, 679
Void legacy, 684
Wearing apparel, 321
Will, 1013
What is.

DEPOSIT —
See MONEY ON DEPOSIT.
In bank, funds, 513
Of amount of verdict in appropriation proceedings entitles corporation to possession, 1723
Of will with Probate Judge. See WILL, 1067, 1070

DEPOSITION —
See EVIDENCE.
See CODE OF CIVIL PROCEDURE, 11522-11549 G. C.
On trial in Probate Court, 38
Probate Judge may take, 13

DEPUTY CLERK —
Cannot act for judge, when, 12
Probate Judge may appoint, 11
liability of, for acts of, 13
may take security from, 11
may perform duties of, 11
How appointed, 12
Oath and powers of, 11
Cannot perform judicial act, 12
Can not practice law, 7
nor prepare pleadings, etc., 7
nor make out accounts or records, etc., 7
Who may be, 12

DESCENT —
See DISTRIBUTION.
Ancestor, meaning, 908
Ancestral property, 908

(References are to sections.)

DESCENT — *Continued.*
Applied on legal not equitable principles, 908
Advancements, 928
law presumes equal division, 928
what is, 929
characteristics, 929, 930
when greater than heir's share, 932
real or personal estate, 933
value of, 934
Aliens may inherit, 935
Bastards may inherit, 936
Curtesy, estate by abolished, 938
Dower, 944
Definition, 907, 909
Difference between distribution, 907
Devise and descent, use of words, 909
Deed of gift, 910
what constitutes, 910
Heir at law, how designated, 1902
Illegitimate children, may when, 937
Living and dead, construction of, 940
Law controlling, 755, 757, 907
Legal and equitable, legal controls, 911
Legal representative, 912
Next of kin, 913
how computed, 913
our Court adopts civil law, 913
rules of common law, 913
Permanent leases, 941, 942
Partnership real estate, 917
See PARTNERSHIP ASSETS.
Personal estate, distribution of, 921, 938
Posthumous child, 941
Relict of deceased husband, 914
how applied, 914
former husband, 914
Real estate converted into money by guardian, 911
Real estate, order of descent where title came by descent devise or deed of gift, 915
where title came by purchaser, 917
when to next of kin of intestate, 918
when to children of former husband or wife, 919
Real and personal estate, when to descend to children of intestate and how, 923
when all descendants of equal degree of consanguinity, 924
when there are living both children and heirs of deceased children, 925
extent of application of such provision, 926
of estate which came from former husband or wife, 920
Statute embraces whole subject, 907
Statute applies when, 907
Title by purchase, 911
meaning, 911
partition among heirs is not, 911
when is, 911
Widow or widower entitled to what amount of personalty, 938
of realty, 944

(References are to sections.)

DESIGNATING HEIR-AT-LAW —
By declaration in Court, 1902
Entry, 1905
form of, 1904
Nature of proceedings, 1903
DESPERATE CLAIMS —
See Sale of Desperate Claims.
Terms of compounding fixed in order, 463
Sale of, how conducted, 463
Disposition of, of decedent's estate, 456, 463
of insolvent debtor, 1602
What are, 456
Notice of application to Court for sale, 459
Notice of sale, 463
Uncollectible, etc., 725
DESTROYED RECORDS —
See Records, Will, 1154, 1157
DESTROYED WILL —
New record or probate of, 1154, 1157
See Spoliated Wills.
DEVISE OF LAND —
See Devisee: Will: Receipts.
Action to obtain construction, 33
See Construction of Wills.
Charge upon not revocation, 1058
Charitable, when valid, 1028
See Charitable Use.
Debts of decedent, devise subject to, 1206
Descent of land of intestate that came by, 915, 918
See Descent.
Forfeited by neglect to probate will, 1084
See Probate of Wills.
How land that came by passes, 915, 918
Lapses, when, 1194
See Legacy.
Title to in other county, how perfected, 1111
To witness, void, when, 1044
To whom may be made, 1018, 1028
What passes by, 1192
Who may make, 1018
DEVISEE —
Assets of estate of decedent embezzled, proceedings by, 395
Bond, may be party to or may bring suit on, 261
when may give to creditor of estate for payment of claim accruing after two years, 571
Charged by will with payment of debt or legacy, effect, 587
takes land subject to charge, 1058
Claims may be filed in Court for benefit of, 456
Complaint against person suspected of concealing assets, etc., 395
Contribution by to raise portion for absent or posthumous child, 1064, 1210
when not required to contribute, 1064
to raise portion of devisee, witness to will, when, 1044
when devised property taken to pay debts, 1207
unless will otherwise provides, 1208
in case of insolvency, etc., 1211
to pay claims after settlement of estate, 587, 593
Death of, before testator, effect, 1194

(References are to sections.)

DEVISEE — *Continued.*
Executor, etc., foreign rights of devisee as to, 195
Liability of after settlement of estates by executor, etc., 585, 593
Neglect to probate will in three years, effect, 1084
Notice to, of hearing of executor, etc., claim against estate, 633
Party in action to contest will, 12080 G. C.
for sale of land, 833
to complete contract for, 523
on administration bond, 261
Residuary, takes deceased child's share of real estate, when, 1194
Revivor of action against. Code C. P., 11409 G. C.
Service upon unknown, *Id.*
See Sale of Real Estate.
Specific performance by, 532
against, on decedent's agreement to convey land, 1057
Title of, to land, may be ordered sold, 850
When Probate Judge is interested as, effect, 9
Who may be, 1018, 1028
Witness to will, effect, 1044

DEVOLUTION —
Of property, 54

DILIGENCE —
Required, 442

DISABILITIES —
See Guardians — Statute of Limitations.
Appropriation proceedings, appointment of attorney for persons under, 1694
Saving of rights of persons in contest of will, 1112
of supplied record of will, 1157
as record of foreign will, 1133
in proceedings by creditors against heirs, etc., after settlement of estate, 587

DISALLOWANCE —
Of claims against decedent's estate, 609
See Presentation of Claims.
limitation of action after, 609
when claim disallowed at instance of heir or creditor, 561
Of claim against insolvent debtor, to be indorsed, etc., 1628
See Assignments.
limitation of action, after, 1628
when claim disallowed at instance of assignor or creditor, 1635

DISCHARGE —
See Accounting.
See Termination of Trust.
Of debt in will against executor effect, 391
naming a person executor does not operate as, 389
final discharge, how executor or administrator to obtain, 795
Of surety on administration bond, 243
on bond of assignee or trustee of insolvent debtor, 1562
Of prisoner in jail, proceedings for, 13530 to 13535 G. C.

DISCOUNT —
Of debt against decedent's estate paid before due, 571

DISCOVERY OF WILL —
Effect on distribution, 775, 169, 152

DISINTERESTED PERSONS —
Appraisers must be, 857
Arbitrators must be, 594

(References are to sections.)

DISPUTED CLAIMS —
See ASSETS — ARBITRATION, ETC. CLAIMS.
Assignment for creditors, *Id.*
Limitation of action on, by creditor of decedent, 609, 971
of insolvent debtor, 1628

DISTRIBUTEE —
See DEVISEE, LEGATEE.
See HEIRS.
To give indemnifying bond to executor, etc., when, 751
When may sue on administration bond, 265
form of petition, 265

DISTRIBUTION —
Account of, 795
object of, 796
form of, 797
entry and order of discharge, 798
Action to enforce order of, 761
citation against executor, etc., to appear, 761
when returnable, 761
Common Pleas has concurrent jurisdiction, 781
Probate Court, on motion of either party may send case to Common Pleas, 779
execution, service and return, 774
hearing and judgment, 774, 777
lien of judgment, 774
parties, Probate Court may bring in all necessary, 777
petition for, 761
service on non-resident, 770
sureties may be made parties to judgment, 783
defense of, in case of service by publication, 783
Appeal from Probate and Common Pleas Courts, 785
Assets in kind, may be made of, when and how, 751
Creditor of heirs may be subrogated to right of heir, 759
Child's share, how barred, 938, 939
Definition, 755
Debt of heir may be set off against heir's share, 760
Evidence of may be perpetuated how, 795
record of, how made, 795
Enforcement of, 761
nature of proceedings, 762
where brought, 761, 752, 781
parties, 763
sureties may be, 783, 784
petition, 764
form of, 765
citation, 765
entry ordering, 767
form of, 768
service of, 769, 770
order for publication, 771
form of, 772
proof of service, 773
hearing and judgment, 774
trial, 775
proof, 775
judgment, 776
entry, 776

(References are to sections.)

DISTRIBUTION — *Continued.*
Court may bring all necessary parties, 777, 778
case may be taken to Common Pleas, 779
motion for, 780
appeals, 785
Insolvent estates, 959–1012
See INSOLVENT ESTATES.
allowance of, appeal on disallowed claim not to disturb prior, 1010, 1298
distribution after commissioner's return, 536
when Court to make order of on return of list of debts, 976
when Court to make further order of, 980
Investment of unclaimed money, 786
Insolvent debtor's estate, 1653
In kind, 751
what may be, 751
application for, 752
hearing and order, 753
indemnity bond, 754
Kind and when made, 756
voluntary, 756
involuntary, 756
in money, 755-785
in kind, 751-754
real estate, 757
personal estate, 757
Law controlling, 758
domicile controls personalty, 758
location real estate, 758
Method of, 750
Non-resident, interested in business here, 170
Notes, stocks, etc., may be distributed in kind, 751
Order of, 921
how enforced, 761-781
Right to, accrues when, 938
Statute directing, 907, 938
Sale of land, of money arising from, 814, 903
Widow's share, 938
how barred, 939
Distribution of funds by trustee, 1303
at his own peril, 1303
unless by order of Court, 1303
See GUARDIAN.

DITCH —
County ditch appeals, 1850

DIVIDENDS —
Assignments, 1631, 1659
how calculated, 1631, 1659
Declaring and payment of by assignee of insolvent debtor, 1653, 984, 1011, 976
when report of payment, etc., to be made, 1653
of claim of surety jointly liable with assignor, 1632
Payment of, 978, 974
To whom payable, 1289, 692
When assets, 374

DIVORCE —
Guardian cannot bring, 1383

(References are to sections.)

DOCKETS KEPT BY PROBATE JUDGE—
Administration, 15947 G. C.
Civil, 15497 G. C.
Execution, 15497 G. C.
Guardian's, 15497 G. C.
DOMICILE—
When court may determine, 75
As to wills, 1016
controls construction, 1016
Definition, 74
Place of probate of will, 1086
Of minor, 1322
how fixed, 1322
guardian cannot change, 1322
DOWER—
Assignment of in sale of real estate, 869, 857
in metes and bounds, 869
in proceedings of sale, 869
how where homestead claimed, 869, 950
where she dies before, 869, 950
of rents and profits, 857
on sale of equitable interest in land, 825
See SALE OF REAL ESTATE.
Adultery of husband, 954
Assignment of by action, 943
in Court of Common Pleas, 943
in Probate Court, 947
applies when, 957
application for, 958
entry, 958
Assignment for creditors, 1600
Assignment of by heir or guardian to be approved by Probate Judge, 951
Assignee's sale free of contingent right of husband or wife, 1600, 1618
See ASSIGNMENTS.
answer of husband or wife to be endowed out of proceeds, 1600
when wife has executed a mortgage jointly with her husband, or husband has executed it for purchase price, 1601
Barred how, 954, 122, 943, 947
by adultery, 947
by waste, 947
by delinquent tax sale, 947
by actions, 947
by statute of limitation, 947
by accepting under will, 947
by judicial proceeding, 947
Consort must be dead, 948
Can be sold when, 943
Calculation of in proceeds, —
See ANNUITY TABLES, SALE OF REAL ESTATE.
Charge on land, when specially assigned, 870
Conveyance in lieu of, effect, 951
of defective conveyance, 952
effect of eviction from premises, 953
Definition, 943
Eviction of premises, 953
Election of widow or widower to take, or take under will, 1215, 1235
See ELECTION UNDER WILL.
Guardian's sale of land, of contingent right of wife of, in the same ward, 1522
of dower of insane person, 1523

DOWER—*Continued.*
Guardian may act for ward, 1396
Inchoate, 943
is not an estate, 943
Insane woman, proceedings to discharge land of dower of, 12021 et seq., G. C.
Land sold fraudulently, 955
what is, 943, 946, 955
Legacy in lieu, 687
Liberal construction applied, 943
Not a vested right, 943
Of what estates a widow or widower endowed, 944
Property to which attaches, 949
not in public land, 949
in leasehold, 949
partnership lands, 949
vested remainder, 949
in trust, 949
exchange of properties, 949
burial ground, 949
land taken by condemnation, 949
Relinquishment of, 946
by joining in deed, 946
by postnuptial contract, 946
by antenuptial contract, 946
equitable jointure, 946
contract in writing, 946
election of proceeds of sale, 946, 947
Table for establishing value of, 2015–2024 — 2136
Value when land sold, 950
as to purchase money mortgage, 950
ante-marriage mortgage, 950
vendor's lien, 950
mechanic's lien, 950
sale by administrator, 950
sale on execution, 950
insurance money, 950
bankruptcy, 950
assignee, 1601, 950
When becomes fixed, 943
When exists, 944
Widow or widower, 945
marriage relation must exist, 945
cohabitation alone not sufficient, 945
divorce by aggression of husband, 945
See ELECTION UNDER WILL.
Waste, forfeits, 956
When lands are given up, fraud, etc., 955
When statute of limitations run against, 947
Interest of, 950
DRAIN—See DITCH, 1850
DRUNKARD—
Appointment of guardian for, 1535
See GUARDIANS.
notice to be served on party, etc., 1537
sale thereafter invalid, 1537
when guardianship shall terminate, 1540
appeal from appointment, 39
Can not make will unless, 1022
See TESTAMENTARY CAPACITY.
Guardian may borrow money and mortgage real estate, 1460, 1472

(References are to sections.)

DRUNKENNESS —
Habitual, 220
Removal of guardian for, 1358
See GUARDIANS.
See TRUSTEE.
of executor or administrator, 213
See REMOVAL OF ADMINISTRATOR.
DUMB PERSON —
May make a will, 1018, 1023

E.

EDUCATION —
Of ward, when guardian controls, 1311, 1366, 1367, 1375
See GUARDIAN.
when father controls, 1366
when mother controls, 1366
sale of property to provide, 1405
lease of property to provide, 1433
ELECTION UNDER WILL BY WIDOW OR WIDOWER.
Application for commission, 1232
form of, 1232
By acts of parties, 1226
must be with full knowledge, 1226
qualifying, as executor not an election, 1226
Court admitting will to probate only has power to take, 1224
Citation, when should issue, 1216
to issue for, 1215
to whom issued, 1217
divorced wife need not, 1216
form of, 1218
Commission to take, 1233
Commissioners' report, 1233
entry, 1234
Can not take both unless, etc., 1215
Construction of will, may file petition asking before election, 1215
Devisee how affected by, 1230
compensation by, 1230
Definition, 1214
Duty of Court to explain to her, her rights, 1221
Does not bar right to remain in mansion house or to year's support, 1221
Entitled to both dower and provisions of will, 1220, 1221
Entry of, 1225
Effect of election to take, 1227
only as to property devised, 1227
may cause relinquishment of right to other property, 1227
does not relinquish homestead right, 1227
nor year's allowance, 1227
Except in case of proceedings to contest will, 1215
Entered on journal, 1221
Effect of not to take, 1228
entitled to dower in real estate, 1228
can take nothing under the will, 1228
distributee's share of personalty, 1228
Failing to make election to retain dower, etc., 1221
How set aside, 1229
Probate Judge cannot, 1229
Chancery Court may when, 1229
Insane or imbecile widow, 1235
application for, 1236
form of commission, 1237
duty of commissioner, 1238
duty of Court, 1239
form of entry, 1239

(References are to sections.)

ELECTION UNDER WILL BY WIDOW OR WIDOWER — *Continued.*
Judge to explains wills, 1223
includes what, 1223
Made in person, 1221, 1222
Must be made in one year, 1215
Taking under will bars dower, 1221
To be recorded, 1224
Time within which to be made, 1219
when construction of will is asked, 1219
Court of Chancery may extend, 1219
To take under will or take dower, 1215–1235
Where widow unable to appear, 1231
Where widow dies within one year and before election, 1222
When entitled to make election after such proceedings, 1215
ELECTION —
Election of widow:
Deputy can not make, 1223
Insolvents, election of trustees of, 1564
Time of election of Probate Judge, 7
ELIGIBILITY AND QUALIFICATION —
for administrators, 115–123
for executors, 79–82
for Probate Judge, 6
EMINENT DOMAIN — See APPROPRIATION OF PROPERTY, 1674
Catholic school property may be taken, 1668
Electric road is not additional servitude, 1668
Land for sidetrack may be taken, 1668
Legislature may confer power, 1666
Park property may be taken, 1668
Power of Probate Court, 20
Public use, what is, 1666
Right strictly construed, 1664
Taking what constitutes, 1668
Unused property may be taken, 1668
EMBEZZLEMENT —
Of assets, etc., of estate, proceedings in case of, 395, 414
See ASSETS.
appeal from order of Probate Court in, 39
EMBLEMENTS —
Are assets of estate — see Crops, 369
Definition, 368
Duty as to sale of, 476
Limitation of, 1030
May be sold before severance, 470
Purchaser may enter upon and possess, 370
Issue of first donee in tail to have fee, 1030
Sale deferred beyond three months, 470
Who entitled to at judicial sale, 368
ENTRIES — See FORMS.
ENTAILED ESTATE —
Limited to issue of first donee, 1030
Law favors a fee in preference to, 1189
Rule against perpetuities, 1031
EPILEPTICS —
Ohio Hospital for, admission to, 29, 1999
EQUITABLE INTERESTS —
In real estate sold by admr., 820
EQUITY —
Will not reform will, 1180
Will preserve a trust, 1275
ERROR —
Appeal and ——— may be prosecuted simultaneously, 40

(References are to sections.)

ERROR — *Continued.*
Appropriation of property by private corporations, proceedings in 1720, 1722, 1733
by municipal corporations, 1773
Appointment of guardian, 1173
Can not be prosecuted to Circuit Court, 52
Claim not due, 583
Claim of executor, 642
Contempt of Court, 1993, 1994
Election under will, 1229
Foreign will, 1123
From Common Pleas to Probate, 52
Guardian sale of real estate, 1431
Guardian's accounting, 1495
Guardians of lunatics, etc., 1515
Hearing on appeal dismisses error, 52
How commenced, 52
Habeas corpus, 1975
In aid of execution, 1950
In construing will for widow,1223
In real estate proceedings, 906
In distribution of personalty, 785
Interested party may prosecute, 93
Jurisdiction and procedure in, 12258-12282 G. C.
Must be from judicial act, 52
Must be commenced when, 52
None from Common Pleas to Circuit on probate of will, 1153
Nunc pro tunc entry, 53
power under, 53
On hearing of executor's, etc., claim against estate, 641
Proceedings in general, 52
Probate of wills, 1114
Resignation and removal, 232
Removal of assignee, 1575
Removal of executor, etc., lies from order of, 213
Spoliated will, 1153
Same rules apply as Common Pleas, 52
To exceptions of account, 736
To removal of trustee, 1302
Widow's allowance, 340
What is final order, 52
What may be reviewed, 52

ESCHEAT —
Of chattels, 921
Of lands, 919

ESTOPPEL — See APPROPRIATION OF PROPERTY.

EVIDENCE — See DEPOSITION.
Action for breach of administrator's bond, etc., what may be given in evidence in, 276
Allowance of claim in suit on administrator's bond by creditor, 277
Appropriation proceedings by private corporations, 1711, 1673
burden of proof, 1695
fact of publication of service, how proved, 1692
View as, 1710
View of jury, 1711
Claimant cannot testify when, 640
Deed of execution, etc., under order of Court to sell and is evidence of what, 899
Injury by wrongful death, in action for, 536
Inventory, evidence of what, 318
In appropriation proceeding, 1673
Of minister's license to solemnize marriages, 1997
Of notice of appointment of executor or administrator, 546

EVIDENCE—*Continued.*
Of fraudulent conveyance, 1580
On examination of person suspected of concealing assets of estate 405, 406
Party can not testify when adverse party is executor, etc., except, etc., 11495 G. C.
To prove contract to make will, 1170
Will, certified copy of is, 1110
admission of, to construe will, 1133
spoliated, testimony as to, 1146, 1148
what necessary before will is admitted to probate, 1105
revocation, to rebut presumption of revocation of by birth of child, 1062
EXAMINATION —
Of assignor and assignee as to assignment, 1585
Of creditor of insolvent as to claim, 1632
Of debtor in proceedings in aid of execution, 1911
Of assignee, executor, guardian, etc., as to accounts filed, 733
Of person suspected of concealing, etc., assets of estate, 395, 408
Of witnesses to will, 1095
Of witnesses on exceptions to inventory, 312
EXCEPTIONS —
See ERROR.
Code of Civil Procedure, see § 11599 G. C.
Account of admr., 737
Bills of, from decision of Probate Judge, how taken and allowed, 785
How tried, 739
To accounts of executors, etc., 743
further time allowed to file, 729
of assignee, etc., 1653
To guardian's bond, 1343
To inventory of estate, 312
appeal to Common Pleas, 312
Evidence, 740
In proceedings as to insolvent estates, 976
Error and appeal, 747
form of, 737
In proceedings to enforce order of distribution, 785
On hearing of executor's etc., claim against estate, 641
Road appeals, to report of viewers, 1830
EXECUTION —
Cannot be had against estate of deceased, 816
Distribution, to enforce order of, 774, 777
How and when may issue against executors, etc., 626
when account has been rendered and settled, 626
runs against goods, etc., of deceased in their hands, 628
when returned unsatisfied, effect, 628
Insolvent estate, in proceedings against, 990
made to evade proceedings void, 415
On judgment for goods of estate concealed or embezzled, 413
Proceedings in aid of, 1911
See PROCEEDINGS IN AID OF EXECUTION.
Reference of doubtful claims against estate, on judgment in case of, 597
Stay of, on error, Code of Civil Procedure, 10825 G. C.
on appeal, 12233 G. C.
Waste on judgment for, 628
EXECUTION DOCKET—
To be kept by Probate Court, 1594 G. C.
EXECUTOR—
See ADMINISTRATOR AND EXECUTOR.
EXECUTRIX—
Marriage of does not extinguish authority, 115
EXEMPT PROPERTY—See HOMESTEAD.
Exempted from assignment unless expressly waived, 1598
Property exempt from execution, 867, 1598

(References are to sections.)

EXEMPTION —
Determined at time of distribution, 1601
Previous allowance will not bar when, 1601
EXHIBITION OF CLAIMS AGAINST ESTATE—
See PRESENTATION OF CLAIMS.
EXPECTANCY —
Of heirs assignable, 800
Can not be devised, 1026
EXPENSES —
Court may order account shown, 653
See ACCOUNTS.
Administrator's and executor's, 654
See PAYMENT OF DEBTS.
Assignee's, 1642
See ASSIGNMENTS.
Guardian's 1490
See GUARDIANS.
Of administration of estate. See Costs, 647
last sickness and funeral, 647
See FUNERAL EXPENSES.
proving claim against estate, 557
sale of real estate, 903
EXEMPTIONS —
See WIDOW'S ALLOWANCE.
Who entitled to, 1598
What entitled to, 1598
EXTRA COMPENSATION —
What constitutes, 659
FATHER —
See PARENT.
Consent of, necessary on marriage of minor, 1997
Entitled to custody and control of education of minor, 1366
See GUARDIANS.
duty of guardian when father unable to maintain, etc., 1367, 1313
May appoint guardian by will, 1307
May be appointed guardian for his children, when, 1311
When he inherits property, 917
See DESCENT.
FEE BILL —
Of Probate Judge to be filled and recorded, 1600 G. C.
FEES— See COSTS.
Administrator's and executor's, 654, 1499
special, 137
Appraisers' of personal property of estate, 301
of real property, 872
Appropriation of property by private corporation, 875
Assignee's, 1642
Attorney's, of assignee of insolvent debtor, 1642
of party under disability, etc., in appropriation proceedings, 1694
Clerk's in appropriation proceedings, 1746
Commissioner of insolvent debtor, 1012
Ditch, appeal county, ——
railroad, 8912 G. C.
Elections:
contest of Justice of the Peace, 5168 G. C.
Examiners' of county treasury, 2699 G. C.
Girls' Industrial Home, commitment to, 2109 G. C.
Guardians', 1490
when appointed for minors of same parentage, 1338
no extra for investing trust funds, 1367
Inquest of lunacy, 1999
Jurors, 3008, 11204 G. C.
appropriation of property, 1746
ditch appeal, county, ——

(References are to sections.)

FEES—*Continued.*
township, 1873
Justice of the Peace, for issuing orders to appraisers, 286
Levee, construction of. See DITCH.
Physicians attending insane patient in infirmary, 1981 G. C.
Probate Judge's, generally, 1600 G. C.
account of verified by, 1600 G. C.
itemized, to be filed in each case, 1600 G. C.
administration of estate, 1602 G. C.
appropriation of property, ——
assignment for creditors, 11145 G. C.
bank deposits unclaimed, for record of, ——
bounty cases, 1604
ditch, county. See DITCH.
railroad, 8912 G. C.
contest of Justice of the Peace, 5768 G. C.
girls' industrial home, commitment to, 2109 G. C.
habeas corpus, 12179 G. C.
levee, construction. See DITCH.
marriage license, issuing, 11188 G. C.
pension cases, 1619 G. C.
proceedings in aid of execution, 11786
proceedings in case of fees paid to predecessor for services performed by Probate Judge, 1587 G. C.
judge to make sworn statement of such services and prosecuting attorney to sue on bond of predecessor for same, 1588 G. C.
road, state. See ROADS.
sale of real estate, action by executor, guardian, etc., for entry releasing liens, 814
tobacco inspector, appointment of, 6044 G. C.
warehouseman, issuing license, 6044 G. C.
trustee's accounts, settling, 1299
will, deposit of with, 1067
Prosecuting attorney's in inquests of lunacy, 1980-2029 G. C.
Railroad ditch, etc., 8912 G. C.
Road, state. See ROADS.
Sheriff's, 11204 G. C.
appropriation of property, 11089 G. C.
ditch, county, ——
Trustee of insolvent debtor, 1642
of non-resident, etc., 1299
Unclaimed, Probate Judge to make list of and post in office, 3040 G. C.
fees for, 3040 G. C.
how disposed of, 3042 G. C.
Will, deposit of with Probate Judge, 1067
Witnesses, 11204 G. C.
appropriation of property, 11089 G. C.
ditch, county, ——

F.

FEE SIMPLE—
See CONSTRUCTION OF WILL.
Devisee for life, remainder to heirs in, construed, 1188
See DESCENT.
Passes without words, heirs, in will, 1189
See SHELLEY'S CASE.

FILES—
Probate Judge to have custody of, of Probate Court, 11

FILING—
Of desperate claims in Court for benefit of heirs, etc., 456
Of wills in Probate Court, 1109

(References are to sections.)

FINAL ACCOUNT—
See ACCOUNT, ADMINISTRATORS AND EXECUTORS, ASSIGNMENT FOR CREDITORS, GUARDIANS, ETC.
FINAL DISCHARGE—
See TERMINATION OF TRUST—ACCOUNT.
How executor, etc., may obtain, 795
Exempt from liability, unless, etc., 795
FINAL ORDER—
See ROADS—DITCHES, ETC.
What is, 906
What is, in appointment of guardian, 1511
What is, in condemnation, 52
In appropriation proceeding, 1674
FINAL RECORD—
To be kept by Probate Court, 1594 G. C.
what to contain, 1594 G. C.
when to be made up, 1594 G. C.
FINAL SETTLEMENTS—
See ACCOUNT, SETTLEMENT—TERMINATION TRUST—GUARDIAN.
FINE—See AMERCEMENT, PENALTY.
Imposed by Probate Judge to be paid into county treasury, 13460 G. C.
how collected, 13460 G. C.
Marriage, for breach of provisions as to solemnizing, 1997
FIRE MARSHAL—
Appeal from order of, 2006.
FIXTURE—
Agriculture, 365
Definition, 365
Domestic, 365
Fence, 365
Rules governing, 365
Trees, wood, etc., 366
FOREIGN ADMINISTRATOR AND EXECUTOR—
Account, may be compelled to render at suit of heir or legatee, 190
Action may be brought by in this State, 195
under like restrictions as non-resident, 195
or against, 187
service in, for failure to pay heirs, etc., after order of distribution, 770
Action against by heirs, legatee, etc., 190, 191
Bond may be required of before sale, 199
unless he has already given one in foreign State and filed copy here, 199
for distribution of surplus proceeds of sale, 200
Courts have like power over as if appointed under laws of this State, 188
Cannot attack judgment in other State, 187
Cannot be charged with assets in another State when, 187
Confirmance of verdict in condemnation proceeding, 1711
Definition, 186
Form of refunding bond, 192
Form of bond to secure distributee, 194
Foreign executor must give bond, 199, 200
Laws governing settlement of estates generally control, 189
Laws applicable to, 198
Letters testamentary when to issue to, 1132, 169
May be sued here, 198
May be compelled in equity to disclose funds, 191
May be required to secure distributees, etc., 193
May prosecute suits in this State, 195

(References are to sections.)

FOREIGN ADMINISTRATOR AND EXECUTOR — *Continued.*
Must give an appeal bond, 195
May be authorized to sell real estate, 197
Powers of, 1132, 169, 187, 195, 197
Refunding bond may be required of heirs, etc., when, 190
Sale of land by, for payment of debts, 197
power to sell real or personal estate, 1132, 169
Sureties on bond may require indemnity, when, 193
Validity of payment to foreign administrator, 196
What petition must show, 198
FOREIGN GUARDIAN —
Cannot give title unless law authorizes, 1478
Guardian here, removed, 1477
what done in such cases, 1479
How may collect money, 1282
Idiot, imbecile or lunatic, 1483
Improvement of real estate of imbecile, etc., 1452, 1455
May recover property in this State and how, 1480
May sue and be sued here, 1481
Rights of in this State, 1480, 1481, 1475
Removal of ward, 1476
Sale of land of non-resident ward, 1481, 1482
additional security may be required of, 1481
Foreign assignments:
See ASSIGNMENTS.
FOREIGN WILLS —
Admission and effect of admission to record 1130
Definition, 1118
Executed in other State, 1119
how admitted, 1020
application, 1121
form, 1121
form of entry, 1122
appeal, 1123
error, 1123
Executed in other country, 1124
proceedings, 1125
motion to admit, 1126
form of, 1126
ordering notice, 1127
form of, 1128
admission to probate, 1129
effect of, 1130
entry ordering probate, 1131
effect of, 1131*a*
Has same validity as original, 1130
Motion to admit continued for two months, 1125
Notice of filing application, 1125
Not defeated by production of, 1133
No contest of in this State, 1133
Of will of alien, 1130
Power of executor, etc., under, 1132, 169
Probate Court may appoint, 1271
Proceedings to admit to record, 1125
Record of will of alien, 1130, 1119
Rights of purchaser without knowledge of, 1133
Saving of rights of infants, etc., 1133
Set aside in foreign State, how far invalid here, 1133
Trustee named in to give bond, etc., 1268
appointed by foreign Court, 1269
by Probate Court of county where property is, 1271
Trust created by, how executed, 1267, 1271

(References are to sections.)

FOREIGN WILLS — *Continued.*
Unless offered for record with four years, etc., 1133
When trustee not required to give bond, 1133
What determines, 1118
Where to be probated, 1086
Where admitted to probate effect on earlier will, 1131*a*
FORMS —
Appeal bonds, 47
Administrator with the will annexed
citation, application for executor, 101
entry ordering, 102
to renounce or take, 103
Ancillary Administration:
application for, 174, 175
entry ordering, 178
application for letters, 179
bond, 180
letters, 182
Appointment, notice to administrator, 545
proof of publication, 547
petition where not given, 549
entry, 550
Arbitration:
agreement to refer, 596
order of reference, 600
notice and oath to referees, 601
subpoena, etc., 604
finding of referees, 604
confirming of award, 606
Accounts, Administrators:
affidavit to voucher, 724
oath to account, 726
administrator's account, 727
entry, 728
notice of filing, 730
entry on, 731
account hearing of, 733
exceptions to account, 737
order of reference, 741
statement in lieu of account, 748
Assignment:
deed of, 1550
application for appointment, 1553
bond, 1554
letters, 1556
notice of appointment, 1557
application to elect trustee, 1566
entry ordering citation, 1567
entry ordering election, 1569
confirmation of election, 1571
application to raise, 1577
entry, 1577
application to continue business, 1590
entry, 1590
application for sale of personal property, 1607
notice to lien holder, 1607
answer of chattel mortgage claim, 1608
order where property not sold, 1612
confirmation of sale, 1614

(References are to sections.)

FORMS — *Continued.*
petition for exemption, 1601
petition for sale of real estate, 1622
assignee's deed, 1627
affidavit to claim, 1633
report of claims filed, 1639
affidavit to attorney fees, 1645
account, 1656
exception to account, 1659
report of payment, 1661
confirmation of report, 1661
Appropriation of Property by Private Corporations:
Application for minor, 1678
entry ordering notice, 1678
notice, 1678
order of deed, 1678
deed, 1678
petition, 1688
entry ordering jury, 1702
entry ordering venire, 1702
oath, 1706
view of premises, 1707
empaneling jury, 1709
appointing attorney, 1709
verdict, 1716
confirmation, 1716, 1719
on payment of amount, 1724
petition of owner, 1740
notice to corporation, 1738
demand of description, 1739
motion for injunction, 1745
entry on, 1745
Appropriation of Property by Muncipal Corporation:
petition, 1752
precipe, 1752
entry on filing, 1753
notice, 1755
ordering jury, 1759
confirmation of verdict, 1775
Appeal, County Roads:
bond, 1788
entry on filing transcript, 1790
entry approving, 1793
entry reversing, 1794
entry confirming report, 1799
motion for review, 1801
ordering, 1802
Appeal. Road. Compensation:
entry drawing jury, 1817
final entry, 1824
Appeal, County Ditches:
exceptions, 1832
entry on transcript, 1838
consolidation of cases, 1840
ordering jury, 1843
oath, 1848
verdict, 1852
confirmation of verdict, 1854
Appeal, Township Ditches:

(References are to sections.)

FORMS — *Continued.*
notice, 1862
ordering jury, 1864
Aid of execution:
appplication, 1915
order, 1917
notice, 1918
warrant to arrest, 1924
order after arrest, 1925
order to apply property, 1941
order to sell real estate, 1947
Adoption:
petition, 1892
consent, 1894
entry, 1897
Bonds:
See various subheads for particular bonds.
approval of trust company, 241
examination of sureties, 242
Bonds, Suit on:
leave to bring, suit, application, 271
entry, 272
granting leave to bring, 275
Compounding claims, 452
entry, 454
Completion of contract for land:
sale of real estate on contract, 526
entry, 530
deed, 531
Claim not due, 573
notice, 574
ordering paid, 576
ordering assets retained, 577
ordering bond given, 578
bond, 579
Claim of executor, 636
entry, 637
notice, 637
notice non-residence, 638
allowance of, 640
appeal bond, 644
approval, 644
Contempt:
order when made in presence of judge, 1978
appointing attorney to bring action, 1982
charge of, 1983
summons, 1984, 1985
attachment, 1984, 1985
entry of guilty, 1988
commitment, 1990
order of discharge, 1992
Designation of heir, 1904
entry, 1905
Dower:
assignment of, 958
entry, 958
Distribution in kind, 752
entry on, 753
indemnity bond, 754

(References are to sections.)

FORMS — *Continued.*
Distribution of Personal Property:
account of, 797
entry ordering discharge, 798
entry ordering citation, 767
petition, 765
citation, 768
notice by publication, 771
form of, 772
judgment, 776
motion to take case to Common Pleas, 780
Embezzled assets:
complaint against person, 400
entry ordering citation, 401
citation, 402
commitment to jail, 404
examination in embezzlement, 407
order to draw jury, 409
report of clerk of jurors, 409
venire for jury, 409
verdict in embezzlement, 411
finding on embezzled goods, 412
Election under will:
citation to widow, 1218
election, 1225
entry, 1225
commission for absent, 1232
journal entry, 1232
commission, 1233
commissioners' report, 1233
entry, 1234
commission for insane, 1237
entry, 1239
Franchise for street:
petition, 1877
Foreign guardian. Application to pay money to, 1283
entry, 1284
notice, 1284
order, 1285
Foreign administration:
refunding bond, 192
bond to secure distributee from foreign executor, 194
Guardians:
application for appointment, 1325
choice of, 1328
bond, 1334
property statement of sureties, 1334
mortgage security, 1335
entry appointment, 1340
letters, 1341
exceptions to bond, 1345
notice, 1346
order additional bond, 1347
order releasing surety, 1351
application for citation, 1364
entry, 1364
inventory, 1368
indenture, 1371
judge's certificate, 1371

(References are to sections.)

FORMS — *Continued.*
entry of approval, 1371
application to invest in land, 1387
entry, 1387
application to sell land, 1387
entry, 1387
petition to sell real estate, 1412
order of notice, 1414
form of notice, 1416
order to appraise, 1420
order to give additional bond, 1421
form of additional bond, 1423
order of sale, 1426
guardian's deed, 1430
petition for a lease, 1436
entry on, 1437
appointment of appraiser, 1439
order to appraise, 1440
report of appraisement, 1440
order to lease, 1442
report of guardians, 1444
application to borrow, 1470
order and report of, 1471
entry confirming, 1473
guardian's mortgage, 1474*a*
Guardian of lunatic:
application, 1506
entry ordering notice, 1506
notice, 1507
entry ordering, 1510
fixing dower, 1513a
Habeas Corpus:
application by person imprisoned, 1956
application by third person, 1956
application by parent for child, 1956
entry ordering writ, 1959
writ when not in custody of officer, 1963
when in custody of officer, 1964
return of, 1968
answer of respondent, 1968
entry discharging person, 1972
entry remanding prisoner, 1973
Inventory:
statement in lieu of inventory, 283
entry, 283
appointment of appraiser by justice, 286
notice of appraisement, 289
affidavit of service, 289
oath of appraisers, 291
citation to return inventory, 304
entry and writ, 305
entry for removal for not filing inventory, 308
exceptions to inventory, 313
entry ordering notice, 314
notice, 315
hearing of entry, 316
Inheritance tax:
notice to collect, 348
entry on, 353
appraisement for, 357

(References are to sections.)

FORMS — *Continued.*
entry allowing, 357
Investment of funds, 516
entry, 516
Investment of unclaimed money, 787
entry authorizing, 788
return of, 789
application to pay money to owner, 792
entry ordering, 793
Incumbrances, application, 798*b*
entry, notice, 798*c*
order, 798*d*
Insolvent estate settled by administrator:
oath to insolvent commissioner, 994
report of commissioner, 975
to Probate Judge, 1007
appeal insolvent judge, 1006
form of bond, 1006
application for insolvency, 961
entry declaring, 964
notice of insolvency, 966
presentation of claim insolvency, 968
report of insolvency, 978
entry on, 979
Judge where interested:
application, 10
entry, 10
Letters of administration, 127
application for, 112
administrator's bond, 125
Letters beyond twenty-one years:
notice of hearing for appointment of administrator, 66
entry, 66
grant of letters, 66
Letters Testamentary:
application for, 78
executor's bond, 84
executor's letters, 87
entry appointing executor, 89
application of executor to borrow money, 97
entry granting, 98
Legacy, application for, 698
entry, 699
bond, 700
Proceedings to oust municipal officers:
complaint, 2007
entry on, 2007
empaneling of jury, 2007
verdict of jury, 2008
Partition:
application for certificate of Probate Court, 1881
entry on, 1882
certificate, 1883
motion in Common Pleas, 1886
entry in, 1886
Partnership assets:
application for appraisement, 419
entry ordering notice, 420
form of notice, 421

(References are to sections.)

FORMS — *Continued.*
entry ordering appraisal, 422
appraisement of, 423
entry confirming, 424
bond of surviving partner, 429
approval of partner's election, 430
deed of partnership, 439
Real Estate:
deed, of executor, private sale, 809
bond to prevent sale of, 826
petition of administrator to sell, 836
filing of, 837
notice of sale of, 841
waiver of summons, 843
guardian *ad litem* appointment, 845
answer, 845
widow's answer of, 846
decree of sale of, 852
order of appraisement of, 858, 852
copy of, 859
return of, 859
oath of appraisers, 863, 859
bond in sale of, 874
confirmation of appraisement, 876
order of sale of, 878
report of sale of, public, 878
report of sale of, private, 878
notice of sale, 887
confirmation of sale, 895
distribution of proceeds of sale, 895
resale of, 896
motion to set aside appraisement, 898
deed, administrators, public sale, 901
Removal of administrator:
resignation, 212
entry, 212
removal, application for, 216
entry, 217
notice, 219
order, 228
Release of surety, 245
entry, 245
notice for new surety, 247
indemnity bond, 256
Rejection of claim:
affidavit to claim, 558
requisition to reject, 563
bond for, 564
entry ordering, 565
notice, 566
Sale of desperate claims 458
entry ordering notice, 460
notice for, 461
entry for public sale, 464
return of sale, 465
private sale, 466
return of, 467
Sale of personal property:
redelivery bond, 475

(References are to sections.)

FORMS — *Continued.*
order to sell property disposed of by will, 477
property not sold within three months, 478
entry, 478
notice of public sale, 480
sale bill, 490
private sale, 496
less than appraised value, 497
affidavit for, 497
order for, 498
return of, 500
affidavit to, 500
Sale of stocks, 503
entry authorizing, 503
Special administrator's bond, 134
appointment, 135
letters, 136
application for citation, 144
entry ordering citation, 145
citation for special administrator, 146
attachment, 147
entry ordering, 147
writ of, 148
commitment to jail, 149
Trustees' bond, 1259
application for appointment, 1255
entry, 1261
form of letters, 1262
Vagrant child:
application to declare, 1907
entry ordering notice, 1908
entry ordering child committed, 1909
Widow's allowance:
increase of, 336
decrease, 336
entry, 337
notice, 338
entry on hearing, 339
Wrongful death, settlement in, 538
entry allowing, 539
report, 540
approval, 540
apportionment, 542
Will, 1047
deposit of, 1067
order for, 1067
citation to produce, 1073
form of, 1074
entry for, 1074
attachment, 1075
commitment, 1080
probate of:
application, 1088
entry fixing, 1090
notice of, 1093
testimony of witnesses, 1097
commission, 1103
order, absent witnesses, 1102
subscribing witness, 1111
return of commissioner, 1104

(References are to sections.)

FORMS — *Continued.*
order of, 1107
foreign:
Application for, executed in other State, 1121
entry ordering record, 1122
application for will made in other county, 1126
order of notice, 1127
form of notice, 1128
order admitting to probate, 1131
spoliated:
application, 1143
order of notice, 1145
order establishing, 1151
nuncupative, 1169
testimony in, 1169
codicil, 1179
FRANCHISES —
See APPROPRIATION.
Hearing and decree, 1878
How acquired, 1876
Petition, 1877
form, 1877
Use of street granted to corporation, 1875
FRAUDULENT CONVEYANCE —
Action to set aside by creditor of insolvent debtor, 1580
appointment of trustee to recover possession, 1580
notice of object of suit to be published, 1580
what Court to administer trust, 1580
Sale of land of decedent, may be set aside in action for, 823
when it can not, 822
in what Court action to be brought, 823
limitation of, 822
parties to, 833
FRAUDULENT CONDUCT —
Removal of guardian for, 1358
See GUARDIAN.
of executor or administrator, 213
See REMOVAL OF ADMINISTRATOR, ETC.
FRAUDULENT CONVEYED LAND — 383, 1579
Dower in, 955, 939, 1249
FREEHOLDERS —
Appraisers of decedent's real estate must be, 857
of ward's real estate, 1418
to report as to leasing ward's real estate, 1438
Definition, 373
FRUITS — 366
See EMBLEMENTS.
FUGITIVES FROM JUSTICE —
Proceedings relating to, §§ 13520-13522 G. C.
FUNDS —
Bank — deposited, 513
Custody of, 512
In hands of guardian at final settlement, 1388
Investment of, by executor, etc., guardians and trustees, 514
See MONEY ON DEPOSIT.
by guardian of person and estate, 1367
unclaimed, belonging to heirs, etc., 786
FUNERAL EXPENSES —
Amount of, 649, 650
extravagance not encouraged, 650

(References are to sections.)

FUNERAL EXPENSES — *Continued.*
position in life largely controls, 650
undertaker should be held to make proper charge, 650
Claims for should be presented, 649
Court will limit amount, 650
Executors may pay before letters granted, 70
Friend, when not entitled for payment, 649
First paid, 647
Husband liable for wife's, etc., 649
Includes what, 649
wake, 649
mourning apparel, 649
carriage hire, 649
claims of relatives attending, 649
taking up body, 649
communication of death, 649
Order of payment, 649
Of unknown person, 2862 G. C.
Tombstone in same class, 651
Wife not for husband's, etc., 649
Who entitled to, 649

G.

GAIN AND LOSS —
How apportioned between life tenant and remainderman, 1290
GENDER —
Words importing masculine applied to feminine, 1033
GIFT —
Evidence of, 1248
Of real estate by drunkard void, when, 1537
To avoid proceedings against persons suspected of concealing assets, etc., of estate, void, 415
What constitutes, 1242
When is established, 1248
GIFT *CAUSA MORTIS* —
Definition, 1240
Distinction between gifts, *inter vivos*, 1240
Drafts and checks unpaid not, 1241
Evidence of, 1248
Intention to give is not a gift, 1246
Inter vivos, what are, 929
Makers own note cannot, 1241
Must be clear and convincing declarations, when not admissible, 1248
Requisites of, 1242
in view of death, 1243
what constitutes, 1243
death of donor, 1244
delivery of, 1245
owner must part with possession, 1245
must be with intention, 1245
Revocation of gift, 1247
Right of creditors and family, 1249
cannot defeat debts, 1249
nor wife of marital rights, 1249
but may of distributive share, 1249
Should be absolute, 1246
Subsequent birth of child, 1247
What may be given, 1241
GIRLS' INDUSTRIAL HOME —
Commitment to, proceedings, 2128
GOODWILL OF BUSINESS —
Definition, 416, 425
When assets, 382

(References are to sections.)

GOODS AND CHATTELS —
Executor and administrator to make inventory of and administer, 83, 124, 137
See ASSETS, ACCOUNTS, CHOSES IN ACTION, ETC.
Proceedings against persons suspected of concealing, etc., of estate, 395, 414
Widow and children entitled to what, 320, 322
GRANDCHILDREN —
Inheritance of property by, 924
See DESCENT, CONSTRUCTION OF WILLS.
GRAVESTONES —
See TOMBSTONES.
GUARDIANS —
Account, when may be opened, 1494
Accounting, 1484
appeal from settlement of, 39
appeal, 1495
appeal over appointment of same, 1515
barred by time, 1486
compensation how determined, 1490
Common Pleas to settle when Probate Judge interested, 7
deceased, insane or incompetent, executor, administrator or guardian to settle, 1499
how settlement enforced, 1499
duty to, 1484
exceptions, 1492
further time to file, 729
effect of settlement, 1493
each is final, 1494
error, 1495
entitled to what credits, 1489
enforcement of filing, 1362
examination under oath as to, 733
female guardian on marriage must settle, 1356
final, what is, 1494
guardian should be charged with, 1488
hearing, 1492
how opened out, 1494
how finding enforced, 1498, 1499
intermediate what is, 1494
idiot, etc., guardian of must settle, when, 1513
when guardian becomes insane, his executor, etc., or guardian to settle, 1499
when executor, etc., becomes insane or incompetent, his executor, etc., guardian to render final account, when, 707
jurisdiction of Probate Court over, 27
notice, 1492
notice, none required to non-resident, 37n
notice of filing to be published, 729
costs of, 729
Probate Judge or clerk can not prepare accounts, 7, 1491
review of, 1493
record of to be kept by Probate Court, 1594 G. C.
what to contain and when to be made, 1594 G. C.
removed, must render final, 1354
review of settlement for fraud, etc., when and how, 1493
settlement with succeeding guardian, 1496
settlement with ward, 1497
settlement by executors of deceased guardian, 1499, 1500
what included, 1494
when to be filed, 1485
where to be filed, 1485

(References are to sections.)

GUARDIANS — *Continued.*
what should contain, 1487
when to be rendered, 1367
when estate does not exceed two hundred dollars, 1367
Authority dates from order of appointment, 13
Attorney, employment of, 1402
Arbitration, 1382
may compound, etc., 1382
should have order of Court in doubtful case, 1382
Ancillary, 1314
Application for appointment, 1324
what it should show, 1324
form of, 1325
Action and defenses:
Against ward, 383, 1384
Answer of. Code C. P., 11326 G. C.
Bond, action on. Code C. P., 11242, 11243 G. C.
Completion of real contracts, *et seq.*, 523
of idiot, etc., 1398
Direction of Court, to obtain, 33
Foreign guardian may recover property of foreign ward by, 1480
right to sue in this State, 1481
Infant, when action to be brought by, 1383
defense of by guardian *ad litem*. Id., 1384
even if a guardian, 1384
Insane person, action to be brought by. Id., 1383
who may bring action, 1383
defense by. Id., 1384
Lease of ward's real estate, 1434, 1527
May sue without joining party in interest, 1383
Sale of ward's real estate, 1410, 1522
Where action against may be brought, 11278 G. C.
Appeal:
Accounts, as to settlement of, 39
Appointment of, 39
Bond not required, when, 43
Completion of real contracts, 39
Distribution, from order of, 785
From appointment, 1342
From order of Court, 1495
Road cases, 1785
bond not required, when, 1787
Proceedings in Common Pleas, 51
Sale of real estate, 39
Transcript, when to be filed, 49
Appointment, 1319
Appeal as to, 39
Application for, 1323
for idiot, lunatic, etc., 1501
for drunkard, 1535
Jurisdiction of Probate Court as to, 1319
Not to be unless there is an estate, 1320
Not to be of person if father is capable, 1320
Proceedings is *in rem*, 1319
When minor may choose, 1327
minor can not select one of person and another of estate unless, etc., 1327
appointed before minor had right to select, how long to act, 1354
when minor fails to select suitable, court may appoint, 1327
When necessary, 1320
Who ineligible as, 1331

(References are to sections.)

GUARDIANS — *Continued.*
Ward's presence, etc., 1319
Appropriation of property, 1397
By private corporations, 1676
By municipal corporations, appeal in, 1779
Has no right unless under order of Court, 1397
Bond:
Action must be within 10 years from time Court passes on account, 1353
Action on, how and by whom brought. Code of Civil Procedure, 12242 G. C.
limitation of action. Id., 12226 G. C.
Additional may be required, 1343
before sale of real estate, 1422
exceptions to, 1343
who may file, 1344
from guardian of idiot, etc., 1522
from foreign guardian, 1481
notice and form, 1346
entry ordering, 1346
ordering additional bond, 1347
Appeal bond, when not required. Code of Civil Procedure, 43
Approval of, by Court, 1323
Exceptions to, how and by whom made notice of filing, 1343
Foreign guardian, on sale of land to give, 1481
Form 1334
Finding on account fixes amount of sureties liability, 1352
Informality or illegality, etc., not to render void, 1337
Joint bond when wards of sale parentage, 1338
fees in such case, 1338
Mortgage security in lieu of freehold sureties may be given, 1323
No authority until given, 1333
Of guardian of person and estate or estate only, 1323
Of guardian of person only, 1314
Penalty in, 1333
Road cases, appeal bond required, 1827
Responsibility of judge, 1333
Sale of real estate, bond for, 1422, 1522
Sureties must be freeholders, 1323, 1333
release of, extent of liability, 1348
application, 1349
notice, 1350
entry ordering, 1351
Testamentary guardian to give, 1310
when not required, 1310
Wife of idiot, etc., appointed his guardian, to give, 1512
Who may sue for breach, 1352
When required on completion of real contract of idiot, etc., 1398
Compensation:
For services, 1490
Failing to render account within thirty days after notification, etc., to receive none, 1367
Of executor, etc., of deceased guardian for settlement, 1499
Complete contract for real estate, 1398
Contracts between, and ward, 1399
cannot make, valid, 1399
always viewed with suspicion, 1399
guardian must show otherwise, 1399
Choice of, 1327
when minor may make, 1327
how made, 1328

(References are to sections.)

GUARDIANS — *Continued.*
cannot choose one person as guardian for estate and another for his person, 1328
Court need not appoint unless suitable, 1328
once exercised cannot again, 1328
does not extend to testamentary, 1328
where made, 1328
form of, 1328
parents, 1329
dying requests of, 1329
Courts, 1330
duty of, 1330
must act before allowed, 1490
Custody of ward, duties as to, 1369
may enforce right, 1369
may apprentice ward, 1370
form of indenture, 1371
form of judge's certificate, 1371
entry of approval, 1371
Carrying on business of ward, 1379
guardian does so on his own responsibility, 1379
should not be done without order of Court, 1379
Conversion of real estate into personalty loses its ancestral quality, 911, 921
Can not purchase property of, 1403
Death:
Executor or administrator of guardian to settle account, 1499
Distribution:
Of assets in kind, power as to, 751
Received in, liability, 1380
Of funds from proceeds of sale of ancestral real estate, 915, 921
Duties, etc., Statutory:
Of guardian of person and estate, 1367
account to render, how and when, 1367
effect of failure to render, 1367
no extra fees allowed, 1367
education of ward, to attend to, when, 1367
funds, full itemized statement of, to render, 1367
insurance of buildings on which money loaned, 1367
inventory to make and file, how and when, 1367
effect of failure to make, etc., 1367
loan or invest money of ward, when and how, 1367
effect of failure to loan, etc., 1367
management of estate, 1367
payment of debts, 1367
prescribed by statute, 1367
settlement of estate, 1367
suits to attend to, 1367
Of guardian of estate, 1316
Of guardian of person, 1313
Definition, 1305
Domicile, what is, 1322
minor cannot change, 1322
mother cannot when, 1322
guardian cannot, 1322
at death of parent fixes, 1322
Distinction between and executor, 1361
Debts, collection of, 1381
guardian must collect promptly, 1381
if not acts at his peril, 1381
should be cash, 1381

(References are to sections.)

GUARDIANS — *Continued.*
Debts, of ward, 1380
cannot pay if barred by statute, 1381
guardian must pay, 1380
when Court may order, 1380
promise to pay not within statute of frauds, 1380
Deposit of fund, 1389
Divorce cannot bring, 1383
Evidence:
party can not testify when adverse party is, except, 11495 G. C.
when assignee or vendee of guardian is adverse party, 11494 G. C.
Error from appointment, 1342
Education, duties as to, 1375
according to ward's estate, 1375
must be proper, 1375
Father must consent when, 1312
Foreign guardian, 1475
See FOREIGN GUARDIAN.
Has no right to convert personalty into realty or realty into personalty, 1386
How duties enforced, 1362
Inventory:
form, 1368
record of, when to be made, 1594 G. C.
when to be filed, 1368
when guardian to file and what to contain, 1367
effect of failure to file, 1367
what should contain, 1368
Investment of funds, 1385
duties of guardian to make, 1367, 1405, 1398
effect of failure to make, 1367
first mortgage, 1385
good faith and diligence required, 1385
how invested, 1385
in what securities to be made, 1367, 1398
must make as provided by law or at his own peril, 1385
testamentary, follow will, 1385
United States bonds, 1385
Investment of funds in lands, 1386
application for, 1386
when filed, 1385
form of, 1387
entry on, 1387
application to sell such land, 1387
entry on, 1387
how made, 1386
must be productive real estate, 1386
Interest on funds, 1388
rate on, 1388
when charged with, 1388
when guardian uses funds, 1388
Kinds, 1305
Letters of, 1341
form of, 1341
Lease of real estate:
Appointment of appraisers, 1439
Order to appraise, 1440
Power of guardian to make for three years, 1432
When guardian may make for fifteen years, 1433
application for such lease, 1434
essentials of, 1435
form of, 1435

(References are to sections.)

GUARDIANS — *Continued.*
notice, 1437
joint application for, 1438
report of appraisers as to, 1438, 1440
hearing and orders thereon, 1441
order authorizing, 1442
provisions as to improvements, 1443
extending beyond minority to determine, unless, etc., 1445
effect of death of ward, 1445
effect of death of one of several, 1445
lien of tenant for improvements, 1445
Power of guardian of idiot, etc., to make, 1525
when such lease to determine, 1525
lien of tenant for improvements, 1525
lease for three years, without order of Court, 1526
when guardian of idiot, etc., may make long lease, 1526
application for, 1527
proceedings on application, 1528
report of appraisers as to, 1528
when guardian to give bond, 1528
hearing and orders, 1529
Report of guardian, 1444
Termination of, 1445
Power to lease real estate for petroleum oil or natural gas purposes, 1452, 1446, 1447
Court to prescribe terms, 1450
petition therefor, 1453, 1448
what to contain, 1448
notice of hearing, 1454, 1449
Court to prescribe terms, etc., 1455
Power to lease real estate for mining purposes, 1456, 1451, 1452
appraisement, 1454
petition; time for hearing, 1457, 1453
land to be viewed by disinterested freeholders, 1458
order to, 1455
Probate Court to order lease, 1447
royalty; report of by guardian, bond to recover, 1448, 1456
report of guardian, 1456
change in terms of leasing, 1448, 1457
lands owned in common by minor, 1449
owned in common, 1458
Liability:
For failure to invest ward's money, 1367
For failure to list or pay taxes, 1392
For failure to file inventory, 1367
For failure to render account, 1367
For loss of money deposited in bank, when, 1385, 1389
For lease of ward's premises for sale of liquors, 1378, 1432
Of married woman, guardian of idiot, etc., 1512
Marriage:
Of female guardian determine guardianship, 1356
Of female ward determines guardianship of person but not of estate, 1356
consent of guardian to marriage of, necessary, when, 27-2117
before license issues for, 1997
or before marriage solemnized after publication of bans, 1997
May bring action to construe trust, 34
Minor, who is, 1321
Money on hands at final settlement, 1388
Mortgage in lieu of surety, 1335
form of, 1335

(References are to sections.)

GUARDIANS — *Continued.*
Maintenance, duties as to, 1373
fixed allowance made by Court, 1377
not responsible unless he contract for same, 1373
not limited to income, 1373
no rigid rule can be adopted, 1373
cannot desert ward, 1373
examples of amount allowed, 1373
Management of estate, 1378
guardian has absolute control, 1378
liable if acts result injuriously, 1378
must act honestly, 1378
Management of real estate, 1392
has full control, 1392
can neither sell nor release except as provided by statute, 1392
must list for taxation, 1392
Mortgage of lands, 1459
statute must be followed, 1459
where action brought, 1461
when may, 1461
for whom may, 1462
application, when filed, 1463
what should contain, 1464
essentials of, 1465
form of, 1466
proceedings upon filing petition, 1467
viewers when appointed, 1468
amount to be borrowed, 1469
report of rate, etc., 1470
order to guardian, 1471
confirmation of report, 1472
entry, 1473
report of execution of mortgage, 1474
mortgage, form of, 1474*a*
Natural, 1306
only exists as to person, 1306
when recognized, 1306
when mother is, 1306
Notice to parties, 1326
not essential unless statute requires, 1326
parent must have, 1326
Non-resident guardian and ward:
Application for sale of real estate by, where to be made, 1481
Property in this State may be recovered by, 1480
Provisions as to resident guardian apply to, 1481
Rights of, in this State, 1480, 1481
Sale of land of non-resident ward, 1481
Security, additional, may be required of, 1481
Of estate:
Appointment of, 1311
Chosen by minor, 1327
Executor or administrator can not be, 1331
Power to sell ward's lands, 1405
to lease ward's lands, 1432, 1433
Statutory duties, 1316
Of person:
Appointment, 1311
Bond, 1314
Chosen by minor, 1327
Executor or administrator may be, 1331

(References are to sections.)

GUARDIANS — *Continued.*
Statutory duties, 1313
Of person and estate:
Appointment, 1311
Executor or administrator can not be, 1331
Power to sell ward's lands, 1405
to lease ward's lands, 1432, 1433
Statutory duties, 1367
Order of appointment, 1339
cannot be impeached collaterally, 1339
form of entry, 1340
should show jurisdiction, 1340
should show parents' consent or notice, 1340
Oath:
Of guardian of person and estate or either, 1367, 1314
to accounts, 1367
examination under, as to, 733
to inventory, 1367
to statement of ward's estate, 1323
to petition for leave to sell real estate, 1413
who may administer, 1336
Of freeholders, on report as to lease of ward's estate, 1438
Occupying claimant:
In proceedings as to, § 11915 G. C.
Rights of, holding under sale and conveyance made by, 11908 G. C.
Partition:
May assign dower, 1396
Power of, to act for ward in, 1383, 1396
Person under, may make will, 1024
Power of Court over, 1363
guardian's discretion, 1363
should not be exercised when, 1363
Procedure when Court directs manner of executing trust, 1364
application, 1365
entry, 1364
form of citation, 1364
Power over person and estate, 1366
Parent, when may receive compensation for maintenance, 1374
father ordinarily not, 1374
exceptions where child's estate abundant, 1374
mother usually allowed, 1374
Personalty received from ancestor of ward, 1390
must be approved by guardian, 1390
if not must convert into money, 1390
Residence, how determined, 1322
Resident of county, 1322
Responsible when, 1361
Rights of parents, 1366
Rights to services of ward, 1372
when lives in family, 1372
when makes earnings elsewhere, 1371
Religious instruction, 1376
should be that which accords with ward's relations and friends 1376
Rents, 1393
guardian should collect, 1393
Repairs, 1443, 1394
should make ordinary, 1394
extensive not without order of Court, 1394
Rights of action against ward, 1401

(References are to sections.)

GUARDIANS — *Continued.*
Removal:
See REMOVAL OF GUARDIAN.
Causes for, 1358
same as trustee, 1360
religious teachings, 1360
attempt to alienate from parent, 1360
improper education, 1360
Failure to give new bond, for, 1348
How long powers shall continue, 1354
Inventory, may be removed for failure to file, 1367
Jurisdiction of Probate Court over, 27, 1359
Marriage of female guardian, effect, 1356
of female ward, effect, 1356
Notice to guardian, 1358, 1477
Procedure for, 1359
Removal from State of guardian, 1358
of ward and appointment of foreign guardian, 1476
removes resident guardian, when, 1477
notice to guardian, 1477
order of Court, 1479
When guardian discharged, 1355
Resignation:
Court may accept and appoint another, 1357
Road cases:
Appeals in, 1785, 1787
Sale:
Coal, fire clay, etc., 1522
Sale of personal property:
Guardian has full power, 1391
No order necessary, 1391
Not usual to sell family pictures, 1391
Purchaser not bound to inquire, 1391
When may be made, 1405
Sale of real estate:
Appraisers, appointment of, 1418
oath of, 1421
Appraised value, not to be sold at less than two-thirds of, 1425
Appeal, 1431
Bond to be given before, 1422
Court can not waive giving, 1422
form of, 1423
giving is jurisdictional, 1422, 1424
Confirmation of, and deed, 1429
Court must look after interests of ward, 1417
Consent to sale by executor, etc., may be signed by legal guardian, 838
but not by guardian of person, 838
Deed, form of, 1430
Error, 1431
Foreign guardian of foreign ward may make, 1481
additional security may be required of, 1481
when land situated in more than one county, 1481
Guardian *ad litem*, when should be appointed, 1417
power to appeal case, 844
Hearing, 1418
Insane person of, 1522
sale or adjustment of dower, 1523
Joint application for, 1405
Jurisdiction of Probate and Common Pleas, 28
Liens, Court to determine priority of, 814
Nature of action, 1404
Order to appraise, 1420

(References are to sections.)

GUARDIANS — *Continued.*
Order of sale, how made, 1425
form, 1426
Petition for, 1410
essentials of, 1411
form of, 1412
notice of filing and hearing, 1413
ordering notice, 1414
service of notice, 1415
form of notice, 1416
of idiot, etc., 1522
wife of, to be made party, 1522
answer of, consenting to sale, effect, 1522
Parties to action, 1408
when next of inheritance, 1408
when liens on property, 1408
Private sale, when, 1425, 1428
terms, 1425
of idiot, etc., 1522
Proceedings when actions determined by Probate Court, 814
Purchaser, who can not be, 492, 889
Purposes for which sale may be had, 1405
of real estate of idiot, etc., 1522
Public sale, 1427
Release and satisfaction of liens to be entered of record, 814
fee for recorder, 814
Remedy of purchaser at invalid sale, 902
Report of, 1429
Survey of into town lots, may be made, 1410, 1418, 1425
Terms of, 1425
Where brought, 1406, 1407
What may be sold, 1409
When order should be granted, 1419
Service:
Service on by summons, 839
by publication, when, 841
in appeals in road cases, 1818
Guardian *ad litem* can not waive notice or service of, in action for sale of real estate by executor, etc., 844
Settlement:
By executors of deceased, 1499, 1500
Effect of, 1493
Review of, 1493
With succeeding guardian, 1496
With ward, 1496
Sureties on guardian's bond:
Exceptions to, 1343
notice of, 1343
Liability, limited to penalty in bond, 1353
fixed by order of Probate Court, 1353
conditions of bond control, 1353
where there are different bonds, 1353
on bond for sale of real estate, 1353
when receipt of ward does not release, 1353
Release of, 1348
notice of application, 1348
extent of liability of original, 1348
Statement of ward's estate to be filed, 1323
Same powers as trustee, 1361
Termination of trust, 1355

(References are to sections.)

GUARDIANS — *Continued.*
no power after, 1355
Taxation of costs of account, 1494
Taxes:
May release ward's tax title, 1395
tender of release, its effect on subsequent costs, 27
Must list and pay taxes on ward's land, 1392
compensation for money, etc., advanced to pay, 1392
Unreasonable delay in collecting and paying debts, 255
Various kinds, 1317
Who may be, 1331
administrator or executor cannot, 1331
Probate Judge cannot, 1331
non-resident of State cannot, 1331
married woman can be, 1331
Who should not be appointed, 1332
ought to possess ability of ordinary trustee, 1332
ought to have confidence of ward, 1332
Ward's right of action against, 1400

GUARDIANSHIP —
Appeal from removal, 1342
Appointment before appeal can be taken, 1342
Circuit Court to review order, 1342

GUARDIAN AD LITEM —
Appointment, 845
Answer, 845
Appropriation of property by municipal corporation, appointment of, 1756
By whom appointed, 1384
Cannot enter appearance of ward, 1384
Defense of infant must be made by, Id., 1384
Duties and compensation, Id., 845, 844
Duty as to appraisement of property, 1396
In sale of real estate by guardian, 1417
Need not be appointed in action for sale of real estate by executor, etc., unless, etc., 844
entry, 845
Can not waive notice or service of summons in such action, 844, 843

GUARDIAN OF DRUNKARDS —
Appeal from order appointing, 39
Appointment of for, when and how, 1535
Duties, rights and liabilities, 1535
Guardian of drunkards minor children unless, etc., 1535
Incapacity to contract, 1538
Law relating to guardians generally, applicable, 1534
Mortgage of real estate by guardian, 1460-1472
Notice to be served on person before application, 1537
sale thereafter void, 1537
Procedure to appoint, 1536
Procedure to terminate, 1541
Sale, gift or conveyance after service of notice void, 1537
Termination of, 1540
When order to be made, 1539
When to be appointed, 1535

GUARDIANS OF LUNATICS, ETC.—
Application for, 1504
form of, 1505
entry on, 1506
notice, 1506
form of, 1507
Appeal, 1515
Accounting:
See GUARDIANS.
exceptions to, 1517

(References are to sections.)

GUARDIANS OF LUNATICS, ETC.— *Continued.*
how opened up, 1517
settled, 1513
when and how, 1499
Action by, 1521
not to abate by termination of guardianship, 1521
Answer of, 845
Appeal from order appointing, 39
Appointment of, when, 1501
when wife to be appointed, 1512
liability and sureties, 1512
Court having jurisdiction, 1502
Completion of, of real contract of, 1398
when additional bond required, 1398
Dower, sale of insane widow's, 1523
procedure in assignment, 1525
answer of wife of idiot, etc., consenting to sale of contingent, 1522
Defense of, by guardian, 1384
Duty as to existing contracts, 1519
may pay attorney of ward, 1519
Duties of, as to welfare, 1518
not limited to income, 1518
fancied enjoyments allowed, 1518
wards should be kept comfortable, 1518
Entry finding person incapacitated, 1510
Effect of finding of disability, 1511
right to marry, 1511
right to make will, 1511
right to contract, 1511
Error, 1515
For whom made, 1503
Foreign, of foreign idiot, etc., may sell property in this state when, 1483
See FOREIGN GUARDIANS.
may collect money, how, 1282
Guardian of ward's minor children, unless, etc., 1501
Hearing, 1508
Insolvency of estate, 1520
suit for ward, 1521
Imbecile defined, 1501
Improvement of real estate, 1530, 1398
proceedings, 1531
may unite with owners of adjacent property, 1532
guardian's report, 1533
Lunatic, imbecile, etc., 1533
Laws of ordinary guardians apply, 1516
Lease of real estate of ward, when and how, 1525
when to determine, 1525
lease for three years without order of Court, 1526
lien of tenant for improvements, 1525
when long lease may be authorized, 1526
application for, how made, 1527
what petition must contain, 1527
proceedings on petition, 1528
report of appraisers, 1528
final order on hearing, etc., 1529
Mortgage of real estate by guardian, 1460
petition therefor, 1464
proceedings upon filing a petition, 1467
amount to be borrowed, 1469

(References are to sections.)

GUARDIANS OF LUNATICS, ETC.— *Continued.*
acceptance and confirmation of report and terms, **1472**
Notice of guardians appointment, 1501
Notice of filing account to be published, 729
Nature of proceedings, 1508
Partition, power to act for wards in, 1383
of foreign guardian, Id., 12045 G. C.
Review of settlement, when and by whom, **1516**
notice of motion for, 1516
Removal, 1514
Sale of lands by foreign, 1481, 1483
Sale of dower of insane widow, 1523
Sale of real estate of idiot, etc., when, 1522
petition for, 1522
terms of sale, 1522
private sale, when, 1522
wife may be made a party, 1522
effect of her answer consenting to sale, 1522
Vouchers signed by ward not allowed on settlement, 1516, **1517**
heretofore signed and allowed void, 1516
When order should be made, 1509
Who should be appointed, 1512
Ward, minor children of to be guardian of when, **1501**
Wife to be appointed, when, 1512
bond of and its effect, 1512
liabilities of sureties of, 1512
When and how guardianship shall terminate, **1513**
Wrongful death, compromise for, 1367, 1387

H.

HABEAS CORPUS —
Answer of respondent, 1968
form of, 1968
Adjournment of cause, 1969
Appeal, 1975
A statutory right, 1951
Application, who may make, 1954
requisites of, 1955, 1962
form of, 1956
what should be stated in, 1956
Cannot be used to review or revise error, **1953**
Definition, 1951
Entry discharging, 1972
Entry remanding prisoner, 1973
Error, 1975
Essentially civil, 1951
Entry ordering writ, 1959
Form of, when not in custody of officer, 1963
Form of, when in custody of officer, 1964
How prisoner designated, 1961
How served, 1965
Hearing, 1971
Is a special proceeding, 1951
Jury, not entitled to, 1971
Jurisdiction of Probate Court, 1952, 28
Return of writ, 1966
what it shall contain, 1968
form of, 1968
Second application, 1974

(References are to sections.)

HABEAS CORPUS — *Continued.*
Should be brought where defendant is, 1952
Venue, 1952
Who entitled to, 1953
When must be granted, 1958
Who may issue, 1960
When prisoner discharged, 1970
HABITUAL—
Drunkenness, 220
Habitation, 74
HEIR—
See DEVISEE — DISTRIBUTION — LEGATEE.
Adopted, right of, 1888, 1898
Advancements made to, 928, 934
Allowance to widow, may ask review of, 333
Appraisement, must be notified of, 288
may be present at, 292
Claim against estate, may require executor, etc., to reject, 561
must file bond in such case, 561
may give bond to creditor to prevent payment of claim not due in two years, 571
Contribution to pay claims after settlement, 587, 588, 593
See CONTRIBUTION.
Concealing assets, etc., of estate, may complain against person, 395
Completion of real contracts, parties in action for, 523
may have an action for, 532
Contest of will, parties to, 12080 G. C.
Contribution by, to pay claims, etc. See Contribution, Devisee, 1064, 1210, 587, 593
Creditors, proceedings by, against, 585, 593, 590
of subrogated to right, etc., 759
attachment, 759
Debt of to estate may be taken out of share of, 760
statute of limitation as to, 760
Debt due from is in asset, 392
Descent and distribution, order of. See Descent and Distribution, 915
Disinheritance of 1181, 1202
Designation of heir at law, 1902
See DESIGNATING HEIR AT LAW.
Desperate claims may be filed in Court for the benefit of, 456
Distribution, may compel payment of order of, 761
Dower, assignment of by, 951
See DOWER.
minor not to be prejudiced by, 957
Entitled to possession of real estate, 799
Estate of liable, after death, 589
Foreign executor, rights of as to, 190
Guardian's sale of real estate, parties to proceedings, 1522
How construed, 1196
Inherits property, if will not probated, when, 1084
Inventory, may compel filing of, 303
Insolvency of not to affect others, 591
Liability of, for claims against estate, 587, 585
Provision against contesting will, 1203
Parties to action for sale of land, 833
on administration bond, 261
on rejected claim, 561
to complete real contract, 523
to contest will, 12080 G. C.
Requisition to reject claim, 561-568
Revivor of action by and against, when. Id., 11407-11409 G. C.
of judgment, 11649 G. C.
Restraint of alienation, 1204

(References are to sections.)

HEIR—*Continued.*
Sale of real estate, parties to action for, 833
may sell interest in subject to debts, 749, 847
title of, to land be sold, 850
Transfer of real estate to. 1111a
Unknown, proceedings against C. C. P., 11298 G. C.
service by publication. Id., 11298 G. C.
When party may testify, when adverse party claims as. Id., 11495 G. C.
When Probate Judge interested as, effect, 9
HEIRS, LEGATEES, DEVISEES AND DISTRIBUTEES—
Account, foreign executor, etc., may be compelled to, at suit of, 190
Action by to enforce order of distribution, 761, 779
to enforce contribution, 593
on administration bond to recover share, etc., 265
for maladministration, 269
to review widow's allowance, 333
asking direction of Court respecting estate, when, 33
Action against by creditors after settlement, 585
See ATTACHMENT.
contribution to be made, how, 587
creditors to proceed against all in one action, 590
estate liable after death, 589
heirs to indemnify one another in what cases, 593
jury may be called, when, 590
liability, in case of insolvency of heir, etc., 591
limitation of liability under will, 587
limitation of bringing action, 587
new parties may be made, 592
Action against by executor, etc., asking direction of Court respecting estate, 33
Appeal in action to enforce order of distribution, 785
Appraisement, notice to be served on, at taking of, 299
Bond to secure claim rejected at instance of heir, 561
to executor, etc., for payment of legacy, etc., within two years, 696
to prevent sale of land, 826
to creditor for payment of claims not due in two years, 571
refunding, to foreign executor when suits pending, etc., 190
indemnifying, when distributees to give to executor, etc., 751
Contribution may be required of, when and how, 1207, 1213
Contribution to raise portion for absent or posthumous child, 1064
portion of child, when subject to, 1210
when devised or bequeathed property taken to pay debts, 1207
when any liable are insolvent, 1211
in action by creditors to pay claims after settlement of estate, 587
heirs, etc., liable to contribution among themselves, 593
action to enforce, 593
Desperate claims may be sold or filed in court for benefit of, etc., 456
Debt against, 798a.
Foreign executor, etc., may be compelled to account at suit, 190
refunding bond to, 190
Inventory, may attend at making of, 292
notice of taking to be served on, 288
Parties in action for sale of land, 833
on administration bond, 261
Proceedings by against persons suspected of concealing assets of estate, 395, 414
Property specifically bequeathed delivery of to, 474
Sale of land, parties in action for, 833
may give bond to prevent, when, 826
interest of in premises set off to widow may be sold, when, 850

(References are to sections.)

HEIRS, LEGATEES, DEVISEES AND DISTRIBUTEES—*Continued.*
When party can testify when adverse party claims or defends as. Code of Civil Procedure, 11495 G. C.
HEIRLOOMS—
No right in equity to recover, 397
HOME OF THE FRIENDLESS—
Commitment of girls to, 515
HOMESTEAD—
See SALE OF REAL ESTATE, EXEMPTIONS.
Assignment of, who entitled to, etc., 1598, 868, 867
on sale of land by executor, 857
by assignee of insolvent debtor, 1598, 1618
Property assigned subject to, 1549
Five hundred dollars in lieu of,1600
application for, 1600
HOSPITAL—
Admission to of epileptics, 10498 G. C.
HUSBAND AND WIFE—
See WIFE.
Husband:
Not relation of wife, when, 1194
Action for wrongful death brought for benefit of, 536
Adoption of children by, 1888, 1898
Assignment for creditors, election to be endowed out of proceeds of sale, 1600
Dower of. See Dower, 944
in ward's real estate, provisions as to, on sale of, by guardian, 1413
When they inherit from each other. See DESCENT, 915, 918, 921, 938
When entitled to letters of administration, 114, 120.
See LETTERS OF ADMINISTRATION.

I.

IDIOT—
See INSANE PERSON.
Action of, by guardian, 1521
See GUARDIAN OF LUNATIC, ETC.
Appeal—see APPEAL, GUARDIAN.
Appropriation of property of, 1677
Can not make will, 1022, 1020
Contracts, completion of real estate, 1398
Dower of, power of guardian to sell, 1523
Foreign guardian may dispose of effects of, 1483
Guardian appointed for, 1501
powers and duties, 1516
power of to borrow money and mortgage real estate, 1460–1472
wife of, may be, 1612
Improvement of real estate, 1530-1533
Inquest as to, 1999
Lease of real estate, 1525, 1529
Sale of real estate, 1522
Trustee of non-resident, powers and duties of, 1274
ILLEGITIMATE CHILD—
See BASTARD.
ILLITERACY—
How affecting qualification of executors, 79, 115
No ground for removal, 222, 226
IMBECILE—
Idiot. See Guardian, 1501, 1513
Defined, 1501
Improvement of real estate, 1530-1533
Power to make will, 1022

(References are to sections.)

IMPRISONMENT —
See CONTEMPT.
Of person refusing to produce will, 1079
Of person suspected of concealing assets, etc., of estate, 402
IMPROVEMENTS —
Executor cannot make permanent, 506
Lease of ward's lands to secure, 1433, 1525
Lien to tenant for, 1447
Of real estate of imbecile, 1530-1533
INALIENABLE RIGHTS —
Power to make will is not, 1017
INCOME —
Alteration and repairs:
To be used before principal, 1288
What is, 1290
INCOMPETENCY —
Removal of executor or administrator for, 213, 222
of guardian, 1358
INCOMPETENT—See GUARDIAN.
INCUMBRANCE —
See LIENS.
Upon real or personal estate no revocation of devise, 1058
Devisee takes subject to, 1058
Court may order receipt filed, etc., 798*a*.
application, 798*b*.
entry, 798*c*.
notice, 798*c*.
hearing and order, 798*d*.
hearing and order, 798*d*
receipt ordered recorded, 798*a*
INCHOATE DOWER —
What it is, 943
INDEMNITY —
Distributee to give bond of to executor, etc., when, 751
Executor, etc., before paying legacy may require bond of, 696
Surety of executor, etc., wasting estate may require bond of, 253
of foreign executor, etc., 193
INDEX —
Omitted by predecessor, probate Judge must make, 1586 G. C.
To records and dockets kept by Probate Court, 1594 G. C.
INDORSEMENT—
Of allowance or rejection of claim against insolvent's estate, 1628
decedent's estate, 609
See PRESENTATION OF CLAIMS.
On will deposited with Probate Judge, 1068
INDUSTRIAL HOME—
Commitment of girls to, 2128
See GIRL'S INDUSTRIAL HOME.
INDUSTRIAL SCHOOL—
Commitment and discharge of boys, 2128
See BOY'S INDUSTRIAL SCHOOL.
INFANT —
See CHILD, GUARDIAN, HEIR, MINOR.
Appropriation of property of, 1677
Action of by guardian or next friend, 1383
Adoption of, and change of name, 1888, 1898
Answer, what guardian of to deny in, 1383, 1384
See GUARDIAN AD LITEM.
Cannot make will, 1020
Contest of will, rights as to, 1112
Defense by guardian *ad litem*, 1383, 1384
Foreign will, rights of, as to record of, 1133

(References are to sections.)

INFANT—*Continued.*
Guardian of, rights and duties, etc., 1319
See GUARDIAN.
Limitation of action against heir, etc., after settlement, 587
Service of summons on, 841
When incompetent to testify under ten years of age. Code of Civil Procedure, 11493 G. C.
INHERITANCE—
Rules, of, 915
INHERITANCE TAX—
Administrators and executors, duties. See EXECUTOR, 2041
legacy shall be retained, 2041
payment to county treasurer, 2041
Accounts kept by treasurer, 2210
Actual value, court shall find, 2076
Appeal from final orders, 2091
how perfected, 2091
what is, 2092
who may, 2091
Application to transfer stock, 2099
Application to transfer assets, 2101
Application to release securities, 2102
Auditor reports to Probate Court, 2075
Auditor may examine deposits, 2095
Auditor appoints deputies, 2204
Appraisement of property, 2058
Bank deposits, situs of, 2030
delivery of, 2100
Bank corporation liable, when, 2096
Beneficiary liable to tax, 2040
Bonds, situs of, 2030
Brother, subject to tax, 2031
Burial expenses, exempt, 2029
Charities exempt, 2032
what are, 2032
Child exemption to, 2031
City, distribution to, 2213
Collection of tax, 2203
Collateral, 2014
Conditions of transfer, tax, 2022
Computation of tax, 2070
Commission of executor exempt, 2029
Constitutionality, 2015
Contemplation of death defined, 2020
Corporate stock situs, 2030
Costs of administration exempt, 2029
Costs of legislation exempt, 2029
Corporation not to transfer securities, 2095
Corporation not to give up deposits, 2095
liability, 2095
may give notice, 2095
transfer of stocks of, 2098
Court to determine amount on legacy, 2041
Courtesy—not subject to, 2064
Decedent defined, 2020
Deductions for United States tax, 2028
Deductions for general tax, 2029
Definition of terms, 2020
estates, 2020
property, 2020
succession, 2020
within state, 2020
decedent, 2020
contemplation of death, 2020
Delay of payment of tax, 2203

(References are to sections.)

INHERITANCE TAX — *Continued.*
Delivery of securities, 2100
Deposits, delivery of, 2100
Determination of value of limited estate, 2066, 2067
Discount on payment, 2043
Distribution of tax, 2213
Division of tax, 2212
Dower not subject to, 2064
Duties of auditor, 2058, 2062
Duties of Probate Court, 2051, 2062, 2076, 2082, 2088, 2107
Estate defined, 2020
Estates held in abeyance, 2072
Estates for life, how appraised, 2073
Erroneous, court may add, 2048
Error may be prosecuted, 2092
Essentials of application to fix tax, 2052
Exceptions, order finding value, 2080
filing, 2083
court to fix time, 2080
notice of time, 2086
hearing, 2084
entry, 2087
order of hearing, 2085
Executor, above commission, subject to, 2021
See ADMINISTRATOR.
to collect tax, 2037
to retain, 2041
to apply for order to modify, 2071
not discharged until he files certified receipt, 2094
Exemptions, property subject to, 2029
See GENERAL DEDUCTIONS.
widows allowance, 2025
public charities, 2032
Father, exemption to, 2031, 2034
Fees, 2211
Filing a notice of application, 2053
Final order, what is, 2092
Fixing value on real estate, 2064
Fixing value on personal property, 2065
Fixing value on limited estate, 2066, 2067
Foreign institutions not exempt, 2032
Forms, petition to remit interest, 2045
notice of application to remit, 2045
order remitting interest, 2045
application to fix tax generally, 2054
on administration, 2055
on non-resident, 2056
small estate, 2057
order to appraise, 2060
writ to appraise, 2061
notice of hearing before auditor, 2063
application to state insurance superintendent, 2068
report of auditor, 2075
entry determining tax, 2078
notice to fix tax, 2080
order exempting from tax, 2081
exceptions, 2084
order for hearing, 2085
notice of hearing, 2086
entry, finding, etc., 2087
certifying finding to auditor, 2089
of transfer to auditor, 2096
application to transfer stock, 2099
application to transfer assets, 2101
application to release assets, 2102

(References are to sections.)

INHERITANCE TAX — *Continued.*
General deductions, 2029
costs of administration, 2029
attorney fees, 2029
burial expense, 2029
commission of executor, 2029
costs of litigation, 2029
General rules for fixing residence, 2023
Good will asset, 2062
Grant, gift, etc., 2021
Hearing, unconstitutional without, 2015
Highest rate assessed, 2071, 2072
Historical, 2014
Husband, exemption of, 2031, 2032
Husband of daughter, exemption of, 2031, 2032
Increase, subsequent, 2019
Institutions within state, exempt, 2032
Interest, future, how determined, 2066
Interest on tax, due, 2043
Interest, petition to remit, 2045
Jurisdiction of Probate Court, 2050, 2051
Land contracts, situs, 2030
Law takes effect, when, 2018
Liability of executor, 2039
Liability of beneficiary, 2039
Liability of corporations holding deposits, 2095
Lien of tax, 2103
Life insurance, not subject to, 2062
Life insurance, when subject to, 2062
Market value, to determine, 2076
Minor, when interested, 2076
Monthly reports to state auditor, 2208
Motion to modify finding, 2090
Mother, exemption of, 2031, 2034
Mortgages, situs of, 2030
Municipal corporation, share of tax, 2213
Mutually considered child, exempt, 2031, 2034
Niece, exemption of, 2031, 2034
Nephew, exemption of, 2031, 2034
Non-resident, general rule, 2024
Notice of application to remit interest, 2046
of application to fix tax, 2055
of hearing before auditor, 2063
of finding of tax, etc., 2076, 2077
how served, 2079
that tax is fixed, 2080
of time of hearing exceptions, 2082
of transfer of deposits to auditor, 2096
of hearing exceptions, 2086
Object and purpose, 2017
Origin of law, 2013
Originates, when, 2214, 2215
Order. See FORMS, 2045
Order to appraise, 2061
to exempt from tax, 2080
determining tax, 2080
hearing exceptions, 2085
Payment, delay, 2103
on property charged with legacy, 2042
within one year, 2043
time limit, 2044

(References are to sections.)

INHERITANCE TAX—*Continued.*
Personal property, situs of, 2030
property, valuation of, 2065
liability of executor, 2040
liability of beneficiaries, 2040
Petition to remit interest, 2045
Power, conveyance by, 2021
Powers and duties of Probate Court, 2050
Probate Court, jurisdiction, 2050, 2051
motion to modify judgment, 2091
powers and duties, 2000, 2001
to final tax, 2076
to certify finding to auditor, 2088
record, to keep, 2107
Property defined, 2020
Property tax, tax is, 2016
Property in another state, 2026
Property not subject to tax, 2031
wife, 2031
child, 2031
father, 2031
mother, 2031
husband, 2031
adult child, 2031
adopted child, 2031
brother, 2031
sister, 2031
niece, 2031
nephew, 2031
wife of son, 2031
widow of son, 2031
husband of daughter, 2031
mutual relatives of child, 2031
widows year's allowance, 2025
Property on which tax is levied, 2021
resident, 2021
non-resident, 2021
grant, gift ordered, 2021
power, etc., 2021
Property not delivered until tax paid, 2037
may be sold for tax, 2037
charged with legacy, 2042
subject to lien, 2102
Proceedings on report of auditor, 2077
Prosecuting attorney, represents county, 2104
duty as to collection, 2104
Public charities exempt, 2032
Purpose of law, 2017
Rates of taxation, 2035
Real estate valuation, 2064
Record to be kept, 2107
Receipt, treasurer to give, 2094
Refunder, when incumbrance, 2066
over payment, 2071
Report of auditor to court, 2075
charged to whom, 2113
of auditor considered, 2077
Reports to recorder, 2109
Residence, general rule fixing, 2023
Resident of state, who is, 2023
Right to tax rests on property, 2016
Schedule of rates, 2031
of exemptions, 2031

(References are to sections.)

INHERITANCE TAX—*Continued.*
Securities, transfer of, 2095
Shares of stock, transfer of, 2095, 2097, 2098
Situs of property, 2030
land, 2030
personal property, 2030
corporate stocks, 2030
bank deposits, 2030
tangible personal property, 2030
mortgages, 2030
bonds, 2030
Sister, exemptions, 2031, 2032
Stock, transfer of, 2095
delivery of custody, 2100
Subsequent increase, 2019
Succession defined, 2020
Superintendent of insurance to calculate tax, 2066
Survivorship, tax on, 2021
Tax, property on which it is levied, 2021
when due and payable, 2037
collection of, 2102
time of succession, 2037
when can not be determined, 2037
executor to collect, 2037
property not delivered until paid, 2037
property may be sold, 2037
time of payment, 2038
certified receipt of its payment, 2094
on legacy, retained, 2041
to whom paid, 2043
distribution, 2113
computation, 2070
division, 2112
at higher rate, 2071
dependent upon contingencies, 2071
on estates in abeyance, 2072
where deemed to originate, 2114, 2115
Time of payment of tax, 2038
Time limit for payment, 2044
Tax commission, consent to transfer, 2095
duty, to see provisions of law complied with, 2106
appoints deputies, 2106
Taxation, rates, 2035
Township, distribution to, 2113
Transfer of securities, etc., 2095
stocks, etc., 2098
without knowledge, 2097
Treasurer to give receipts, 2094
to keep accounts, 2110
United States deduction of tax of, etc., 2028
Valuation of future limited estate, 2066
personal property, 2065
real estate, 2064
Widows, year's allowance exempt, 2025
Wife of son, exemption of, 2031, 2034
Wife, exemption of, 2031, 2034
Within the state defined, 2020
When inheritance is foreign, 2032
is not foreign, 2033
When law takes effect, 2018
Year's allowance of widow exempt, 2025

INJUNCTIONS—
See APPROPRIATION OF PROPERTY.

(References are to sections.)

INJUNCTIONS — *Continued.*
Power of Probate Court to grant, 25
In actions in Court of Common Pleas, 25
When may be granted by Probate Court, 25
Granted in appropriation proceedings, 1745
Proceedings in aid of execution, 1944
INJURY —
Action for, by wrongful death, 534, 536
See WRONGFUL DEATH.
INQUEST —
See ASYLUM.
Of lunacy, 1999
IN REM —
See DEFINITIONS, 543
IN PERSONAM—
Defined, 543
INSANE ASYLUM—
See ASYLUM, 1999
INSANE PERSON—
See IDIOT, GUARDIANS, ETC.
Action of, 1383
Appropriation of property of, 1677
Can not make will, 1018-1026
Contest of will, rights as to, 1112
Defense of, 1384
Dower of. See DOWER.
Election to take dower, or under will, how made for insane or imbecile widow, 1235
Guardian of, 1501, 1513
See GUARDIAN OF LUNATICS.
power of, to borrow money or mortgage real estate, 1460-1472
Improvement of real estate of imbecile, 1530-1533
Incompetent to testify, 11493 G. C.
Inquest as to, 1999
Lease of lands, 1525, 1529
Limitation of action by and against. See DISABILITIES.
Sale of lands, 1522
Trustee of non-resident, powers and duties of, 1274, 1300
INSANE DELUSION, 1022.
INSOLVENT ESTATES SETTLED BY ADMINISTRATOR —
Application for, 961
form of, 962
Action on rejected claim, 986
Act when commissioners not appointed, 963
Account, when and how compelled to render, 992
Action against when estate represented insolvent, 985
Claims to be presented, 970
Confirmation of distribution, 980
Commissioners appointed to audit claims, 993
contingent debts, provisions for, 982
dividend thereon and of residue, 984
when they become absolute, 983
Creditor may sue estate represented insolvent, when, 991
are barred from recovering claim when, 987
payment to after estate represented insolvent, 670
previously paid not liable to refund, 670
Claims not presented barred, unless, etc., 987
Costs when disallowed claim referred or litigated, 972
Disputed claim, in action on, may prove assets, 990
Distribution on return of list of debts, 976

(References are to sections.)

INSOLVENT ESTATES SETTLED BY ADMINISTRATOR — *Continued.*
Exceptions to report, 981
Exceptions to allowance of debts, hearing of, 976
Extention of time, 968
form of, 968
entry, 968
Entitled to preference for a demand, etc., 985
Form of notice, 966
How divided between two or more creditors, 989
Judgment on disallowed claim, 973
Limitation of action on disallowed claim, 971
List of claims to be filed, 967
Liable only for assets in his hands, 988, 990
Notice to creditors after insolvency declared, 965
Order declaring, 964
Order of distribution, 977
entry, 977
Presentation and proof of claims, 970
Prepartion of report, 974
hearing, 977
Report of payment of dividends, 978
form of, 978
Reference of disallowed claim, 969
Time allowed creditors to present claims, 967
When not to be declared, 959, 671
When to be declared, 960, 670
When claim is presented and rejected, before estate is represented insolvent, 985
When suit is brought against, of estate represented insolvent upon claim disallowed, 985
When action may be discontinued, 985
When demand is disputed, how action may be tried, 985
When Court to make further order of, 980
When creditor may sue after three years, 991
When surplus remains after paying debts allowed, 988
INSOLVENT ESTATE SETTLED BY COMMISSIONER —
Appeal from decision of, 1004, 1008
procedure on, 1005
form of bond, 1006
form of notice, 1006
report to Probate Judge, 1007
Appointed to audit claims, 993
Appeal from decision on disallowed claim, 1004
Allowance of, not to disturb prior distribution, 1010
Bond for, by creditor, 1004
Bond on appeal, 1004
Costs, 1004
Compensation of commissioners, 1012
Contingent debts, provisions for, 982
Creditor may appeal from decision of, 1004
may sue estate represented insolvent, when, 991
is barred from recovering claim, when, 987
payment to after estate represented insolvent, 670
Duties of, 995
Dividend thereon, and of residue, 984
Distribution after commissioner's return, 1011
Examination of claimants under oath, 1000
Eligibility of commissioners, 994
Hearing on claim, 1002

(References are to sections.)

INSOLVENT ESTATE SETTLED BY COMMISSIONER — *Continued.*
May swear claimants and witnesses, 1001
May reject claim, if claimant refuses to be examined under oath, 1000
Notice of meeting, 996
Notice of appointment, 996
form of, 997
Notice by executor, etc., 1004
Omission to appeal, how remedied, 1008
Oath of, 994
Presentation of claims, 999
Reference to, 994
Report of to Court, 998, 1003
Time allowed creditors to present and prove claims, 998
When proceedings to be instituted, 1008
When they become absolute, 983
INSURANCE —
Fire, 379
admr. to collect, 379
Life, 380
admr. to collect when, 380
devise of, 1026.
Mutual benefit, 381
not an asset, 381
Executor to keep property insured, 517
By life tenant, 1292
INTENTION —
Governs in construction of will, 1182
Essential to revocation of will, 1049
INTESTATE —
Inheritance of estate of, 915
defined, 110, 907
INTEREST—
Dower entitled to, 950
Discount of, of debt against decedent's estate paid before due, 570, 571
On sale of land by executor, etc., deferred payments to bear, 879
On sale of land by guardian, 1425
On legacies, 694, 675
On annuities, 694
On widows distributive share, 756
On claims paid, 672
On investments, 515
On release of ward's tax title, 1395
Rate of, 515
Chargeable to admr., 715
When executor, etc., chargeable with, 710, 515
When guardian chargeable with, 1367, 1388
INTEREST OF PROBATE JUDGE —
Duty in case of, 9
in appropriation proceedings, 1682
INTERESTED PERSON, 84n, 1142
INTOXICATION—
As to making will, 1022
As to removal of administrator, 220
INVENTORY —
See APPRAISEMENT.
Additional, when new assets discovered, 311
return of, 311
judge must enforce, 282
Administrator *de bonis non* need not file, 282, 281
Allowance to widow and children, 324
money to be set off is necessary, 325
stated in separate schedule, 324

(References are to sections.)

INVENTORY — *Continued.*
Appraisement in whose presence and how made, 292
appraisers must sign, 300
articles to be included in, but not appraised, 320
Appraisers, 284
how appointed, 284
when justice may appoint, 284
fees, 301
Bond, notes, and other securities included in, 296
Condition of bond, requirement as to, 83, 124
Contents, 281
Copy to be retained by administrator, etc., original to be returned to Court, 300
Debts and accounts, 295
Debts of executor discharged in will, 391
due testator from executor must be returned in, 389
Dead body, of property found on, 2859 G. C.
Definition, 280
Detailed statement required, 293
Emblements to be included in, 369
Exceptions to, 312
costs of, 312
examination of witnesses under oath, 312
finding to be entered on journal, 312
form of, 313
entry ordering notice, 314
notice, 315, 312
hearing and order, 316, 312
appeal, 317, 312
Executor and administrator together with appraisers to make, 287
Entry on, 308
Effect of revocation of letters, 309
Effect of as evidence, 318
administrator liable for, 318
administrator may show actual value, 318
is *prima facie* value, 318
Executor and administrator, inventory by, 389, 281, 303, 391
appraisement included in, 281
compensation of Probate Judge, 300
monthly statement of Probate Court to county auditor, 300
neglect or refusal to return, 303
priority of debt for taxes or penalty, 300
retention of copy and return of original, 300
removal for failure to return, 306
signing of, 300
tax inquisitors no allowance for, 300
taxation, Probate Court to send statement of to county auditor for, 300
Fees of appraisers, 301
Guardian, filed by, when to be, 1367
removal of, for failure to file, 1367
return of, may be compelled, 1362
Insolvent debtors, assignee of, what inventory to contain, 1594
Importance of, 280
Includes appraisement, 280
Include what, 298
all assets of estate, 298
administrator's own indebtedness, 298
leasehold estate, 298

(References are to sections.)

INVENTORY — *Continued.*
property not in possession, 298
animals *feroe natura*, 298
Limitation of time, 282
Money and bank bills, how inventoried, 297
Notice of time and place of making, when and to whom given, 287, 288
of hearing exceptions, 312
Notice for, 289
service of, 289
form of, 289
New assets, 211
Oath of appraisers inserted in or annexed to, 290
form of, 291
of executor, etc., as to contents, 302
by whom administered, 302
indorsed upon or annexed to inventory, 302
Omitted when, 282
Original to be returned to Court copy retained by executor, etc., 300
Partnership estate, 420–431
Probate Judge must inforce, 282
Real estate, 299
when included, 299
Return of, 83, 124, 281
how enforced, 303
application for citation, 304
entry and writ of citation, 305
removal for not, 306
excuse for not, 307
personalty discovered after, 311
revocation of letters on failure to return, 306
Residuary legatee need not return when, 57, 281
Separate enumeration of each item, 292
Signed by appraisers, 300
Special administrator must return, 133
Statement in lieu of, 283
form of, 283
entry, 283
Taxation, monthly statement of Probate Judge to county auditor for, 300
Value, how made, 294
bond, 295
debts generally, 296
bank bills, 297
When should be made, 280, 281
What articles shall remain in possession of widow, 322
When will directs that none be made, Court may require, 470
When may be omitted, 282
Who may attend, 292
INVESTMENT —
See MONEY ON DEPOSIT.
By guardian, 1385
in land, 1386
Court may order same paid over, when, 791
See TRUSTEE.
Executor or administrator to make of unclaimed money, 786
See ASSETS.
Guardian to make certain, for ward, 1367
Interest on, 515
when chargeable to administrator, 515
Securities, in what executor, guardian, etc., may make, 514
Trustee, when liable, 512

(References are to sections.)

INVESTMENT — *Continued.*
When executor to make, 515
application for, 516
INVESTMENT OF UNCLAIMED MONEY —
Application for, 787
Entry authorizing, 788
Executors may, 514
How, 786
How paid to owner, 791
application for, 792
entry ordering, 793
Judge accountable for safe keeping, 794
Return of, 789
When cannot be, 790
ISSUE—
Defined, 1197

J.

JOINT CONTRACT—
Liability of estate of decedent on, 624
JOINTURE —
What bars dower, 951
Effect of eviction from, 953
JOINT OBLIGATION —
Estate of decedent, 624
JOINT OR CO-ADMINISTRATION —
Definition, 201
Division of commission, 207
Court may divide, 207
parties may agree, 207
If they divide the work each will be liable for his own *devastavit*, 203
Joint letters not to be issued when, 201
Liability on bond, 202
Listing property for taxation, 205
must be where executor resides, 205
how where reside in different place, 205
May act independently of each other, 201
Notice of protest to one sufficient, 203
One cannot bind other in judgment, 203
One can collect all assets to pay debts, 203
Remedies against each other, 206
Sale of real estate all must join, 203
Separate, joint bonds, 202
When liable for acts of coadministrator, 202, 204
passive conduct not sufficient, 202
JOINT EXECUTORS —
Court may apportion commission between, 207
Debt when chargeable to, 390
JOINT WILLS —
Contract to make, 1170
Definition, 1170
Ohio decisions, 1171
Revocability, 1173
When admissible to probate, 1172
JOURNAL —
To be kept by Probate Court, 1594 G. C.
Approval of court as to distribution of notes, etc., to be entered on, 751
JOURNAL ENTRIES—See FORMS.
JUDGE—See PROBATE JUDGE.

(References are to sections.)

JUDGMENT — See ORDER.
Adjusting and settling various matters as to decedent's estate, 261
Appeal from, 39
Appropriation of lands by private corporation, confirming verdict in, 1715*a*, 1726*a*
Award of referees, 597
Collateral attack, 3-90
Claim rejected at instance of heir or creditor of decedent, 561
against assignee or trustee, 1628
disallowed against insolvent estate, how rendered, 973, 985
report of referees as to disputed claim, 602
Concealing or embezzling assets of estate, against persons suspected of, 408
lien of, 408
Distribution, to enforce order of, 774, 777
lien of, 774
transcript, when to be filed with clerk of Common Pleas, 413
duty of prosecuting attorney if judgment rendered in favor of State, 414
Fraudulent conveyances, judgment as to certain, 1580
Guardian must obey, what, 1367, 1313, 1362
Insolvent, apportioned when estate is, 990
Levees, judgment as to, 2002
Joint contract, liability of estate, 624
Lien of, 408, 413, 774
Revivor, 627
Road cases, appeals in, 1797
Vacation of modification of, 11631 G. C. to 11643 G. C.
When Court can modify, 6
See TERMS OF COURT.
JUDICIAL ACT—
Deputy cannot perform, 13
Definition, 239
Error lies from, 52
When acts of judge are, 13
JURISDICTION OF COMMON PLEAS—
See APPEAL COMMON PLEAS.
When Probate Judge interested, 9, 1682
JURISDICTION—
Can not be taken away by Federal Court, 55
Appointment of executor, 72
Appointment of administrator, 111
Appointment of special administrator, 131
Appointment of administrator *de bonis non*, 155
Appointment of ancillary administrator, 171
Arbitration of claims in favor of estate, 455
Appointment of trustee, 1276
Appointment of guardian, 1319, 1339
Appellate Court, 30
Assignee's sale of real estate, 1620
Appointment of guardian for lunatic, 1502
Adoption of child, 1901
Aid of execution, 1912
Can direct administrator to carry out contract, 27
Cannot direct administrator to allow claim, 27
Constitutional provision, 18
Common law actions, 21
may hear and empanel jury, 21
Concurrent, 28
Contempt, 1976
Distribution of personal property, 756, 781, 777
Election under will, 1214
to set aside, 1229

(References are to sections.)

JURISDICTION — *Continued.*
Execution of trust, 1295
Equitable, 20, 24
when has such power, 20
Exclusive, 27
Guardian's sale of real estate, 1406
Guardians generally, 1363, 1380
Growth of in Probate Court, 24
Habeas corpus, 1952
In appropriation proceedings, 1737, 1728, 1662
In appointment of assignees, 1544
In proceedings for embezzlement, 397
In management of trusts, 1253
Indenture of wards, 1369
Limited, 22, 3
what is meant by term, 22
Over foreign administrator, 187, 189
Origin of, 1
Power of Court to appoint trustee, 1253
Probate Court has common law, 19
Probate Court can direct administrator to receive payment of claim, 27
Probate Court cannot direct administrator to purchase monument, 27
Probate of will, 1086
contest of, 113, 1086*a*
Probate Court has only such as statute gives, 19, 22
Removal of administrators and executors, 208–209
Removal of guardian, 1359
Rejected claim in assignments, 1638
Suit on bonds, 261, 266, 269
Sale of desperate claim, 457
Suit against heirs for unpaid claims, 586
Suit on rejected claim, 610
Sale of real estate, 808, 813
Same rules to govern as Court of Common Pleas, 32
To review inferior courts, 31
To review widow's allowance, 335
To grant injunctions, 25
To appoint receivers, 26
To quiet title, 23
To open up accounts, 745
Termination of trust, 1304
To set aside fraudulent sales, 1584
To construe a will or trust, 33
Common Pleas Court has jurisdiction, 33
must be trust before Court will act, 34
not on after acquired property, 34
who may bring action, 34
for payment of legacies, 34
in order to ascertain title, 34
by guardian, 34
for year's allowance, 34
appealable, 34
When attaches prior to any other Court, 29
When Probate Judge interested, 9, 1682
JURY —
Administration of estates on bond of executor, etc., 277
in action by creditor against heirs, etc., 590
in action for damages for wrongful death, etc., 536
for concealing or embezzling assets, 408
Appropriation of property by private corporations, 1701
challenges, 1704
impaneling, 1703
oath, 1706
verdict, 1715*a*

(References are to sections.)

JURY—*Continued.*
view of premises, 1707
by municipal corporations, 1758
drawing of, 1760
verdict of, 1763
view of premises, 1762
Ditch appeals, county, 1850
See DITCH APPEALS.
view of premises, 1849
Clerk's certificate, 409
Concealed assets, 409
Drift, removal of, 2000
Fees. Code Civil Procedure, §§ 11203, 3008 G. C.
appropriation of property, 11089 G. C.
election of justice, contest of, 578 R. S.
In sale of real estate, 813
Order for, 409
Power to empanel, 21
Road appeals. See ROAD APPEALS.
Venire for, 409

JUSTICE OF THE PEACE—
Arbitration of claims against estate, duties as to, 594, 597
Claim against estate, may take affidavit of, 557
Contest of election of, 2012
Decedent's personal property, may appoint appraisers for when, 284, 285
form of certificate of appointment, 286
oath to inventory may be administered by, when, 302
real property, may appoint appraisers for, when, 406
certificate of appointment, to make, etc., 406
oath of appraisers may be administered by, 862
Insolvent debtor's property, may appoint appraisers for, when, 1594
Marriage:
duties of, before solemnizing, 2117 G. C.

JUVENILE COURT—
Absence of judges, 2151
Additional offense each day, 2199
Adoption procedure for, 2231
Affidavit, 2166
Agents of institution, 2236
Age limitations, 2198
Agreement to incorporate, 2231
Aiding or abetting delinquent, 2199
Appearance docket, 2159
Appeal and error, 2229
Appointment of probation officer, 2220
Association, committed to, 2194
in other states, 2238
Bail, 2225
Benevolent or charitable institution, 2187
Binding over to Common Pleas, 2241
Bond, forfeit, 2227
Bond, recognizance, 2245
Boys' industrial school, etc., 2187
Child under age taken to juvenile court, 2215
arrested, in police court, 2216
abusing, penalty, 2199
commitment, 2187

(References are to sections.)

JUVENILE COURT—*Continued.*
Child, etc.—Continued.
contract for care, 2235
delinquent defined, 2164
deformed, not brought into state, 2239
dependent defined, 2167
failure to support, 2203
penalty, charged with, 2242
trial of, 2187
Citation, 2169
after hearing, 2212
form, 2172
warrant, 2170
care, parental defined, 2164
chapter liberal construction, 2247
clerk of court, duties, 2155
Commitment, 2200
aiding delinquency, 2200
child, 2200
delinquent, 2200
institution, 2200
non-support, 2203
on continuance, 2211
temporary, 2211
Compensation of jurors, 2185
Condition of suspension of sentence, 2226
Contempt of court, 2169
Continuing guardian, 2168
Costs, 2185
Courts having jurisdiction, 2151
judge of, 2150
Definitions, 2155
delinquency, aiding, etc., 2199
delinquent child defined, 2160
delinquent, institution for, 2187
dependent child defined, 2162
designation of judge, 2152
Detention home:
agents of specified institutions, duties, 2236
association, incorporation, etc., 2235
association of other states, 2239
association, report of, 2237
board of state charities, etc., 2237
boys' industrial home, etc., 2241
construction of statute, 2247
county commissioners may establish, 2231
expense of, 2232
felony, child charged with, 2242
girls' industrial home, 2241
institution, to, 2235
matron, 2231
penalty, etc., 2242
religious belief, 2240
tax levy, 2232
ward when child becomes, 2233
Drawing jury, 2185
Duty and power as to dependent children, 2243
Duties and powers of probation officer, 2223
Each day additional offense, 2199, 2203
Error proceedings in, 2228

(References are to sections.)

JUVENILE COURT—*Continued.*
Evidence when may not be used, 2230
Expense, detention home, 2242
pursuit, capture, etc., 2218
Failure to support child, 2203
Felony, child charged with, 2242
Finding of court not evidence, 2230
Forfeit of bond, 2227
Fugitive from justice, 2169
Forms:
affidavit for publication, 2176
appointment probation officer, 2222
bond, non-support, 2207
citation, 2172
complaint for child, 2168
complaint delinquency, 2180
complaint non-support, etc., 2204
entry:
arrest at hearing, 2213
binding over to court, 2244
citation, order for, 2176
order for publication, 2179
order for warrant, 2183
placing child, 2194
plea of guilty, 2201
finding guilty, 2202
non-support, 2204
workhouse, 2209
notice to parents, 2173
oath probation officer, 2221
recognizance, 2245
warrant, 2183
Girl, age may be committed to industrial school, 2198
Girls' industrial home, commitment to, 2187
dependent not committed to, 2198
Habeas corpus, when writ may issue, 2159
Hearing, 2186
Historical, 2148
Home, private, may be placed in, 2187
Hospital, private, may be placed in, 2189
Hospital, public, may be placed in, 2188
Industrial schools, how construed, 2241
Industrial schools, commitment to, 2187
Institutions, 2189
Institutions for treatment, 2188
Jail, commitment to, 2211
Journal. See FORMS ENTRY.
docket, etc., 2155
Jury, that may demand, 2185
Jury, drawing, 2185
Jurisdiction of court, 2156, 2244
when it terminates, 2199
non-support, 2159
Justice of peace, transfer, 2215
Juvenile court defined, 2153
Juvenile judge defined, 2150
Judge, how designated, 2152
Judge to request report, 2237

(References are to sections.)

JUVENILE COURT—*Continued.*
Law, liberally construed, 2247
Maintenance, charged to parent, ——
Matron, qualifications of, 2231
Minors. See CHILD DEFINED, 2164
warrant for, 2179
Misdemeanors, against children, 2250
Nature of court, 2147
Neglect, 2213
Non-support, 2203
Notice to parents, 2169
Notice by publication, 2175
Ohio state reformatory, commitment to, 2187
Parental care defined, 2168
Parent defined, maintenance charged to, 2164
Penalty when child charged with, 2242
Permanent commitment, 2233
Physician's certificate, 2189
Police court, transfer from, 2215
Probation, statute relating to sentence not applicable, 1374 G. C.
Probation officer:
appointment, 2219
compensation, 2219
duties, 2223
oath, 2222
warrants, etc., issued to, 2217
when delinquent child to custody of, 2291
Procedure for adoption, 2233
Proper parental care, 2268
Prosecuting attorney's duty, 2224
Publication, notice by, 2175
Recognizance, form, 2245
Religious belief, 2240
Reputable citizen, child in custody of, 2187
Residence unknown, 2169
Seal of court, 2154
Separation of delinquent and dependent children, 2231
Sexes separate, 2231
Special room for trial, 2185
Suspension of sentence, 2226
Temporary commitment, 2233
Training school, commitment to, 2187, 2189
Trial, right to jury, 2185
by court, 2186
special room for, 2185
Warrant, right to issue, 2169, 2214
Who may file complaint, 2166
Workhouse, sentence, etc., 2210

L.

LABOR CLAIMS—
In settlement of estates, 647, 664
Preference in assignments, 1649, 1650, 1651

LABORERS—
Wages of, a preferred claim against insolvent debtor's estate, when, 1647
against estate of decedent, 647

(References are to sections.)

LAND—See Real Estate—Title—Descent—Wills.
LANDLORD AND TENANT—See Liquor Laws.
Lien of tenant for improvements made under lease of guardian of minor, idiot, etc., 1445, 1525
LAPSED LEGACY, 683
LAST SICKNESS—
Order of payment, 652
What it includes, 652
Expenses of, a preferred claim, 647
Expenses incurred in, 652
LAST ILLNESS DEFINED, 652
LAST AS APPLIED TO WILLS, 1139
LEASE—
Duties of administrator, 373
Guardian of minor to make, 1432, 1445
See Guardians.
of idiot, 1525, 1529
for petroleum oil or natural gas purposes, 1452
for mining purposes, 1456
Freehold, what is, 373
Permanent leasehold estate descend same as fee simple, 942
Permanent are freeholds, 373
Trustee of minor, idiot, etc., may make, 1278
Where deceased, lessee, assets, 373
LEASEHOLD—
Descends as real estate, 942
dower in, 949
LEGACIES—See Legatee.
Affects settlement of estates how, 674
Absolute, 680
Adeemed, 685
distinction between and satisfaction, 685
Annuities in nature of, 692
what are, 692
Abatement of, 693
order of, 693
Creditor to, 688
order of abatement, 688
Collection where enforced, 674
Conditional, 680
Cumulative, 681
Contingent, 679
Demonstrative, 677
defined, 677
Dower in lieu of, 687
order of abatement, 687
Debtor to, 689
is assets, 689
Discharge of debts in will against executor construed as, 391
must be included in inventory, 391
General, 676
defined, 676
gifts of stock, 678
Income, in nature of, 692
what are, 692
Land, charge on, 690
Life, for, 691
Lapsed, 683
what is,

(References are to sections.)

LEGACIES — *Continued.*
what is, 683
how occurs, 683
when does not, 683
Payment rules as to, 694
when should be, 695, 266
administrator may require bond, 696
form of, 700
entry, 701
sale of real estate for, 819
Paid within two years requires bond, 696
sale of real estate to pay, 819
Repeated, 681
Residuary, 682
See RESIDUARY LEGATEE.
defined, 682
Satisfied, 686
Substituted, 681
Stated amount, 682
Specific, 675
what is, 675
gifts of stock, 678
delivered how, 474, 675
abatement of, 675
Unpaid not subject to chattel mortgage, 674
Vested, 679
Void, 684
differs from lapsed, 684
LEGAL ADVERTISEMENT —
See SALE OF REAL ESTATE.
See ASSIGNMENTS.
LEGAL HEIRS DEFINED, 1196
LEGAL REPRESENTATIVES — See HEIRS, ETC., 912
LEGAL SERVICES — See ATTORNEY.
LEGATEE — See LEGACIES, DEVISEE, RESIDUARY LEGATEE.
Allowance to widow, may ask review of, 333
Appraisement, notice to of, 288
may be present at, 292
Bond, to give for payment of legacy, when, 474, 696
redelivery, 475
when may bring suit on bond of administrator, etc., 265
when Court may authorize suit on bond of administrator, etc., by, 269
Charged by will with payment of debt, effect, 587
takes land subject to charge, 1058
Concealing assets, rights against persons, 395
Contribution by, to raise portion for absent child, etc., 1064, 1210
to pay share of devisee witnesses to will, when, 1044
to pay legacies, etc., when devised property taken to pay debts, 1207, 1212
to pay claims against estate after settlement, etc. See Contribution, 587, 593
Creditors may bring action against, after settlement, when, 587
Debt due from is an asset, 392
Death of, legacy not to relapse, when, 1194
Distribution, may enforce order of, 761
Foreign executors, etc., rights as to, 190, 193
How may obtain legacy by action, 265
How may obtain legacy within two years, 696
Inventory, may compel filing of, 303

(References are to sections.)

LEGATEE — *Continued.*
may be present at taking of, 292
Not to be sold unless required to pay debts, 474
Notice to, of hearing of executor's, etc., claim against estate, 633
of making inventory and appraisement to be given to, 288
Party to contest of will, C. C. P., 12080 G. C.
in action on administration bond, 261
in action for sale of land, 833
Personal property specifically bequeathed to be delivered, when, 474
Probate Judge, when interested as, 9
Property bequeathed, takes subject to encumbrance, 1058
Residuary defined, 1033
See RESIDUARY LEGATEE.
bond of executor, who is, 57
not to discharge lien on real estate for payment of debts, except, 60
inventory, when not required to return, 57, 281
lien of decedent's creditors, land passing to, is subject to, 60, 281
takes deceased child's share of real estate, when, 1194
Sale of real estate to pay legacy of, 819
Sums paid to may be recovered, when, 159
Testimony, when adverse party claims as, 11495 G. C.
Witness to will, effect of beign, 1044
LEGITIMACY—
Of persons born bastards, how effected. See WILLS—DESCENT, 937
LETTERS OF ADMINISTRATION. See ADMINISTRATOR AND EXECUTOR.
Application for, to file affidavit and give bond, 114, 124
when and where made, 111
form of, 113
Bond must be given, 124
form of, 125
County in which granted, 72
Court should not appoint non-resident, 116
Creditor, 122
Definition, 108
Death of party for whom application is made, 109
Husband or widow entitled to, 120
abandonment, 120
adultery, 120
ante-nuptial agreement, 120
living apart, 120
In what county issued, 72
Jurisdiction, first obtained excludes others, 72
New, when to be granted, 306
Not to issue on estate of a life convict, 109
Not to issue as of right after twenty years, 64
when may issue after twenty years, 64
notice of appointment for, 64
Not to issue to Probate Judge, 9
Non-resident interested in business here, 170
No presumption of will, 110
Next of kin, 121
who are, 121
Order for, 129
form of, 129
Order of priority among those entitled, 117
Residence of administrator, 116
Renunciation, waiver, etc., 119
may be conditional, 119
Revocation of, 306, 741, 992

(References are to sections.)

LETTERS OF ADMINISTRATION — *Continued.*
by discovery of will, 162
To whom granted, 114
when in case of will probated without the State, 169, 1132
when persons entitled to are incompetent or neglect to take out, 114
To special administrator, 129
administrator with the will annexed, 100, 93
administrator *de bonis non*, 152, 64
To such person as the Court may see fit, 123
When in same degree, 118
Who entitled to, 114
Probate Judge is not, 9
Who is intestate, 110
Who may be appointed, 115
evidently unsuitable, 115
Will not issue of right after twenty years, 64
may issue, on petition, etc., 64
LETTERS OF GUARDIANSHIP —
See GUARDIANS.
LETTERS OF ASSIGNEE —
See ASSIGNEE.
LETTERS OF TRUSTEE —
See TRUSTEE.
LETTERS TESTAMENTARY —
Application for, 114
Application when made, 71
Application for appointment, 76
must state jurisdictional facts, 76
oath to, 77
form of, 78
Bond, 83
must be given, 83
amount, 84
form of, 84
when need not be given, 85
County in which granted, 72
Definition of executor, 68
Distinction between administrator and executor, 69
Decedent resident or inhabitant of county, 74
Estate to be administered, 75
judgment is, 75
unliquidated demand is, 75
How granted during minority, 93
In what county granted, 72
Issue to person named in will, when, 71
on estate of non-resident, 72
under will probated without the State, 1132, 169
Jurisdiction, first obtained excludes all others, 72
exclusive jurisdiction to grant and revoke, 27
Not to issue to Probate Judge, 9
Order of appointment, 88
form of letters, 87
form of entry, 89
effect of, 90
how may be attacked, 91
Power prior to letters, 70
Revocation of, 306, 741, 992, 491, 213
See RESIGNATION, REMOVAL, ETC.

(References are to sections.)

LETTERS TESTAMENTARY — *Continued.*
Renunciation of executor, 92
Who entitled to, 71
minor must attain majority, 93
Probate Judge not entitled to, 9
when to issue to foreign executor, 1124, 1132, 169
What Court should grant, 72
Will must be duly probated, 73
Who may be appointed, 79
named in the will, 80
legally competent, 81
residence of the executor, 82
LIABILITY —
Death by wrongful act, 534, 536
See WRONGFUL DEATH.
Executors and administrators. Inventory.
See ADMINISTRATORS AND EXECUTORS.
Guardians. See Guardians.
Heirs, devisees, etc., to contribution. See Contribution, 1064, 1207, 1212, 587, 523
Lease of premises for sale of liquors, 1378, 1432
Person refusing to produce will, 1079
Trustee for loss of money deposited in bank, 512, 513
See MONEY ON DEPOSIT.
Officer neglecting to serve or return process or pay over money, 2010
See AMERCEMENT.
LICENSE —
Minister of the Gospel, of, to solemnize marriage, 1997
to be produced to Probate Judge of county in which marriage solemnized, 1997
Parties of applying for marriage, 1997
LIENS —
Administration of estates:
Bond of residuary legatee does not discharge, except, 60
Concealing assets, of judgment against persons, 408
Debts, on undevised real estate for payment of, 1206, 1209
unaffected by provisions as to payment of, 666
Distribution, against executor, etc., to enforce order of, 774
Judgment of, 774
embezzling, etc., estate, 408
Mechanics, rights and duties of executors, etc., 519
On personal property of decedent created during his life time, order of payment, 666
Residuary legatee, bond of to pay debts does not release, 60
Sale of real estate, holders of parties in action for, 833
priorities of, adjusted in such action, 814
proceeds, applied to satisfy, order of, 903
Taxes, of executors, etc., for payment of, 1392
Assignment for creditors:
See ASSIGNMENTS.
Assignee takes subject to, 1631
Assignment does not affect priority of, 1647
judgment can not attach after assignment, 1646
Payment of by order of Probate Court, 1618
Sale of real estate free from, 1602
Title requiring decree to settle action for sale may be brought in Common Pleas, 1618
Guardians, etc.:
See GUARDIANS.

(References are to sections.)

LIENS — *Continued.*
Lease of real estate to discharge, 1433
of tenant for improvements, 1445, 1525
Of drunkard, after notice of appointment of guardian void, 1537
Sale of real estate to discharge, 1405
petition to describe, 1410
Sale of liquors on ward's premises, 1432
Taxes paid, of guardian for, 1392

LIFE —
Expectation of, 2142

LIFE ESTATE —
Devise for life, limited to heirs, how construed, 1188
With power of disposal, 821, 1193
construction of power, 1193
Rule in Shelley's case abolished as to wills, 1189
Given by will not enlarged to fee by power of sale, etc., 1193, 821
And remainders in shares of stock, 692
When widow may dispose of property, 1193

LIFE TENANT —
Alteration and repairs affects how, 1291
Gain and loss, affects how, 1290
Insurance of property, 1292
Principal and income affect show, 1288
Special assessments, 1292
Taxes of property, 1292

LIMITATION OF ACTIONS —
Administration of estates:
Administrator has no right to pay when barred, 608
Administrator cannot waive, 614
Action against heir, 617
Action against administrator *de bonis non*, 618–620
Barred if not sued in six months, 609
Barred by General Statute, 608
Bond of executor, etc., 267
Creditors by, against executors and administrators, 613
cannot acquire superior right, 612
on claims accruing after two years, 613
when administrator may be sued, 613
when assets received after two years, 615
new assets, 616
claim must have been presented, 613
on claim rejected by executor, etc., 609, 580, 610
assets received after two years, 615
of insolvent estate, 971
at instance of heir or creditor, 561
when administrator, etc., dies, etc., and new one appointed, 618
against administrator *de bonis non*, 619
when former administrator, etc., has not given notice of appointment, etc., 620
when notice of appointment is not given within proper time, and is given afterward, 548
special administrator, limitation of action when appointed, 150
time within which brought, 611
against heirs, devisees, etc., after settlement, 587
where brought, 610
on bond of executor, etc., 267
Different provisions, 607
Executors, etc., by, for death by negligence, 536, 535
to subject land fraudulently conveyed, 822

(References are to sections.)

LIMITATION OF ACTIONS — *Continued.*
Insolvent estate, failure by creditor to present claims a bar to recovery, when, 987
action against, when barred, 971
to remedy an omission to appeal from decision of commissioners of insolvent estate, 1008
Rejection of claim, what is, 560–610
Will, contest of, 1112
Assignment for creditors:
On claims rejected by assignee or trustee, 1628
Fraudulent conveyance, action to set aside, 1581
Guardian and ward:
To open and review settlement of guardian, 1493
of guardian of lunatic, 1516
LIQUOR LAWS —
Liability under, for lease of premises for sale of liquors, 1432
LIVING PERSONS —
Administration on estates of, 109
LOANS —
Duty of guardian to make, of money of ward, 1367
See INVESTMENTS.
of trustee of minor, idiot, etc., 1286
LOST RECORDS —
How restored. See Record, 12345 G. C.
LOST STOCK—
How restored. See RECORD, 12345 G. C.
LOST STOCK—
How re-issued, 2131
LOST WILLS—
Admission to probate, 1135
See SPOLIATED WILLS.
LUNATIC—See INSANE PERSON, GUARDIAN.
Power to make will, 1022
Election for under will, 1235

M.

MACHINERY, 365
See FIXTURES.
MAINTENANCE—
Duty of guardian of person to furnish ward, when, 1313
See GUARDIANS.
MALFEASANCE—
Proceedings on complaint against municipal officer for, 2121
MANDAMUS—
To compel judge to grant *habeas corpus*, 1958
MANSION HOUSE—See WIDOW.
Rent for, 372
Right of widow or widower to remain in for one year, 944
election of widow to take under will does not bar right, 1221
MANURE—
Personalty when, 367
Real when, 367
MARK—
Testator's signature by, 1038
Attesting witness' signature, 1041
MARRIAGE—
Certificate of to be transmitted to Probate Court for record, 2117
penalty for neglect to make record, 2117
for neglect to return certificate, 2117
Condition in will restraining, 1205
Dissolution of, effect on legitimacy of issue, 937
Does not revoke will, 1061

(References are to sections.)

MARRIAGE—*Continued.*
Disability of guardianship, 1511
Effect on previously born children, 937
Fines for illegal solemnization of, etc., how recovered, 27
License of minister to solemnize, 2117
Mayor may solemnize, 11182 G. C.
Must be valid before dower attaches, 945
Of administratrix and executrix, does not revoke her authority, 79, 115, 81, 27
Of female ward, determines guardianship as to person, but not as to estate, 1356
Of female guardian, determines guardianship, 1356
Of woman, does not revoke her will, 1061
Publication of bans for, 2117
evidence thereof required, when, 2117
evidence of consent of parent or guardian required, 2117
Record to be kept by Probate Court, 1594 G. C.
what to contain, 1594 G. C.
Who may solemnize and how, 2117
penalty against minister or justice for illegal solemnization of, 12921 G. C.
penalty for solemnization by unauthorized person, 12921 G. C.
Who may contract, 2117
when consent of parent or guardian necessary, 2117

MARRIAGE LICENSE—
Age, 27, 2117
Ministers, 2117
Residence, 2117
Relationship, 2117

MARRIED WOMAN—See MARRIAGE.
Liability on appeal in condemnation proceeding, 1779
Liability as guardian of idiot, etc., 1512
May make a will, 1018
Saving of rights in proceedings by creditors against heirs, etc., after settlement of estate, 1410
as to foreign wills, 1133

MARSHALING ASSETS—
See ASSETS.
In conformity with will, 832
When devised property taken to pay debts, 1207, 1209

MECHANIC'S LIEN—
Administrator's relation to, 519

MENTAL CAPACITY, 1021
See TESTAMENTARY CAPACITY.

MILITIA—
Bond of adjutant-general, sufficiency certified by Probate Judge, 2128
of treasurer of, to be approved by Probate Judge, 2128
Drafts, how conducted, 2128

MINING—
Power of guardian to lease real estate for, 1456

MINISTER—
May solemnize marriage and how. See MARRIAGE, 2117
To keep registry of deaths and report to Probate Judge, when, 2117
penalty for neglect, 2117

MINISTERIAL ACT—
Deputy can perform, 13
Definition, 239
Error does not lie from, 52

(References are to sections.)

MINOR—See CHILD, GUARDIAN, INFANT.
Appropriation of property of, 1677
Indenture of, 1370
See GUARDIAN for rights, etc., in relation to.
Can not make will, 1020
Consent of parents necessary for marriage of, 2117
Guardian for, 1321
To whom administration granted while executor is, 93
Guardian may consent to appropriation of property, 1678
form of, 1678
entry of notice, 1678
ordering conveyance, 1678
deed for, 1678
When entitled to homestead exemptions, 867
MISFEASANCE—
Proceedings on complaint against municipal officer for, 2121
MISTAKE—
See CONSTRUCTION OF WILLS.
When and how accounts of executors, etc., may be opened to correct 743
of guardians, 1493
of trustees, 1298
MONEY—
Assignee must deliver to successor, 1573
Assignor's property must be converted into, 1602
Distribution, order of, how enforced, 761
Executor's etc., commissions on amount collected, 654
Foreign guardian of non-resident ward can get, how, 1480
Found on body of unknown person, how disposed of, 2014
Inventory must contain account of, 297
and if none, must so state, 297
Investment of, by executors, trustees, etc., 514
by guardians, 1367, 514
belonging to heirs unclaimed, 786
Liability for deposit in bank, 1264
See MONEY ON DEPOSIT.
Must be inventoried and administered, 83, 124
Officer refusing to pay over, how punished, 2010
Order for payment of, how enforced, 2010
Proceedings against persons suspected of concealing, etc., 395, 414
Sale of real estate, proceeds arising from, how applied, 903
Trustees may get possession of, how, 1572
Unclaimed, how invested, 786
Widow and children entitled to, how much at appraisement, 325
Widow may receive in lieu of dower, 859, 825
Wife of assignor may receive in lieu of contingent right of dower, 1600
MONEY ON DEPOSIT—
By guardian, 1389
Custody, 512
Failure of bank, 513
Not assets, 378
When is, 378
MONOMANIA—
See TESTAMENTARY CAPACITY.
MONUMENT—
Court may allow for and credit to executor, etc., 651
See FUNERAL EXPENSES.
executor, etc., not bound to procure, 651

(References are to sections.)

MOURNING CLOTHES, 649
See FUNERAL EXPENSES.
MORTALITY TABLES —
See TABLES.
MORTGAGE —
Administration of estates:
By guardian, 1459
Inventory must contain particular statement of, 296
Mortgaged premises considered as personal assets, 386
executor or administrator may take possession of, 386
may release and discharge, 387
may foreclose, 388
Mortgagees necessary parties when, 833
Order of priority as to payment, 666
Sale of real estate, priorities adjusted in action for, 814
duty as to, 521
administrator cannot, real estate, 802, 815
application of proceeds for payment of, 903
payment on, 897
cannot be sold subject to, 815
deferred payments secured by, 890
Assignment for creditors:
When executed by husband and wife, 1601
by husband alone for purchase money, 1601
Void as to creditors, void as to assignee, 1549
Rights of assignee as to, 1579
Guardian, etc.:
May give in lieu of bond, 1323
Must take on loan of ward's money, 1367
Proceedings by to borrow money and mortgage real estate of ward, 1460–1472
Sale of ward's land to satisfy, 1405
deferred payments secured by, 1425
MOTHER—
See PARENT.
Consent of, when necessary for marriage of minor child, 2117
See EDUCATION.
Inherits property, when, 917
See DESCENT.
may inherit from or transmit inheritance to bastard, 936
May appoint guardian by will, 1307
See GUARDIANS.
MOTHER'S PENSION—
Act, to whom applies, 2250, 2269
Additional requirements, 2254
Allowance, to cease when, 2261
Amount allowed, 2252
Appeal and error, 2268
Application for support, 2261
Attempts to obtain by fraud, 2266
Benefit of child, 2253
Child, allowance for, 2255
Child, living with mother, 2250
Commissioners may transfer fund, 2264
Conditions of allowance, 2253
Detailed record, 2269
Disposal of funds, 2264

(References are to sections.)

MOTHER'S PENSION — *Continued.*
Forms:
Application for support, 2255
detailed record, 2269
entries, pending examination, 2256
allowance, 2258
discontinuance, 2260
extending allowance, 2261
refusing allowance, 2262
order to auditor, 2259
Fund, when insufficient, 2264
Journal entry. See FORMS.
Length of time of allowance, 2250
Modification of allowance, 2263
Motion to set aside, 2267
Penalty, to obtain by fraud, 2266
Persons, who may receive, 2251
Preliminary examinations, 2255
Probation officer to visit, 2250
Proceedings, record of, 2269
Provisions for tax levy, 2270
Qualifications of mother, 2253
Record, detailed, 2269
Record of proceedings, 2267
Tax levy, 2270
To whom act does not apply, 2265
Urgent cases to have preference, 2264
Visitation of homes, 2250
When allowance shall cease, 2263
Who entitled to, 2250

MOTION—
See FORMS.
Appropriation proceedings, for new trial, 1715*a*.
for abandonment of proceedings, 1725
Compel guardian to render account, 1367
Extension of time to collect assets, 445
Open guardian's settlement, 1516
notice of, 1516
Payment of ward's money to foreign guardian, 1282
Road cases, for new trial, 1822
Transfer of proceedings to Common Pleas when Probate Judge interested, 9

MUNICIPAL CORPORATIONS—
Appropriation of property by, for public use. See Appropriation of Property, 1750-1783
Devise of bequest to, when valid, 1028

(References are to sections.)

MUNICIPAL CORPORATION — *Continued.*
Proceedings against officers of, for malfeasance or misfeasance, 2006
citation for accused, 2006
order of, 2007
complaint, by whom and how made, 2006
form of, 2007
costs, 2008
security for, required of complainant jury, may be demanded, 2007
challenges of, 2008
prosecution, by whom conducted, 2007
removal of officer found guilty, 2008
trial, 2008
MUTUAL WILLS—
Power to make, **1173**

N.

NAME—
Change of, of adopted child, 1888
adult, 2129
NECESSITY OF ADMINISTRATION—
See ADMINISTRATION.
NEGLIGENCE—
See ADMINISTRATORS AND EXECUTORS.
See ASSETS.
Guardian, etc., Liability:
Libility for death caused by, 534, 536
See WRONGFUL DEATH.
NEWSPAPER — See NOTICE.
NEW TRIAL—
Appropriation of property by corporations, 1718
For what causes granted, 52
Motion cannot be made after term, 52
Road appeals, 1822
When and how application made during term, 52
When and how application made after term, 52
NEXT FRIEND—
Action of infant must be brought by, or guardian, 1383
See GUARDIANS.
May select certain property for minor child at appraisement, 320
NEXT OF KIN—
Defined, 122
See DEFINITIONS.
Damages to, for death by wrongful act, 536
Entitled to administration, when, 114
Inherit property, when, 915
Meaning in will, 1199
Notice to, before probate of will, 1067
before granting letters to, 114
Parties in action on administration bond, 261
Remedy against, on decedent's bond to convey land, 1057
When legacy demanded before two years, must give bond, 696
When may sue on administration bond, 269
NON-RESIDENT—
Administration on estate of, in business here, 170
to whom letters granted, 170
disposition of assets, 170
Appropriation of property, service on, 1692

(References are to sections.)

NON-RESIDENT — *Continued.*
Claims of executor, etc., against estate, service of notice of hearing on, 633
Distribution, to enforce order of, service on, 770
Foreign executor, etc. See Administration of Estates, 188
Guardian may recover property in this State, 1480
of minor, idiot, etc., 1282
may enforce collection of judgments, 1481
may sell lands, 1481
Road appeals, notice to appellants and obligors, 1818
Sale of lands by executor, etc., service on, 838
Service by publication, 840
Trustees of, powers and duties. See Trustees, 1274–1300
Widow's election, how taken, 1231
NOTES —
Inventory to contain particular statement of, 296
May be distributed in kind, when and how, 751
Negotiable cannot bind estate, 651
Not to be sold, when, 470
Promissory, given to secure resignation void, 210
not to be sold, 471
how inventoried, 297
given to administrator, 507
duty as to, 507
not subject of gift *causa mortis*, 1241
On sale of personal property, how taken, 483
Surviving partner purchasing partnership property may give, 427
NOTICE —
Administration of estates:
Account of administrator, etc., of filing, etc., 729, 732
costs of, 729
Appeal, 43, 45, 1008
Administrator *de bonis non*, 160
Appointment of administrator or executor, 544, 543, 551
filing of, purpose of, 546
See APPOINTMENT.
Object and purpose, 543
when and how given, 544
proof of, 546, 547
form of, 545
affidavit for, 546
liability of executor, etc., and sureties for failure to give, 550, 531, 543
failure to give extends time for bringing action, 620, 548
by administrator *de bonis non*, 621
when Court may allow, after proper time, 548
Petition for, 549
entry, 550
effect on limitation of action, 548
of application for, after twenty years, 64, 66
application for, 66
Bond, notice to executor, etc., that new bond is required, 248, 249
Claims of executors, etc., against estate, of hearing, 633
filing requisition to reject, 561
Desperate claims, of application for sale, etc., 459
of sale of such claims, 463
Disallowance of claim at instance of heir or creditor, 561
Evidence of, what is, 546
For leave of Court to bring suit, 273
Failure to pay over money, of filing petition against executor, etc.,

(References are to sections.)

NOTICE — *Continued.*
for, 761, 770
General for ancillary administrator, 176
How given when law does not direct, 37
Insolvency of estate, 965
form of, 966
of meeting of commissioners to receive claims, 996
of appeal from decision of commissioners, 1004
of filing petition on omission to appeal, 1008
Inventory and appraisement, of making, 288, 289
of filing and hearing exceptions to inventory, 312
must be in writing, 45
Non-resident:
See NON-RESIDENT.
Next of kin, 111
Public sale, 480
Removal of executor, etc., twenty days' notice, 213
Sale of personal property, 479, 495
See SALE OF PERSONAL PROPERTY.
of desperate claims, application for, 459
sale of, 463
of real estate, 883
See SALE OF REAL ESTATE.
notice of, in German or Bohemian newspaper, 885
of filing petition for, 838
waiver of, 838, 844
Sale of real estate, 841, 887
Surety's application for release, 243
new, 245, 246, 247
to executors, etc., when sureties insufficient, 248
To executor, 101
Will, of probate of, 1067
of application to probate lost, spoliated or destroyed will, 1144
to admit foreign will to record, 1125
of existence of will deposited with Probate Judge, 1070
publication of, to admit will to record when record destroyed, 1157
of appeal from refusal to admit will to probate, 1116
Appropriation of property:
By private corporation, by landowner to compel, 1735
to unknown or non-resident, 1692
By municipal corporation to property owners, 1754
of intention to appeal, 1778
Assignment for creditors:
Accounts, of filing and hearing, 1653, 729
Appointment of assignee, etc., 1557
Disallowance of claim on application of assignor or creditor, 1635
Dividends, of making and paying, 1653
to owners of unpaid dividends, 1653
Fraudulent conveyance, etc., of action to set aside, 1580
Sale of property, 1611, 1609
how given, 1625, 1609
Trustees' election, of time and place, 1564
of appointment, 1557
Ditch appeal:
County, 1833
Drift:
Removal of, appeal, 2119
Guardians, etc.:

(References are to sections.)

NOTICE — *Continued.*
Accounts, of filing and hearing, 729
Filing exceptions to bond, 1343
Idiot, etc., appointment of guardian, 1501
Foreign guardian, application of, for settlement by resident guardian, 1477
Lease of real estate, 1454, 1457
Motion to review settlement of guardian of lunatic, etc., 1516
how given, 1516
Of petition to pay ward's money to foreign guardian, 1282
Of application for appointment of guardian of drunkard, 1537
of termination of guardianship to be given to guardian, 1540
Removal of guardian, 1358, 1477
Road, of appeals, 1818
Sale of land, of filing petition for, 1413
notice of sale, 1425
Surety's application for release, 1348
Inquest of lunacy:
To Probate Judge for removal of patient, 2117
Marriage:
Notice of to be given before solemnization, 2117
Partnership:
To administrator, etc., of deceased partner for appointment of appraisers, 417
Proceedings in aid of execution:
Of order against judgment debtor, 1911, 1920
Railroad ditch, etc., 2120
Road. See ROAD APPEAL.
Trustee:
Accounts, of filing and hearing, 729
Bond, of giving by testamentary, 1256
Settlement of, etc., 1294
NUMBER —
Words importing plural applied to singular, 1033
NUNC PRO TUNC —
Power of Probate Court, 53
NUNCUPATIVE WILLS —
Appraisers of decedent's personal property, 284, 290
Expenses and fees of Probate, etc., by whom paid, 1112
Definition, 1158
For personal property only, 1161
Form of will, 1169, 1159
Form of testimony, 1169
How made, 1169, 1159
How probated, 1167
In last sickness, 1160
definition, 1160
Proof required, 1168
Reduced to writing, 1162
within ten days, 1162

(References are to sections.)

NUNCUPATIVE WILLS — *Continued.*
Rogatia testium, what sufficient, 1164
Subscribed by competent witnesses, 1163
Testator must call upon person present, 1164
no set words necessary, 1164
what sufficient, 1164
Testamentary words, 1165
what constitutes, 1165
Time within which must be admitted to probate, 1166

O.

OATH—See AFFIDAVIT—FORMS.
Administrator's and executor's, 302, 703
real property, 863
Appropriation of property, of jury, 1706
Deputy clerk of Probate Court may administer, 11
Ditch appeal, county, of jury, 1847
Guardian, etc., on application for appointment, 1323
to accounts of, 1367
to inventory, 1367
of appraisers of real property, 1421
of freeholders on report of lease of ward's land, 1438
Insolvent estate, witness and claimant may be examined under, 1000, 1001
Marriage license, on procuring, when, 2117
Probate Judge may administer, 13
Road appeals, of jury, 1820
OFFICE —
Of Probate Court, where kept and how furnished, 4
Term of, of Probate Judge, 5
OHIO —
When property escheats to, 919, 921
OMISSION —
Of executor, etc., to give notice of appointment, liability, 550
OPEN AND CLOSE —
In proceedings to appropriate property by municipal corporations, 1763
In county ditch appeals, 1851
by private corporations, 1711
OPENING SETTLEMENTS —
See ACCOUNTS.
Of executors, etc., 743
guardian, 1493
See GUARDIANS.
trustee, 1298
See TRUSTEE.
OPERATIVE—
Defined, 1649
ORDER—
See FORMS.
Administrator of estates:
Account, appeal from final, 39
Appealable, in what cases, 39
Arbitrator's award, 602
Claims, payment of falling due after two years, 571

(References are to sections.)

ORDER — *Continued.*
bond for, 571
as to disposition of desperate claims a sufficient voucher, 456
Debts, of payment of, 647
Distribution, 27
to enforce, 761
of insolvent estate, 1011, 976, 980
Execution on judgment against executor, etc., 626
Inventory, as to, 281, 303, 470
Liens, determining, priority of, 814
Money belonging to unknown heirs, investment of, 786
distribtuion of, arising from sale of lands, 814
Notice of hearing of executor's, etc., claim against estate, 633
Sale of lands to pay debts, 816, 814, 850, 856, 890, 903, 825
Will, certified copy of, in other county, 1111
of foreign, filing and recording, 1130
Appropriation of property:
To draw jury, 1701
Conduct jury to view premises, 1707
Assignment for creditors:
Continue assignor's business, 1587
Fraudulent transfer, to prohibit, 1585
Payment of dividends, 1653
Sale of property, 1625
To put trustee in possession, etc., 1572
Ditch, appeal:
County, to draw jury, 1842
conduct jury to premises, 1847
Guardians, etc.:
Drunkard, terminating guardianship of, 1540
Duties of, to enforce, 1362
Guardian must obey all, etc., 1367
Lease of real estate, 1441, 1529
Sale of real estate, 1425, 1522
Inquest of lunacy, 1999
Money:
Payment of, how enforced, 1599 G. C.
See CONTEMPT.
Municipal officer:
In proceedings against, to draw jury, 2006
Payment:
By executor of decedent's debts, 647
Of money arising from sale of land, 903
By assignee of insolvent debtor, 1647
Punishment:
For refusal to obey, 2010
Road appeal:
County, to conduct jury to view premises, 1822
conduct jury to view premises, 1822

ORPHAN ASYLUM —
Vagrant or incorrigible children may be sent to, 1616

OUTLETS —
See APPEALS, COUNTY DITCHES.

(References are to sections.)

P.

PAPERS —
Filing, must be docketed, 1998, 16
Surrender of to trustee of insolvent debtor enforced, 1572
PARDON —
Duties of Probate Judge on violation of conditional, 1588 G. C.
PARENTS —
Action in *habeas corpus:*
See HABEAS CORPUS.
Allowance for maintenance, 1374
Adoption of children by, 1888, 1894
See ADOPTION OF CHILD.
Consent of, necessary for marriage of child, when, 1997
Consent as to guardian, 1312
Custody of ward, when to have, 1366
Choice of guardian, 1329
Damage to, for death by wrongful act, 534
Is natural guardian, 1306
Inherit property, when, 917, 936
Marriage of, effect on children, 937
of dissolution of marriage, 937
May appoint guardian by will, 1307
Notice must be given of appointment of guardian, 1326
Religion of, should be followed by guardian, 1376
Service on, when child under fourteen, 841
When entitled to administration of estate, 114
PARTIES TO ACTIONS —
Administrator, to action on bond of, 261
Appropriation of property by private corporation, 1684
of unfinished railroad bed, 1731
Claim of executor, etc., against estate, 633
rejected by executor, etc., at instance of heir or creditor, 561
may be contested though previously allowed, 277
Complete real contracts, 523
Distribution, in action to enforce order of, 777
Fraudulent conveyance, to set aside by creditors of insolvent debtor, 1580
in action for sale of land by executor, etc., 833
Lease of ward's land by guardian, 1438
of idiot, etc., 1527
Proceedings by creditors against heirs, etc., after settlement of estate, 592
Revivor of action by guardian of idiot, etc., 1521
Sale of real estate by executor, etc., 833
when fraudulent conveyance is sought to be set aside, 833
how summoned, 838
waiver of service and consent to sale, 838
Court may adjust all liens, etc., 814
of equitable interest of deceased in land, 825
of ward's land by guardian, 1413
of idiot, etc., 1522
of insolvent debtor's land, 1602
of insolvent debtor's land to adjust liens, 1618
PARTITION —
Affects title how, 911
Action for in Common Pleas, 1879
Action of administrator to sell supersedes, 817
Certificate from Probate Court to Common Pleas, 1880

(References are to sections.)

PARTITION — *Continued.*
form of, 1881, 1883
Creditor not to be made a party, 1880
Common Pleas must order paid over to administrator, 1884
proceedings in, 1885
motion, 1886
entry, 1886
Definition, 1879
Does not prevent administrator from bringing action to sell real estate, 1879
Guardian may act for ward, 1396
Order of Court, 1882
entry, 1882
can not be attacked in Common Pleas Court, 1882
Restraints as to in will, 1204
When will lie, 1879
PARTNERS —
See PARTNERSHIP ASSETS.
Administration of estate of non-resident, doing business in this State, 170
Assignment for creditors by, effect, 1547, 1550
Surviving, duties and rights of, 417
notice to administrator of deceased, for appointment of appraisers, 417
inventory to be delivered to surviving partner and filed, 417
when executor, etc., to have appraisement made, 426
when executor apointed in county other than that in which partnership existed, 426
when surivor may purchase partnership property, and on what terms, 427
receiver to wind up partnership if surviving partner does not purchase property, 427
interest of deceased partner disposed in accordance with articles of co-partnership or provisions of will, 427
how partnership real estate to be conveyed, 437
Testimony in action by or against C. C. P., 11495 G. C.
PARTNERSHIP — See PARTNERSHIP ASSETS.
Dividends in, 1659
Surviving partner no right to appointment, 418
When partner make assignment, 1547
PASSBOOKS DEPOSIT —
Gift *causa mortis*, 1245
PARTNERSHIP ASSETS —
Application for appraisement, 418
entry on filing, 419
form of, 419
form of notice, 420
what to contain, 419
Appraisement, how made, 425
Application to take at appraisement, 428
form of, 428
Administrator continuing business, 436
Duty of partner, 417
Entry confirming appraisement, 424
Executor may have appraisement, 426
Entry approving election, 430
Executor continuing business, 435
Form of executor's deed, 439
Form of bond, 429
Inventory and appraisement, 423

(References are to sections.)

PARTNERSHIP ASSETS — *Continued.*
Insolvent estates, 977
Ordering appraisement, 422
Oath of appraisers, 423
Report of appraisers, 423
Right of administrator at common law, 416
Rights of surviving partner, 433
Value of good will, 425
When partner fails to take, 431
When statute does not apply, 432
Where executor is surviving partner, 434
What is partnership real estate, 438
PATENTS —
Belong to administrator, 375
PAYMENT OF DEBTS OF DECEDENT —
See CLAIMS, PRESENTATION OF CLAIMS, LIMITATION OF ACTIONS, STATUTE OF LIMITATION, AND LEGACIES, PAYMENT OF.
Sale of Real Estate:
Action on bond for neglect of, 255
All general creditors stand alike, 646
Administrator is entitled to charge estate only what he pays, 646
Allowance to widow, 661
Administrator liable if order not followed, 648
Before final settlement, 673
Cannot pay in order other than statute directs, 648
Cause of violation of order, 648
Compensation of executor or administrator, 654
when entitled to, 655
how calculated, 656
fixed by will, 657
joint administrators, 658
extra, 659
Debts due United States, 662
Debt of executor, etc., against the estate, how paid, 631, 641
Expenses of administrator, 653
Employment of agent, office rent, etc., 660
Expenses of administrator, 653
Funeral expenses, 649
when to be paid, 649
in first class, 649
person furnishing entitled to be paid, 649
administrator personally liable when, 649
what are, 649
amount to be allowed, 650
tombstone, 651
General creditors, 665
Heir may give bond to prevent sale of real estate, 826
Interest on claims, 672
Insolvency, how made in case of, 976, 980
Last sickness, 652
in preferred class, 652
what included, 652
Limitation of actions by creditors, 613, 571
on rejected claim, 609, 561
Notice of demands, 668
Order of, 647
liens not affected, 666
Principal function of administrator, etc., 646
Personal property is primary fund for, 646

(References are to sections.)

PAYMENT OF DEBTS OF DECEDENT — *Continued.*
Residuary legatee may give bond for, 60, 281
Secured creditors, 666
Taxes, 663
Undevised real estate to be first applied, 1206
Wages, 664
When may be paid without liability, 667, 669, 670, 671
Sale of real estate for, 819, 816
allegation of petition, 830
When not due, 570
in two years, 613, 571
When provisions made for by will, 1208, 1209
Whole estate liable for, 1209
PENALTY
Guardian, against failing to file inventory, 1367
to list or pay taxes, 1392
refusing to serve process or pay over money, 2125
Probate Judge or clerk practicing law, 7
Probate Judge improperly issuing marriage license, 11194 G. C.
Justice, minister or clerk, etc., failing to transmit marriage certificate to Probate Judge, 2117
Justice or minister for illegally solemnizing marriage, 2117
Unauthorized person solemnizing marriage, 2117
how and in what Court covered, 2117
PENSION CASES—
Duty of Probate Judge in, 1604 G. C.
PERISHABLE PROPERTY—
Sale of, 505
PENSION MONEY—
When belong to administrator, 376
PERMANENT LEASEHOLD ESTATE—
Descends same as fee simple, 942
PERPETUITIES—
Applies to real estate, 1031
Application to personalty, 1031
Rule against, 1031
Who comes within, 1030, 1031
PERSONAL PROPERTY—
See ASSETS—INVENTORY—SALE OF PERSONAL PROPERTY.
Administration on, not necessary if less than twenty dollars, 152
Distributed according to law, domicile, 185.
PERSONAL ESTATE —
Distribution of, 938
Distribution of, 921
See DISTRIBUTION.
how order of enforced, 761
Definition, 364
Goes to administrator when not to heir, 54
Guardian cannot change real into personalty, 1386
Invenory of, of decedent, 281
See INVENTORY.
See FORMS.
of insolvent debtor, 1594
of ward, 1367
Liable for debts, 55
Legatee takes subject to charge on, 1058
Preservation of, 506

(References are to sections.)

PERSONAL PROPERTY — *Continued.*
Primary fund for payment of debts, 646
Real estate, when considered personal, 438
Received by guardian from administrator, 1390
Rule of perpetuities, 1031
Sale of, of decedent, 470
See SALE OF PERSONAL PROPERTY.
private sale, 479, 495
liability of executor, etc., for not selling, 717
what not to be sold, 470
specifically bequeathed exempt from, unless required for payment of debts, 1208, 391
of insolvent debtor, 1602
of ward, 1405
Sale of by guardian, 1391
Widow and children entitled to what, exempt from administration, 320, 322
See WIDOW'S ALLOWANCE.
allowance for one year's support, 324
Will to be probated before title passes, 1108
subsequently acquired, passes, 1191
Construction of, domicile controls, 1016
PERSON INTERESTED —
Account, may file exceptions to, 743
Bond may be required by from executor, etc., though will dispenses with giving, 83
to use of on appeal of executor's etc., claim against estate, 641
new bond may be required by of sureties, 248
Claim due after two years may be disputed by, 571
may give bond to creditor for payment of, 571
action on such bond, 581, 582
must be notified of trial of executor's etc., claim against estate, 633
may appeal from decision of Court in such case, 641
Distribution, may sue executor, etc., to compel, 761
parties to action to enforce, 777
Guardian's settlement, may open up, etc., 1516
Inventory, may file exceptions to, 312
May complain against persons concealing assets, etc., 395
May bring action asking direction of Court respecting estate, etc., 33
May sue on administration bond, 269
Mortgaged premises held in trust for, when, 387
Parties in action for sale of land, 833
to enforce distribution, 777
Sale of personal property may be had on application of, notwithstanding will, 470
may give bond to pay debts and prevent sale of real estate, 826
Will, to be notified of deposit of, 1070
may enforce production of, 1072
appeal from refusal to probate, 1116
application to probate foreign will, 1125
notice of application, 1125
right to contest supplied record of will, 1157
When Probate Judge is, effect, 9
PETITION —
See FORMS.
Adoption of children, 1888
Administration after twenty years, 64
Appeal of claim disallowed by commissioner of insolvent estate, 1008

(References are to sections.)

PETITION — *Continued.*
Appropriation of property by private corporations, 1679
by land owner to compel, 1735
by municipal corporations, 1750
Distribution, to enforce order of, 761
Improvement of real estate of imbecile, etc., 1530
Injury by wrongful death, 536
Lease of ward's land by guardian, 1434
of idiot, lunatic, etc., 1527
for petroleum oil or natural gas purposes, 1452
for mining purposes, 1457
Levee, construction of, 2002
Mortgage, real estate of ward by guardian, 1460
Road, abandonment of, 2001
Sale of land by executor, etc., 833
of equitable interest of deceased in land, 825
by guardian of minor, 1410
of lunatic, 1522
by assignee of insolvent debtor, 1618
by trustee of non-resident, 1278
PETITION IN ERROR —
Filing in Supreme Court with leave, 12250
Review of proceedings to appropriate property by, 1773
PHYSICIAN —
Certificate of, for admission of patient to insane asylum, 2118
PICTURES —
What widow and children entitled to, 320
PLANS —
Probate Judge to approve of, of court-house, jail, etc., 9
PLEADINGS —
See PETITION.
See FORMS.
Appropriation of property, 1686
Code of Procedure governs, 36
Not necessary on appeal of executor's etc., claim against estate, 641
Rule days for, 837
POSTHUMOUS CHILD —
Inherits when, 941
Birth of, revokes will, unless, etc., 1062
POSTNUPTIAL CONTRACT —
As to widow's year's allowance, 327
As to dower, 947
POWER —
Construction of, 805
Cannot be delegated, 806
Control of Court over, 807
Defined, 803
Disposal of life estate, 1193
Expiration of, 807
How, 801
Life estate with power of sale, 821
May be applied, 803
What is, to sell, 803

(References are to sections.)

PRACTICE LAW —
Judge and deputy clerk cannot, 7
PREFERRED CLAIMS —
See LABOR CLAIMS.
Against estate of decedent, 647, 666
See PAYMENT OF DEBTS.
of insolvent debtor, 1647
See ASSIGNMENTS.
PREFERRED CREDITORS —
Assignments inure to equal benefit of all, 1579
PREMISES —
View of by jury. See Jury.
PRESENTATION OF CLAIMS —
Against estate of decedent, 557, 609
when insolvent, 998, 967
Administrator must give notice of appointment, 552
Affidavit to, 557
form of, 558
when not required, 558
Allowance of, 559
Action on rejected, 568
Creditor may lose right by laches, 552
Creditor must be diligent, 552
Contingent claims, 569, 982
how presented, 570
when allowed by Court, 571
what included, 572
how presented, 573
Claims not due, 569, 583
application, 573
notice, 574
order of Court, 575
ordering paid, 576
ordering assets retained, 577
ordering giving bond, 578
action on, 581
form of, 579
allowance of Court not conclusive, 580
Disputed or rejected, when is, 560
Funeral expenses should be, 649
Liability of executor in ignoring claim, 560
Literal compliance with statute necessary, 555
Insolvent estates, 993–1112
Must creditor be notified, 559
Need not be formally presented, 554
Payment of interest is allowance, 559
Of insolvent debtor, 1628
Object and purpose, 552
Rejection, what constitutes, 560
indorsement not necessary, 560
Rejected at instance of heir, 561
purpose of, 562
requisition, 563
bond, 564
ordering notice, 565
form of notice, 566
action on real estate stayed, 567
Sufficient presentation, 555
Voucher for, 479b
When once allowed sufficient, 554
When should be, 608
What must be, 553
What need not be, 554
When waived, 556
What amount of, 559

(References are to sections.)

PRESENT VALUE—
Vested dower, 2138
Table for, 2139-2140
Contingent dower, 2141
table, 2142

PRICE—
For which property of insolvent debtor may be sold, 1610
of real estate without State, 1610
Real estate of ward, 1425
of decedent, 880, 879
personal property, 479, 495

PRINCIPAL—
Trustee must maintain, 1288
When used for repairs, 1291
When suffers loss, 1290

PRIORITY—
Of liens on real estate of decedent, how adjusted, 814
See DIVIDENDS.
on insolvent debtor, 1618
Of payment of claims against decedent's estate, 647, 666
insolvent debtor's estate, 1647

PRIVATE PROPERTY—
Condemnation of, for public purposes by municipal corporation, 1748–1783
by private corporation, 1674

PRIVATE SALE—
Of insolvent debtor's property, 1610
ward's real estate, 1425
decedent's real estate, 879
personal property, 479, 495
Affidavit before confirmation of, 882

PROBATE—
See PROBATE OF WILLS.
Admission of will to, how and when, 1067, 1044, 1105, 1155
not admitted to probate without notice to widow and next of kin, 1067
Appeal to Common Pleas, if probate of will refused, 1116
Enforcement of production of will for, 1072, 1079
Foreign will admitted to record, how, 1119, 1124
Jurisdiction of probate of wills, in Probate Court, 27
in Common Pleas Court, 27
Lost, spoliated, etc., will, probate of, 1135, 1157
Nuncupative will, probate of, 1166
Testimony as to, 1095, 1101
Will, probate of, lost or spoliated, 1135, 1157
See SPOLIATED WILLS.
necessary to its validity, 1108
nuncupative will, 1166
See NUNCUPATIVE WILL.
record, when and how made, 1109

PROBATE COURT AND JUDGE—
See JURISDICTION, ETC.—INHERITANCE TAX.
Accounts, to publish notice of filing, 729
may examine accountant under oath, 733
may reduce such examination to writing, 733
and require accountant to subscribe same, 733

(References are to sections.)

PROBATE COURT AND JUDGE — *Continued.*
Acts judicially, 13
Acts ministerially, 13
Acknowledgements, may take, 13
Action for sale of real estate, 24
Adoption of child, 1888, 1898
Administration of estates. See *Infra.*
Appeals. See *Infra,* 39
Appropriation of property. See *Infra.*
Assignment for creditors. See *Infra.*
Asylum, duties in reference to admission, 2118
Bond of, 14
duties as to guardians, 1334
deposited where, 14
liability under, 14
to be filed in office of, 238
to have control and custody of, 11
Cannot be guardian, 1331
Cannot act where interested, 8
Cannot hold any other office, 6
Cannot practice law, etc., 6, 7
difficulty in following law, 6
Can order contract executed,
Cannot direct administrator to allow claim, 27
Cannot direct executor to purchase monument, 27
Cannot modify judgment, 6
Commission from Governor to receive, 1588 G. C.
Choice of guardian, 1330
Commission Pleas, to act for, when, 9
When Common Pleas may act for, 10*a*
has same powers, 32
Contempt, power to punish, 17
proceedings for, 1980
Constitutional provision, 18
status under, 19
Costs. See Costs.
County auditor, examination of complaint against, 2124
County commissioners, judge's duty as to filling vacancy, 2397 G. C.
County seat, Probate Court to be held at, 4
Depositions, may take:
may be used in evidence in, 38
Deputy clerk, powers, etc., 11
can not practice law, 7
Probate Judge may perform duties of, 11
to appoint, 12, 13
Designation of in various States, 1
Ditch appeal, county, duty on, 1833
Dower, assignment of approved by:
code civil procedure, 95
Drift, removal of, appeal to, 2000
Duty to examine accounts whether exceptions be filed or not, 734
Election of judge, 2
Election of widow or widower, 1223
can not set aside, 1229
Entries, etc., omitted by predecessor to make, 1586 G. C.
Error from to Common Pleas C. C. P., 12241 G. C.
to Supreme Court, C. C. P., 12250 G. C.
transcript to furnish or tender of fees C. C. P. 12264
Execution from, 1599 G. C.
proceedings in aid of, 1911
Execution of judgment of, stay of, C. C. P., 12265
Fee bill and report of fees, 1600
must return list of, 16
fees of, 1601 G. C.
See FEES.

(References are to sections.)

PROBATE COURT AND JUDGE—*Continued.*
Fugitives from justice, arrest of by, etc., 71
Girls' Industrial Home, may commit to, 2107 G. C.
Guardian *ad litem* may be appointed by. See GUARDIAN *ad litem.*
Guardians, duties as to, 1319
duties as to bond, 1334
See GUARDIAN *Infra.*
Habeas corpus, may grant writ of, 1552
Has common-law jurisdiction, 19
High character required, 6
Heir at law, how designated, 1902
Home of the Friendless, commitment of girl to, 4100 G. C.
Incumbrances, receipt for recorded, 798*a*
See INCUMBRANCES.
Ineligible to certain other offices, 6
Infants, may be taken from parents, when, 1906
Inquest of lunacy, duties as to, 1999
Insolvent estates. See Assignment for Creditors, *infra.*
Interested, duty, when, 9, 1682
Inventory, must require, 282
duties as to, 293
Investment of trust funds, to direct, 514
Joint sub-district, when petition for may be filed with, 2013
Judgment in, how vacated, 11631 to 11643 G. C.
Judgment debtor, order by for examination of, 1911
Jurisdiction, concurrent, 28
equity, 20
exclusive, 27
limited, 22
acquired by, excludes other Probate Courts, 29
to review inferior courts, 31
in *habeas corpus*, 1952
Justices of peace in township, may change number of, 2012
Law, not to practice, 7
Levee, construction of, duties as to, 2002
Marriage licenses and licenses to solemnize marriages, to issue, 1997
May order administrator to receive payment of note, 27
Must finish business of predecessor, 16
Municipal officers, proceedings on complaint against, 2006
New trial. See new trial.
Non-residents, appointment of trustees of, etc., 1274
Notice of filing accounts, to punish. See Notice, 729
how to give notice not otherwise provided, 37
Oaths, may administer, 13
Office, where kept, how furnished, 4
Omitted entries and records, how supplied, 16
proceedings against judge on default, 1588 G. C.
Origin of, 1
Organization, 2
Partnership assets, on death of partner, 417
Place where held, 4
Power over *nunc pro tunc* entries, 53
Power as clerk, 11
Powers, same as Common Pleas, 32
same England, 1
Practice of law cannot, 6
Procedure where interested, 10
motion, 10
action of Common Pleas, 10
Proceedings in aid of execution, jurisdiction, 1912
Power to hear common law action, 21
Power to appoint trustee, 1253
Process, etc., to issue, 17, 2011

(References are to sections.)

PROBATE COURT AND JUDGE — *Continued.*
Procedure in, 36
Code governs, 36
required State finding, 36
Qualifications of judge, 6
Questions of fact, may determine, 35
Railroad train, duty as to, 2002
Rank of court, 3
Receiver may be appointed by, when, 26
Required to state findings, when, 36
Road appeals. See Appeal, 1785, 1805, 1812
abandonment of roads, 2001
Rooms for, etc., 4
Rules of practice, to make and submit to Supreme Court, 15
of Common Pleas to govern when applicable, 32
Seal of, 1591 G. C.
Sheriffs, etc., to attend, 2010
Subpoena for witnesses issued by, 2011
Sureties of, application for discharge, 12195 G. C.
Telegraph lines, duty as to, 1875
Terms, when exist, 5
Terms of court in criminal jurisdiction, 5
Transcript on appeal. See Transcript on error, 12264 G. C.
Trust funds, to direct investment of, 514
Vacation or modification of judgment by, 11643 G. C.
Wills, duties as to. See Wills.
Who may be, 6
Administration of estates:
Accounts, may require filing of, 741
to be filed in, 721
may allow on oath of one of two or more executors, etc., 709
may refer to commissioner, 738
may open, when, 743
may examine executor, etc., under oath as to, 733
may give further time to file exceptions to, 729
notice of filing and hearing to be given by, 729
Administrator *de bonis non*, may appoint, 152
Appraisement of land, may order, included in inventory of personalty, 299
Assets, may extend time for collecting, 445, 448*a*
proceedings against persons suspected of concealing, etc., 395, 414
judgment a lien on real estate, 408
Bond of executor or administrator to require, 83, 124
may authorize suit on, 269
may require executor, etc., to execute bond of indemnity to surety, when, 253
Claim of executor against estate presented for allowance, 633
notice required to be given, 633
requisition to reject claim against estate, when filed in, 561
notice to be issued on, 561
not due in two years, may order executor, etc., to retain funds to pay, 571
or bond to be taken for, 571
decision of court not conclusive against executor, etc., 580
Compensation of executor, etc., to allow, 654
Compounding of debts due estate, may approve of, 450
Damages for wrongful death, to apportion funds on settlement of, 536
Desperate claims, application for disposition of, made to, 456
proceedings on, 459, 463

(References are to sections.)

PROBATE COURT AND JUDGE — *Continued.*
Distribution, petition to enforce filed in, 761
to issue citation against executor, etc., 761
service on non-resident, 770
hearing and judgment, 774
all necessary parties brought in, 777
may send case to Common Pleas, 779
Foreign executor, etc., power of court over, 188
Insolvent estate, to appoint commissioners, 993
report of commissioners to be made to, 998
to make provision for contingent debts of estate, 982
appeal from, if commissioners reject claim, 1004, 1008
order of distribution made by on return of list of debts, 976
may compel rendition of account, 992
to fix compensation of commissioners, 1012
Inventory of personal property to be returned to, 281
proceedings on exceptions to, 312
Investment of moneys belonging to heirs, etc., unclaimed. See Investment, 786
may order payment of invested funds, 791
responsible for safe keeping of, 794
Legatee may be required by to give bond before distribution, 696
Letters testamentary to grant, when and how, 72, 71
See LETTERS TESTAMENTARY.
of administration, when executor renounces, 100
on death of executor, 94
in what order, 114
Notice of appointment of executor, etc., how evidence of, perfected in, 546
Removal of executor, etc., by, 213
Resignation of executor, etc., may receive, 210
Sale bill to be returned to, 491
Sale of lands, jurisdiction as to, 813
See SALE OF LANDS.
proceedings for, 813, 833
may determine equities and priorities, 814
sale, how ordered, 847
order to contain, what, 850
to appoint appraisers, 857, 861
to order assignment of dower, 857
may set aside appraisement, 880
may fix amount for which to be sold, 880
and manner and place of sale, 633
may order deed, 890
and secure dower when specially assigned, 870
Sale of personal property though will directs otherwise, 470
may order same sold at private sale, 479, 495
Surety may apply to for release from bond, 243
Vouchers, may allow what expenditures, without, 723
When Probate Judge is interested, etc., effect, 9
Appeals to. See APPEAL.
Accounts, settlement of, of executor, guardian, etc., 39
Administration of estates, 39
Completion of real contracts, 39
Ditch, county, 1833
township, 1857
Guardians and trustees, 39
Insolvent estates, 39
Roads, State and county, etc., 1785
township, 1805

(References are to sections.)

PROBATE COURT AND JUDGE — *Continued.*
for damages, 1812
Sale of real estate by executors, etc., 39
Widow, allowance to, 39
See WIDOW'S ALLOWANCE.
Appropriation of property by private corporations:
Abandonment of property, duty on, 1725
Costs, may apportion, 1746
New trial, may grant, 1718
Petition to be filed in, 1679
to issue summons on, 1690
proceedings on, how conducted, 1692
Proceedings in to condemn road-bed of unfinished railroad, 1731, 1733
To appoint attorney for absent, etc., parties, 1694
When interested, what proceedings had, 1682
Appropriation of property by municipal corporations, 1748
Assignment for Creditors:
Accounts, to examine, 1653
to publish notice of filing and hearing, 1653
Assignee to appear before, 1546
Bond of assignee, to be approved by, 1546
new bond may be required, 1562
of trustee, 1572
Claims, to order disallowance of, 1635
Compensation of assignee, etc., to fix, 1642
Deed of assignment to be filed in, 1546
Dividends, to declare, 1653
Examination of assignor or assignee, may require, 1585
Fees allowed to, 6358 R. S.
Former assignment, proceedings by in case of, 1576
Fraud, to make and enforce orders to prevent, 1585
Fraudulent assignment, etc., proceedings, when set aside, 1580
Homestead, may order set-off, 1598
Incumbrances on real estate, to order payment of, 1618
Removal of assignee, if no bond given, 1559
Report of assignee to be filed in, 1628
report and settlement to be made to, 1653
Resignation of assignee, may accept, 1561
Sale of property, to fix terms of, 1610
Trustee, to appoint, when, 1561
creditors may petition for election of, 1564
to give notice of meeting for, 1564
to appoint person elected, 1564
for property fraudulently conveyed, 1580
Guardians:
Appointment of, 1319
Bond of, to approve, 1323, 1314
exceptions to, 1343
Lease of lands, may order, 1433
application for, 1434
proceedings, 1438, 1441
Removal of guardian by, 1358, 1476, 1479
Resident guardian may be required to settle, 1476, 1479
and give way to foreign guardian, 1477
Resignation of guardian, may accept, 1357
Sale of land, to require service of notice of petition for, 1413
to appoint appraisers, 1418
to require bond before sale, 1422
to issue order of sale for, 1425
to confirm sale and order deed, 1429

(References are to sections.)

PROBATE COURT AND JUDGE — *Continued.*
Statement required of applicant, 1323
Sureties released on bond of guardian by, 1348
Guardian of drunkards:
Appointment of, by, 1535
To terminate guardianship, when, 1540
Guardian of lunatics:
Appointed how, 1501
Improvement of real estate, proceedings for, 1513
Lease of lands of, how authorized, 1525, 1529
Sale of lands of, how authorized, 1522
proceedings to authorize foreign guardian to sell lands, etc., 1483
To terminate guardianship, when, 1513
Wife may be appointed, when, 1512
Marriage licenses:
To be issued by, how and to whom, 1997
Trustees of non-residents, lunatics, etc.:
See TRUSTEES.
Accounts to be rendered to Probate Court, when, 1293
Appointment of, 1274
Bond, to be approved by, 1277
Citations and notices, to issue, 1294
Compensation of, allowed by, 1299
Lease of sale of lands, 1278
May authorize trustee to pay over money, etc., to foreign guardian, when, 1280
Resignation, when court may accept or remove, 1300
To determine questions of settlement of, etc., 1295
appeal from determination, 1297
force and effect of determination, 1298
PROBATE OF WILLS —
Appeal, 1116
only to refusal to admit, 1116
how perfected, 1116
Application for, 1087
statements of, 1087
time of hearing, 1089
entry fixing, 1090
form of, 1088
Admission of, 1105
sufficient proof, 1106
preponderance, 1106
forgetfulness of witness, 1106
presumption, 1106
judge should have reasonable assurance, 1106
cannot refuse because will is absurd, 1106
testator must have properly executed will, 1106
importance of attestation clause, 1106
examination of witnesses, 1095
what witnesses may, 1096
form of, 1197
Binding if not contested within two years, 1112
Contest of jurisdiction, 1086*a*
Commission to take testimony, 1101
order to take, 1102
entry, 1102
form of, 1103
return of, 1104
Certified copy, 1110

(References are to sections.)

PROBATE OF WILLS — *Continued.*
Codicils, 1178
See CODICILS.
Definition, 1081
Error, 1114
will not lie to admission, 1114
will to refusal to admit, 1114
Filing and recording of, 1109
where, 1111
Foreign wills, 1118–1133.
See FOREIGN WILLS.
Joint or mutual will, 1172
See JOINT WILLS.
Nuncupative wills, 1158–1169
See NUNCUPATIVE WILLS.
Notice, 1091
to whom given, 1091
service of, 1092
form of, 1093
Nature of proceedings, 1081
common form, 1081
solemn form, 1081
is *ex parte*, 1081
special, 1081
Order of, 1107
entry, 1107
sufficient, 1107
effect of, 1108
Proof, essentials of, 1094
examination of witnesses, 1095
what witnesses may, 1096
form of, 1097
sufficient, 1106
Refusal of, appeal may be had to in Common Pleas, 1116
Repropounding, 1115
Spoliated wills, 1134–1157
See SPOLIATED WILLS.
Testimony, 1097
form of, 1097
where witness unknown or absent, 1098
sufficient, 1099
form of, 1100
Uncontestable after two years, 1112
Void without, 1108
When becomes effectual, 1108
Witnesses, 1095
what, may be heard, 1096
who may call, 1096
only person interested in will, 1096
unknown, etc., 1098
What may be admitted to, 1082
must be of testamentary character, 1082, 1014
in doubt should be, 1082
When should be presented, 1083
no time limited, 1083
effect of withholding, 1084
only party holding, 1084
Who should present will, 1085
any party in interest, 1085
Where to be, 1086

(References are to sections.)

PROBATE OF WILLS — *Continued.*
Probate Court has exclusive jurisdiction, 1108
where estate, 1086
where domiciled, 1086
PROCEEDINGS BY CREDITOR —
After settlement of estate, 584–593
PROCEEDINGS IN AID OF EXECUTION —
Arrest, when order of may issue, and proceedings thereon, 1922, 1921. 1925
warrant to, form, 1924
form of order, 1925
Ascertainable interest in the property, proceedings when another has. 1946
Appeal, 1950
Attendance of parties and witnesses enforced, how. 1932
Auxiliary to some other, 1910
Bond, debtor may be required to give, when. 1922
in default, may be committed to jail, 1922
Common Pleas Court, jurisdiction of, 1911–1922
Compensation of, clerks, sheriff, etc., 11787 G. C.
Continuance of proceedings, 1931
Probate Judge, 11786 G. C.
Costs, 11787 G. C.
Dismissal, 1949
Debtor of judgment debtor may be examined, 1926
effect of order for such examination, 1926
notice may be given to any party, 1926
notice to judgment debtor, 1928
order to be signed by judge and served as summons, 1948
order may be issued before issue and return of execution. when, 1926
proceedings for, 1927
Debtor may pay execution against his creditor, 1936
sheriff's receipt a discharge for amount paid, 1936
Disobedience of order for, how punished, 1934
Error, 1950
Examination of party, 1919
Earnings of debtor, when and what cannot be applied on execution, 1937
Fraud, fact that examination may lead to conviction of. not to excuse from examination, 1929
Injunction, when may be granted, 1943
Hearing, 1916
Judge may order property to be applied on execution, 1937
when and what personal earnings of debtor cannot be applied. 1937
Judgment, power to enforce by contempt proceedings, 1935
Jurisdiction of Common Pleas and Probate Courts, 1911, 1922
Method to be pursued, 1910
Nature of, 1910
Oath, examination to be under, 1933
Original in Probate Court, 1910
Order for examination, 1917
Probate Court, jurisdiction of, 1911, 1922
Petition on motion for, 1914
form, 1915
Notice, 1918
Probate Judge, compensation of 11786
Order to apply property on judgment, 1938
Order to apply money on judgment, 1941
Proceedings before return of execution, 1921

(References are to sections.)

PROCEEDINGS IN AID OF EXECUTION — *Continued.*
Proceedings when another has an ascertainable interest in the property, 1946
Proceedings under, 1947
receiver may be ordered to sell debtor's interest, 1946
order to sell, 1947
sale conducted in the same manner as sales on execution, 1946
Property that may be reached, 1939
Property that cannot be reached, 1940
Receiver may be appointed, and transfers, etc., prohibited, 1942
appointment of, 1943
liability of sheriff on bond when appointed receiver, 1945
may be ordered to sell debtor's interest in the property, 1946
oath and undertaking by, 1945
Reference may be ordered, 1930
examination before referee to be certified, 1933
must be under oath, 1933
Return of execution, examination after, 1911
examination before, 1920
Second proceeding, 1949
Transfers of property may be prohibited, 1942
Who can bring, 1913
Warrant for arrest, may issue, when, 1922
by whom to be issued and where to be executed, 1922
copy of warrant and testimony to be delivered to debtor, 1922
debtor must be examined under oath, 1922
When and where to be brought, 1912
must be a valid judgment, 1912
execution must have been returned, 1912
PROCEEDS —
Arising from sale of land by executor, etc., how applied, 903
PROFITS —
Assignment of dower in, 857
Executor, etc., not to derive from increase of estate, 718
How accounted for, 716
PROMISSORY NOTE — See NOTES.
PROOF —
Appropriation proceedings by private corporation, burden of proof, 1695
Of claim against decedent's estate, 557
insolvent debtors, 1632
Of publication of notice of appointment of executor, etc., 546
To obtain service on non-resident by publication, 841
See SALE OF REAL ESTATE.
Of mailing notice to non-resident, 842
PROPERTY —
Dead bodies is not, 1013
PROSECUTING ATTORNEY —
Escheated personal property, to collect, 921
Municipal officers, to prosecute for malfeasance, when, 2006
To file information against Probate Judge or clerk practicing law, 7
To issue execution and pay over money on judgment against persons concealing assets of estate, etc., when, 414
compensation, 414
PROVISIONS —
Allowance of to widow and children for support, etc., 324
PUBLICATION — See NOTICE.
Accounts in Probate Court, of notice of filing, 729
Appropriation proceedings by private corporations, 1692
service on non-resident or unknown person by, 1692
in proceedings to appropriate unfinished railroad bed, 1731
Newspaper, what notices to be published in, 841, 855

(References are to sections.)

PUBLICATION — *Continued.*
Service by, in what cases, 840
affidavit to obtain, 841
PUBLIC CHARITY —
What is, 1029
PUBLIC USE —
What constitutes, 1666
See APPROPRIATION OF PROPERTY.
PUNISHMENT — 1988
See CONTEMPT.
PURCHASE —
Title by, 911
PURCHASERS —
Appraisers, executors or administrators cannot be, at sale of land by executors, etc., 889, 492
Guardian cannot be, 1391
Title of, to lands fraudulently conveyed, 822
to lands derived from heir without knowledge of will, 1133

Q.

QUARANTINE —
Widows, 341

R.

RAILROAD — See APPROPRIATION OF PROPERTY.
Proceedings to compel to drain land, 2003
Unfinished road-bed of, may be condemned, 1731
proceedings in such case, 1732
in what courts proceedings may be commenced, 1733
RAILROAD DRAIN — See DITCH, 2003
REAL ACTIONS—See SALE OF REAL ESTATE.
Executors, etc., by, to complete contract for sale of land, 523
conveyance under, who to execute and its effect, 528
parties, 523
service, when petition filed in Probate Court, 523
Form of petition by executor, 526. See FORMS.
Guardian to bring, to complete real contract of ward, 1398
Heirs of deceased purchaser may enforce specific performance, 523
Jurisdiction of Probate Court, 13
REAL CHATTELS—
Defined, 373
REAL CONTRACTS —
Assignee of insolvent debtor may complete, when, 1602
Executors, etc., action to complete, when, 1398
REAL ESTATE —
Appraisement of, of decedent's estate, 857
of insolvent debtor's, 1610
of wards, 1418
Action to sell stayed, when, 567
Accounting for, sold, 714
Appraised with personalty, when, 299
Completion of contract for, 523
nature of proceedings, 524
petition, 526
notice, 527
order for deed, 528, 530
hearing, 529
form of deed, 531
Care of, 506
Court may enforce sale by contempt proceedings, 889
Error—what is final judgment, 906
Descends to the heirs, 54, 915
Distributed according to law where situated, 757, 185, 810, 758
Dower in, 944
See DOWER.
Fraudulently conveyed may be sold, 822

(References are to sections.)

REAL ESTATE — *Continued.*
how possession gotten, 823
proceeding where, 824
Guardian cannot dedicate, 1398
Guardian, foreign may sell, 1481
Heir takes subject to debts, 800
Heir may enforce specific performance, 532
Improvement of real estate by guardian of imbecile, etc., 1530–1533
Investment in, by guardian, 1367
Jurisdiction, when presumed, 853
Judgment creditor not party defendant, when, 834
Lease of, by guardian, 1432, 1525
Liens on, adjusted, 1618
Liable for debts, 55, 800
Legacy on, 690
Lease, administrator cannot, 801
Mortgage, administrator cannot, 801
Mortgage of, by guardian, 1460-1472
Management of, by guardian, 1392
Not subject to gift *causa mortis*, 1249
cannot change real estate to personalty, 1386
Partition, 1879
See PARTITION.
Proceeds of sale assets, 384
Personal property first applied to debts, 800
Possession, 799
administrator generally not, 799
Record of payment of lien created by will, 798*a*
Rule of perpetuities, 1031
Sale of by guardian, 1404
Sold without order of Court, 802, 804
See SALE OF REAL ESTATE UNDER POWER.
Sale by foreign administrator, 197-200
Sale by joint administrators, 203
all must join, 203
Sale by executor, 816
See SALE OF REAL ESTATE.
Sale by assignee of insolvent debtor, 1602, 1618
Sale by county auditor, of escheated lands, 8599 G. C.
Transfer of, 1111*a*
Upset price, when fixed, 877
When assets marshaled in conformity with will, 832
When action to sell may be brought, 816
When considered personal, 438
RE-APPRAISEMENT —
when to be ordered, 856, 880, 1625
RECEIPTS — See VOUCHERS.
Executor, etc., required to produce for debts and legacies, etc., paid and filed with account, 721
what items may be allowed without, 723
order of record for payment of incumbrance, 798*a*
RECEIVER —
Cannot appoint in administration of estates, 26
Court cannot appoint during contest of will, 96
In partnership, 26
Probate judge may appoint, when, 26
In aid of execution, 26, 1943
Same as Court of Common Pleas in actions pending therein, 26
RECORD —
Authenticated copy, 17*a*
Account, final, of administrator or executor must be recorded, 795
Adoption, of child, 1895
of heir, 1902
will, or probate of will of, 1154-1157
Levee proceedings, record of, 2002

(References are to sections.)

RECORD—*Continued.*
Incumbrance, payment of 798*a*
Marriage records, 1994
of ministers authorized to solemnize, 1994
Naturalization, record of, 1998
Road appeals, of proceedings in, 1827
non-cupative will, 1166
recorded in each county in which land is situated, 1111
restoration of record of destroyed will, 1154, 1157
REDUCTION OF BOND—
Application, 259*a*
Entry, 259*a*
REFEREES—
Doubtful claim against estate may be referred by executor, etc., to, 594
by whom approved, 594
proceedings when claim is less than one hundred dollars, 597
when claim exceeds one hundred dollars, 599
proceedings, powers and compensation of, 602
costs, how awarded, 602
Claim disallowed by administrator, etc., of insolvent estate may be submitted to, 969
costs awarded by, 972
judgment on award, 973
REFERENCE—
Court may refer account, 1492
Of administrator's account, 738
Of questions arising in actions in Probate Court, 35
Of doubtful claims against estate, 594
Proceedings in aid of execution, reference in, 1911, 1930
REJECTION—
See PRESENTATION OF CLAIMS.
Of claims against estate by executor, etc., 609
at instance of heir or creditor, 561
by assignee of insolvent debtor, 1628
at instance of assignor or creditor, 1625
RELATIVE DEFINED, 1200
RELEASE—
See INCUMBRANCES.
Effect of, of debt in will against executor, etc., 391
Effect of assignment providing for, 1546
Of ward's tax title, 1395
Of sureties on administrator's, etc., bond, 243
assignee's, 1562
guardian's, 1348
RELEASE OF SURETIES—243 *et seq.*
See SURETIES.
RELIGIOUS TEACHINGS—
See GUARDIAN.
REMAINDER—
Alteration and repairs, affect how, 1291
Gain and loss, affect how, 1290
Construction of devise for life, remainder to heirs in fee, 1188
of life estate and remainders in shares of stock.
See DIVIDENDS.
See RENTS.
Principal and income, affect how, 1288
Rents, 371
Contingent remainder, 1033
Dividends, 1289
Street assessments, 1292
Tenant for life, or in dower, guilty of waste, liable to remainderman, 956
Insurance of property, 1292
Taxes of property, 1292

(References are to sections.)

REMOVAL — See RESIGNATION AND REMOVAL.
Administrator or executor, 213
Failure to return inventory, 306
Guardian, 1358, 1476, 1477
Assignee or trustee, 1559, 1562, 1576
Trustee of non-resident minor, idiot, etc., 1300
of unknown and non-resident owners, 1286, 1277
RENTS —
Apportionment, 371
Accounting for, 716
Assignment of dower in, 863
Due after assignment, 1642
Guardian must collect, 1393
Farm land, 371
If administrators collect must account for, 372
Improvements may be made by tenant of ward as part of, 1443
Mansion house, 372
When will directs land sold, 372
Statement of value of, of ward's real estate in application for appointment as guardian, 1323
by guardian in inventory, 1367
in petition for sale of ward's real estate, 1410
in application to make long lease, 1434
of real estate of idiot, etc., 1528
When belongs to administrator, 371, 372
When it accrues, 372
RENUNCIATION —
Of administration, 100, 119
REPORT —
Appraiser's, of decedent's real estate, 863
of ward's real estate, 1422
Assignee or trustee, of claims presented for allowance, 1628
of payment of dividends, when, 1653
Commissioner of insolvent estate, 998
Examiner of county treasury, 2014
Executor's, etc., sale of real estate, 890
when no sale is effected, 890
Freeholder's, as to lease of ward's real estate, 1522
of idiot, etc., real estate, 1528
Guardian, of sale of real estate, 1429
Referee, of doubtful claims, against estate, 602
Viewers or reviewers in road appeals, 1797
REPRESENTATIVES —
Legal — see HEIRS, ETC.
See DEFINITIONS.
Personal — see ADMINISTRATORS AND EXECUTORS.
REQUISITION —
May be filed on executor, etc., to reject claim against estate, 561, 566
on assignee or trustee of insolvent estate, 1635
Object of, 562
form, 563
bond, 564
entry ordering, 565
action when allowed, 562, 567, 568
RESIDENCE —
See DOMICILE.
Appointment of testamentary guardian without reference to, 1309
Suit as to determining action against in same ward, 1384
Defined, 74

(References are to sections.)

RESIDUARY LEGATEE—
Discharges lien on property, 60
Form of bond, 58
Is liable for all debts, 57
Liability upon bond, 59
Must be appointed executor, 57
Need not file inventory, 282
When no administration, 57
RESIGNATION AND REMOVAL OF ADMINISTRATOR—
Acceptance of by court granting letters, 210
Absconding or concealing of executor, etc., of insolvent estate, 992
Account, for failure to render, 741
Account, failure to file by executor of insolvent estate, 992
Acts prior to removal valid, 62, 63
Acts after removal, 230
can only turn over property and file accounts, 230
Appeal and error, 232
Application for removal, 214
who must file, 214
essentials of, 215
form of, 216
entry, 217
notice of hearing, 218
form of notice, 219
Bond, for failure to give, 83, 992
Contest terminating in favor of will, 162
Court having jurisdiction, 209
Causes for removal, 220
habitual drunkenness, 220
what is, 220
gross neglect of duty, 221
incompetency, 222
hostility between heirs and executor, 221, 222
what constitutes incompetency, 222
fraudulent conduct, 223
removal from State, 224
unsettled demands, 225
any other cause, 226
failure to keep account, 226
refusal to obey court, 226
gross carelessness, 226
mismanagement, 226
other statutory causes, 227
neglect to file inventory, 227
return of sale bill, 227
file account, 227
new bond, 227
indemnity bond, 227
Court should order filing of account, 229
Discovery of will, on, 162
Effect of removal, 229
on previous liability, 229
on previous sales and other acts, 159
is a judicial proceeding, 229
Error and appeal, lies from order of removal, 232
Failure to give new bond, 252
to give bond of indemnity to surety, 253
Fraudulent conduct, 213
Form of resignation, 212
entry, 212
Gross neglect of duty, 213
Habitual drunkenness, 213

(References are to sections.)

RESIGNATION AND REMOVAL OF ADMINISTRATOR—*Continued.*
Hearing, etc., 228
How authority of administrator extinguished, 208
How may resign, 210
How authority terminated, 231
Inventory, failure to file, 308
failure to return, 306
Incompetency, 213
Litigation of unsettled demand between and estate, 213
Marriage of female does not operate as, 81
Notice of removal, twenty days, 213
Nature of proceedings, 208
Notes given to secure void, 210
Of administrator or executor, 210
not to affect liability previously incurred, 229
Of assignee or trustee for creditors, 1561
must file and settle accounts, 1573
Of guardian, 1357
Of trustee of non-resident minor, idiot, etc., 1295, 1300
Power of court, 208
Probate of will after granting letters of administration, 162
unless petition for contest filed before revocation, 162
Removal from State, 213
Revocation where order wrongfully made, 211
in wrong county, 211
decedent alive, 211
will admitted to probate, 211
where there is no estate, 211
without notice and insufficient time, 211
Sale bill, failure to return, 491
Sale, private, failure to make return, 491
Waste, for, 253

RESTORATION OF RECORDS —
Will, new record or probate when record destroyed, 1154, 1157
copy of will, authenticated, may alone be admitted to probate, 1156
copy of will and probate admitted to record, 1154
notice, 1157
original will may be again admitted to probate, 1155

RESTRAINT—See WILLS.
Against execution, 1204
Against partition, 1204
Against marriage, 1205
For divorce, 1205
Of alienation, 1204
Remarriage, 1205

RETURN — See REPORT, VERDICT.
Appropriation of property, return of summons in, 1690
Assignee, return of sale by, 1613
Assignments, return of inventory and appraisements in, 1594
Guardians, return of inventories and accounts by, enforced, 1362
Sale of land to pay decedent's debts, return of, 890
return of process in action for, 838
Will, return of process to enforce production of, 1076, 1077

REVERSAL —
Of proceedings in road appeals, 1791

REVIEW —
Of settlement of executor, etc., 743
of guardian, 1493
of trustee, 1298
When may be ordered in road appeals, 1800

(References are to sections.)

REVIEWERS — See VIEWERS.
See APPEAL ROADS.
REVIVOR —
Of action, C. C. P., 13999-11419 G. C.
See CHOSES IN ACTION.
Of judgment, C. C. P., 11644 G. C.
REVOCATION — See RESIGNATION.
Of letters testamentary or of administration. See Revocation, etc., 213, 162, 306, 491
Of will. See Will, 1049, 1065
REVOCATION OF WILLS —
See WILLS.
Alterations, 1050
Absent child, 1064
advancements taken into account, 1065
Bond to convey property, etc., not, 1057
By some other will, 1052
By sales or conveyance of property, 1056
agreement not revocation, 1057
charge or incumbrance not, 1058
may revoke bequest, 1059
By inconsistent clauses of later will, 1060
Birth of child revokes, 1062
unless provided for, 1063
provision for, what is, 1063
Cancellation, 1049, 1050
cannot be in part, 1050
Cannot until after made, 1051
Change of property not, 1058
Conveyance altering, but not divesting estate, 1059
Definition, 1048
Destruction of second will, 1053
does not revive first, 1053, 1054
in order to revive must be re-executed, 1054
Expressly revoked, how, 1049, 1048
Interlineation, 1051
Implied, when, 1049
Intention, necessary, 1049, 1048
Marriage of woman does not revoke, 1061
New will or codicil, 1049
Obliteration, 1050
Other instrument in writing, 1055
Of subsequent, not to revive former, unless, 1053
Revocability essential to will, 1014, 1048
Tearing, 1049, 1050
tearing, cancelling, etc., 1050
evidence must appear on will, 1050
includes cutting, 1050
Will must show intention, 1048
must have existed at testator's death, 1048
what constitutes, 1048
When provisions inconsistent with terms of will, 1060

(References are to sections.)

ROAD APPEALS—
Abandonment, 1825
Additional compensation and damages, how determined and paid, 1821
Appeals; character of, 1785
Appeal by minors, 1797
Appeal; limitation, 1829
Challenge of Jurors; filling of panel, 1808
Commissioners shall transmit papers to court, 1798
Costs when abandoned, 1824
Date when notice of appeal must be given, 1794
Enforcement of judgment, 1818
Entry on preliminary hearing, 1806
Error proceedings to review judgment, 1819
Fees and compensation of officers, 1826
Form of notice, 1792
Form of appeal bond, 1793
Hearing of preliminary questions and motions, 1801
Journal entry confirming verdict, etc., 1815
Matters upon which appeal may be taken, 1787
Matters upon which appeal lies, 1788
Minors, 1797
Notice of appeal and specifications shall be in writing, 1791
Oath of jurors, 1809
Order as to payment of damages, 1822
Procedure when proceedings for appropriation of land abandoned, 1824
Procedure after judgment establishing improvement, 1827
Proceedings after trial, 1831
Questions for preliminary hearing, 1802
Record of proceedings in probate court, 1816
Reversal of order dismissing proceedings, 1828
Review of judgment of probate court, 1830
Right to view premises before testimony submitted, 1810
Taxing costs, 1817
Ten day limit, 1785
Transcript, 1799
Transcript and papers certified to county auditor, 1819
Trial by jury; drawing and listing of names; venire, 1805
Trial, 1812
Verdict of jury; what it shall contain; rendition of judgment; error proceedings, 1813
Verdict, etc., 1814
View, etc., 1811
What is public use, 1789
When order to open road shall be executed, 1784
When cases shall be consolidated, 1807
When orders for payment of compensation and damages shall be issued, 1820
Who may appeal, 1790

ROADS—
Condemnation of material, 1834
power to purchase, 1833
resolution, 1836
what may be condemned, 1835
Proceedings in Probate Court, 1839
appeal bond, 1848
conduct of trial, 1849

(References are to sections.)

RULES—
Of Common Pleas to govern when applicable, 32
Of practice, Probate Judges to make and submit to Supreme Court, 15
RULE DAYS—
For pleading, 837
RULE IN SHELLEY'S CASE—1189
See SHELLEY'S CASE.

S.

SAFE DEPOSIT COMPANIES—See ADMINISTRATION BY TRUST COMPANIES.
May act as executor, guardian, etc., 79
SALE—
Assignee, by of insolvent debtor's property, 1594, 1602, 1625–1601, 39
Executor or administrator, by, of decedent's personal property, 470
See SALE OF PERSONAL PROPERTY.
private, not to be confirmed until affidavit filed, 882
real estate, 816
See SALE OF REAL ESTATE.
notice of in German or Bohemian newspapers, 885
Guardian, by, of ward's real and personal property, 1405
of idiot or insane person, etc. See Guardians, Sale, 1522
of non-resident minor, idiot, etc., 593
of ward's coal or fire-clay, 1522
sale or adjustment of dower, 1523
SALE BILL—
Of decedent's personal property. Sale Bill, 489
See SALE OF PERSONAL PROPERTY.
SALE OF DESPERATE CLAIMS—
Application for, 458
form of, 458
Effect of order, 468
Form of private sale, 466
How sold, 456
Jurisdiction of court, 457
Kind of claims, 457
Proof required, 462
Public or private, 463
Notice of, 459
form of, 461
entry ordering, 460
Terms of, 463
SALE OF PERSONAL PROPERTY—
Arrange sale bill same as inventory, 488
Affidavit before private sale, 479, 495
Clerk of, to be employed, 487
how sale bill made by, 487
Credit given unless court otherwise direct, 482
Desperate claims, disposition of, 456
See SALE OF DESPERATE CLAIMS.
Discretion of executor, etc., in order in which articles to be sold, 488
Emblements, 476
may be sold before or after severance from land, 470
sale may be deferred beyond three months, 470
purchaser may enter upon and possess, 370
List of articles sold must be made out, 487
must include property taken by widow at appraisement, 487
Loss resulting from, when executor, etc., not responsible, 485

(References are to sections.)

SALE OF PERSONAL PROPERTY — *Continued.*
Not to be, directed by will, 477
Not responsible for loss on sale of, when, 485
Notes or bonds for payment must have two or more sureties, 483
Notice of public sale, how given, 479, 495
Order of articles offered, same on sale bill as in inventory, 488
Order to sell personal property at private sale, 495 *et seq.*
Oath, must make to sale bill and return same, when and how, 489
Promissory notes not to be, 471
Public sale, must be made at, 479, 495
when court may order sale at public auction, 479, 495
notice of, 479, 495, 480
form, 480
conduct of, 481
credit to be given, 482
security taken, 483
sufficient surety, 484
payment, 486
purchase by administrator, etc., 492
warranty of title, 494
Private sale, when court may order, 495
affidavit required before, 479, 495
not to be sold for less than two-thirds appraisement, unless, etc., 479, 495
return of, 489, 500
how made, 489
terms of, fixed by Court, how, 479, 495
when not sold within six months, etc., 479, 495
when made, 495
application, 496
form of, 497
entry ordering, 498
Personal property specifically bequeathed not to be sold until, etc., 470, 473
when and what personal property to be sold, 470
Perishable, 505
Record of, when to be made, 16
Regulated by statute, 469
Return of, how enforced, 491
Stock, how sold, 502
form and order, 503
for how much at private sale, 502
Sureties on sale notes, must require two or more, 483
Taken by widow, 472
When to be made, 478
Without order, 504
When property discovered, not mentioned in inventory, 487
Will so directing sale need not be made, 470
but Court may, notwithstanding order it, 470
SALE OF REAL ESTATE — BY ORDER OF COURT — ADMINISTRATOR.
Administrator *de bonis non*, conveyance to be made by when, 835
on death or removal of executor, etc., 835
Affidavit as to how private sale made, 882
Answer of minor defendants by guardian *ad litem*, 845
of widow waiving dower by metes and bounds, etc., 846
and cross petition of lien holders, 846
Application for to be made when and on what ground, 816
in what Courts, 813

(References are to sections.)

SALE OF REAL ESTATE — BY ORDER OF COURT — ADMINISTRATOR — *Continued.*
Appraised value, when sale not to be made for less than two-thirds of, 880
when sale to be made for less than one-third of, 880
Appraisement judgment and order, 852, 855
order and sale may be made at same time, 856
where and how to be made, 857, 863
when no dower to be assigned, 856
object and purpose, 855
appointment of appraisers, 857
order to appraise, 858
copy of, 859
appraisers who may be, 860
vacancy, how filled, 861
to be sworn, 863
valuation, 862
actual view, 864
surveyor, 865
assignment of homestead, 867
who entitled to, 868
assignment of dower, 869
charge on land, 870
report of appraisers, 871
compensation of appraisers, 872
confirmation of appraisement, 876
Action brought for what, 818
debts, 831
legacies, 819
street assessment not, 818
claim of creditor, 818
Action, commencement of, 829
what is, 829
care to be exercised, 829, 811
Appeal, 906
Appraisers, appointment of, 857
when land situate in two or more counties, 857
can not purchase at, 889
compensation, 872
duties, 857
in assignment of, dower, 857
failing to serve, 861
oath, 863
order to appraise, 857
report of, 863
where there is more than one tract and dower is assigned in one for all, 869
when dower can not be set off, and rents and profits are set off in its place, 869
when homestead is set off, 857
Assets, when to be marshaled in conformity to will, 832
Bond required of executor, etc., to account for surplus, etc., before sale, 873
additional bond, when, 875
form of, 874
by administrator *de bonis non*, 835
to prevent sale, 826
when claim rejected at instance of heir, 561
of foreign executor, 199, 200
Confirmation of sale and order for deed, 890, 892

(References are to sections.)

SALE OF REAL ESTATE — BY ORDER OF COURT — ADMINISTRATOR — *Continued.*
collateral attack, 892
discretion of judge, 892
refusal for insufficient price, 892
title, not until, 892
sufficient, 893
may be presumed when, 893
error cured by, 894
advertisement, etc., 894
entry, 895
Civil action is a, 812
Conveyance to be made by administrator *de bonis non*, when, 835
Costs, when objections to granting order of sale, 854
Death of administrator or executor, effect, 835
Deed of land sold, evidence of what, 899, 900
vests title in purchaser, 899
form, 901
Deferred payments, how secured, 890
Court may direct sale without recourse of notes taken for, 890
Distribution of proceeds, 895, 903, 904
per centum of administrator, 653, 663, 904
when Court to order, 814
taxes, 646
form of order, 895
how made, 903
Dower, answer of widow waiving, metes and bounds, etc., 846
assignment of, when and how, 857
specially assigned, a charge on lands, 870
adjustment of on sale of equitable interest in land, 825
Entire estate sold, 815, 850
or part, 851
Effect of order of sale, 853
without, sale void, 853
order after sale void, 853
Error, 906
lands described in petition, 853
Executor or administrator can not purchase at, 889
Foreign executor, etc., authorized to sell, when and how, 1132, 169, 197
when required to give bond in this state, 199
to account for surplus, 200
Fraudulently conveyed land, liable to, 822
how set aside, 823
in what Court action to be brought, 823
limitation of action, 822
necessary parties, 833
title of *bona fide* purchaser protected, 822
Guardian may sign consent for ward, 838
but not guardian of person only, 838
when guardian *ad litem* may be appointed, 844
can not waive notice or service of summons, 844
form of order appointing guardian *ad litem*, 844
of answer of minor defendants by, 844
Guardian *at litem*, 844
See GUARDIAN AND WARD.
when appointed, 844
entry, 845
when need not be, 844
duties of, 844
answer, 845

(References are to sections.)

SALE OF REAL ESTATE — BY ORDER OF COURT — ADMINISTRATOR — *Continued.*
How sale prevented, 826
Improved lands not to be sold for less than two-thirds appraisement, 880
unimproved not less than one-half, 880
Inventory of may be required, 83, 299
In what Court action brought, 813
Jury trial when, 812
Judgment and order of sale, 852
entry, 852
Jurisdiction of Probate and Common Pleas Court, 28
Judicial when is, 877, 810
Legacy, when proceedings authorized to sell land to pay, 819
Liens, Court to determine priorities, 814
answer and cross-petition of lien holder, 846
lien holders and mortgagees necessary parties, 833
release and satisfaction of lien to be entered on record, 814
fee for recorder to be taxed in cost bill, 814
Mortgage cannot be sold subject to, 815
Motion to set aside, 898
when to be made, 898
when granted, 898
rights of parties, 898
form of, 898
Nature of proceedings, 812
Non-resident, affidavit to obtain publication for, 841
Notice to parties by publication, 840
of sale when and how given, 883
in German or Bohemian newspaper, 885
Order of sale, 876, 878
what may be included in, 850
of appraisement and sale may be made at same time, when, 856
must be complied with, 877
formal not required, 877
return of public, 890, 878
return of private, 890, 878
Order for appraisement and assignment of dower, 897
for public sale, 897
private sale, 897
Partial sale, when may be made, 851
Parties necessary, 833
defendant, 834
wife of heir, 834
legatee, 834
Partition proceedings, when action pending for, 1880
sale in partition no bar to sale to pay debts, 1884
Petition for, what to contain, 830
for sale of equitable interest, 825
essentials of, 831
names of parties, 831
verified, 831
rules of ordinary pleadings govern, 831
form of, 836
filing, 837
entry, 837
Private, when, 879, 881
order for, 897
affidavit, as to how made, 882
Publication, notice to parties by, 838

(References are to sections.)

SALE OF REAL ESTATE — BY ORDER OF COURT — ADMINISTRATOR — *Continued.*
affidavit to obtain, 841
Purchase money may be ordered accepted in cash, 890
Public, when to be, 879
notice of, 883
street number, etc., 884
German newspaper, 885
form of, 887
points to be observed, 886
conduct of, 888
ordinary care, 888
statement of administrator, 888
sham bidders, etc., 888
Prevented by heir giving bond, 826
by widow, 827
form of, 828
Proof required, 848
necessity required by statute, 848
Purchaser, who may be, 889
title, 893, 902
writ of possession, 902
caveat emptor applies, 902
not affected by reversal, 902
as to emblements, 902
taxes, 902
Power of Court, 814
determination of equities, 814
release of heir, 814
nature of, 815
according to issues made, 815
Re-appraisement when may be ordered, 856, 880
Removal, resignation, etc., of executor, etc., effect, 835
sales of former executor, etc., valid, 159
Report of appraisers, 863
Return of service, 838
Return of order of sale, 878, 890
when to be made, 878, 890
what must contain, 891
form, 878
when no sale effected, 878, 896
of private sale, 878
Re-sale, 896
when ordered, 896
entry, 896
Service of summons, 838
actual, 839
must be, 838
constructive, 840
reason for, 840
affidavit for, 841
notice of, 838, 841
when heir or devisee unknown, 841
newspaper mailed, 842
entry, 842
waiver, 843
form, 843
guardian *ad litem* cannot, 843, 844
Stay of proceedings when claim rejected at instance of heir, etc., 561
Surplus proceeds how considered, 905

(References are to sections)

SALE OF REAL ESTATE — BY ORDER OF COURT — ADMINISTRATOR — *Continued.*
appeal, 906
error, 906
judicial is, 877
Surviving executor may sell, 107
Securing payments, 897
mortgage, how made, 897
Statute complied with, 811
Trial if contested, 849
costs, etc., 854
Title may be quieted, 815
Terms of sale, 847, 880, 879
Title of heirs, in land set off to widow for dower may be sold, 850
Venue of action, 813
When sale not to be made for less than two-thirds appraised value, 880
When Court to order sale, 847
Whole estate to be sold when partial sale, would injure residue, 851
Will authorizing no order required, 802
When executor, etc., authorized to sell real estate, 816, 802, 819
when authorized by terms of the will, 802
when testator has given a legacy by will that if effectual to charge the real estate and there is not sufficient personal estate to pay it, 819
when personal estate is insufficient to pay the debts of the deceased, allowance to the widow and children and charges of administration, 816
Will or statute followed, 811
When action to be brought, 816
limitations as to, 817
while unpaid debts exist, 817
What may be sold, 820
all interest of deceased, 820
equitable interest, 825
land fraudulently conveyed, 822
What cannot be sold, 821
not for costs, etc., 821
Who may become purchaser, 506, 889
appraiser cannot, 889
administrator cannot, 889
agent for administrator cannot, 889
Widow, answer of, 846
cross-petition, 846
heir may file, 846
SALE OF REAL ESTATE — UNDER POWER —
Administrator with will annexed may complete, 806
Account must set out in detail, 810
Action to construe power, 810
Construction of power, 805
must be strictly pursued, 805
Contingencies complied with, power ends, 807
Control of Court over power, 808
Deed, form of, 809
Distributed as power directs, 810
same as under order of Court, 903
Debts barred by statute, 805
Expiration of power, 807
Judicial not, 810
May be implied, 803
not further than necessary, 803

(References are to sections.)

SALE OF REAL ESTATE—UNDER POWER—*Continued*
Naked power, 805
Power defined, 803
Purchaser need not inquire as to payment of debts, 805
Power can not be delegated, 806
Title under power, 804
when executor has, 804
When authorized by will, 802
What constitutes power, 803
Who can execute power, 806
all must join, 806
satisfied legacy, 686

SCHEDULE—
Allowance to widow or children to be stated in separate, 324
Assignee or trustee of insolvent to file schedule of debts or liabilities, 1594
Insolvent debtor, schedule of debts to be filed; what to contain, 1594

SCHOOL—
Appropriation of, 1748
school lands by railroad company, 1747
Decedent's personal property escheated to State applied to support of, 921
Widow and children entitled to books, 320

SEAL—
Of Probate Court, 1591 G. C.

SECURED CLAIMS—
Dividend on, 974, 1631

SECURITIES—
In what, executors, trustees, etc., may invest, 514
See INVESTMENT OF FUNDS.
guardians, 1367, 514
For claim against insolvent debtor to be stated in affidavit of claimant, 1632
examination of claimant as to, 1632

SECURITY FOR COSTS—
On complaint against municipal officer, 2006
In proceeding to establish joint sub-district, 2013
When plaintiff must give C. C. P., 12359 G. C.

SENILE DEMENTIA—
Disqualifies person from making will, 1022
See TESTAMENTARY CAPACITY.

SEPARATE TRIAL—
In condemnation suits, 1711
See APPEALS, DITCHES.

SERVICE—See NOTICE AND SUMMONS.
Appropriation proceedings, in, 1690, 1731, 1742
Actual, 841
By publication, 840
affidavit to obtain, 840
Lands, in action by executor, etc., to sell, 838
Non-resident executor, on, in action for failure to pay heir, etc., after order of distribution, 770

SET OFF—
Code of Civil Procedure, 11323 G. C.
Affidavit of claim against insolvent estate, must show, 1632

SETTLEMENT—
See CONTRACTS.

SETTLEMENT OF ACCOUNTS—
See ACCOUNTS, ADMINISTRATORS, EXECUTORS, GUARDIANS.

(References are to sections.)

SHEEP—
Appeal from allowance by co-commissioners, 1996
specific legacy, 675
Widow and children entitled to, 320
SHELLEY'S CASE—
Does not apply to will, 1189
Rules in, 1189
SHERIFF—
Amercement of, 2010
Jury in Probate Court, to summon, 1690
Will, to serve process to enforce production of, 1076
liability for neglect, 1077
SICKNESS, LAST—
Expenses of, a preferred claim, 647
SIGNATURE—
Of person making will, at each end, and thereof, 1037
how made, 1039
SISTER—
See DESCENT.
Inherits property, when, 915 *et seq.*
SOLICITOR—
To prosecute claim against municipal officer, 2007
SPECIAL ADMINISTRATOR—
Action cannot be brought against by creditors of decedent, 150
Application for, 131
Application for citation, 143
entry ordering, 145
form of, 144
Appointment of to preserve effects of estate, 129
Bond and conditions, 133
Bond, must give, 133
form of, 134
Compensation of, 137
Committing to jail, 149
Definition, 128
Duties and powers, 137
cease on appointment of regular executor or administrator, 141
Form of letters, 136
Form of citation, 146
Form of writ of attachment, 148
How proceeded against by executor, 142
In discretion of Court, 132
Need not file inventory, 128
Not of frequent occurrence, 128
Order appointing, 135
Ordering writ of attachment, 147
Powers limited to collect and preservation of property, 128
Power to sell, 139
Power to pay debts, 140
Regular administrator, proceed against, how, 142
What delay warrants appointment, 130
When power ceases, 141
When appointed, 129
contest of will, 129
other causes delay granting of letters, 129
Who may be, 132
SPECIFIC PERFORMANCE— See APPEAL, 39
Of contracts of decedent, 523
Of contracts of idiot, etc., 1398

(References are to sections.)

SPENDTHRIFT—
Guardians
SPINNING WHEEL—
Widow entitled to, 320
SPOLIATED WILLS—
Application for probate, 1142
who may offer, 1142
essentials of, 1142
form of, 1143
notice of, 1144
ordering notice, 1145
entry on, 1145
Admission to record, 1154
Authenticated copy recorded, 1156
notice that copy has been admitted, 1157
Appeal, 1153
As applied to wills, 1139
Burden of proof is on proponent, 1136
Court to find and establish contents of when, 1148
Definition, 1134
Degree of proof, 1149
must satisfy judge, 1149
Effect of establishing, 1152
Error, 1153
Examination of witnesses, 1146
same as original wills, 1147
How admitted to probate, etc., 1135, 1152
Lost after probate, but before record, may be recorded, when, 1148
Must have been a will, 1136
Must have been destroyed before death of testator, 1136
Must be duly executed, 1137
Must have been lost, spoliated or destroyed, 1139
evidence as to, 1139
Must have been lost subsequent to death of testator, 1140
Not revoked at death of testator, 1138
Nature of proceedings to establish, 1147
same as ordinary will, 1147
Notice of application to admit to probate, how given, 1144
On what proof established, 1148
Order establishing, 1151
entry, 1151
Original will afterwards admitted, 1155
Probate of, 1135
Proof of contents, 1150
Served, who must be on application to admit to probate, 1144
Testimony of absent witnesses ordered taken, 1146
Testimony of witnesses reduced to writing, 1146
Witness, what to be examined, 1146
STATE OF OHIO—
Escheat of property to, 919, 921
STATE ROAD APPEAL—See APPEAL, 1785
STATEMENT—
In lieu of inventory. See INVENTORY.
Made to Court by executor, etc., in partition sales, 1880
Of ward's estate on application for appointment as guardian, 1323
Of money in county treasury to be furnished by auditor to examiners, etc., 1129 R. S.
STATUTE OF FRAUDS—
Promise of administrator within, 607
Promise of guardian not within, 1380

(References are to sections.)

STATUTE OF LIMITATIONS —
See ASSIGNMENTS: LIMITATION OF ACTION.
Administrator must collect claim before barred, 444
Administrator cannot revive, 608
Action on distribution barred in six years, 756
Debt of executor, 632
when begins to run, 632
Debt of heir, 760
Dower affected by, 947
General provision, 607, 608
Guardian must plead, 1384
Not sued on within six months after rejection barred, 609, 610
On guardian's bond, 1352, 259
Payment prevents running of, 608
Real estate cannot be sold for debt barred, 805
Testator may revive by will, 608
When begins to run, 444
When begins to run against funeral expenses, 552
When claim once allowed by administrator statute does not run, 608

STAY OF EXECUTION —
Code of Civil Procedure, 12265 G. C.
STEALING WILL—
Punishment for, 12451 G. C.
STOCK—See DIVIDENDS.
Care of, 522
Gift of, 678
How sold by executor, etc., 502
application for, 503
May be paid over in kind, when, 751
Of life estates and remainders in shares of, 692
Re-issue of last, 2014c
proxy to vote, 522a
STRAW—
When assets, 368
Sale of, 471
SUBSCRIPTION—1037-1040
See SIGNATURE.

SUIT —
See ACTION, LIMITATION OF ACTIONS.

SUMMONS —
Appropriation proceedings by private corporation, in, 1690, 1747, 1742
in proceedings to appropriate unfinished roadbed of railroad, 1731
Contempt, Probate Court to issue in proceedings for when, 1980
Service and return of in action for sale of land by executor, etc., 838
waiver of service, 838
guardian *ad litem* can not waive, 844
Service by publication, 840
Manner of service and return generally, 839
how served on corporations, 11291 G. C.
on infants, 839
Who may serve, 839
What equivalent to service, 840
When returnable, 840

SUPERIOR COURT —
to compel foreign executor, etc., to account, 190
in action on administration bond, 261
in proceedings by creditors against heirs, etc., after settlement, etc., 585
in proceedings to condemn unfinished roadbed of railroad, 1733

(References are to sections.)

SUPPORT —
See WIDOW'S ALLOWANCE.
Lease of ward's land for, 1433, 1526
See WRONGFUL DEATH.
Sale of ward's lands for, 1405, 1522
See GUARDIANS.
SURETIES —
Application for indemnity, 252
form of, 254
sufficient cause, 255
indemnity bond, 256
May require executor, etc., wasting estate to give indemnifying bond, 253
foreign executor, 193
to render an account, 253
Bound by order of Probate Court, 259
Examination of, 242
Executors, etc., of, may require creditors to sue, 12191 G. C.
Entry ordering notice, 246
General liability, 259
Liability of prior sureties, 250
Liability of new sureties, 251
Number of, must be two or more, 83, 124, 241
Of legatee requiring legacy to be paid within two years, 717
On appeal of executor, etc., claim against estate, 641
Order takes effect when, 248
On notes at administration sale, 483, 484
Parties in action to enforce distribution, 783
on administration bond, 255
what defense may make, 783, 276
Payment of claim of, of deceased insolvent debtor, 982
Qualifications of, of executors, etc., 86, 240, 241
Release of, of executors, etc., 795, 243
death of surety operates as, 243
form of application, 245
notice to executor, etc., required, 243
form of notice, 247
not released until executor, etc., gives bond, 243
extent of liability of, 243, 249
costs paid by surety unless, 243
Rights of certain not affected, 625
Rights on additional bond, 258
When insufficient, new bond may be required, 248
Appeal bond, 43
Assignment for creditors:
May require assignee or trustee to give new bond, 1562
discharged from liability on new bond given, 1562
Jointly liable with assignor, may present and prove claim against estate, 1632
Guardians, etc.:
Exceptions to, sufficiency of, 1343, 1353
Additional may be required, 1343
Release of, how obtained, 1348
notice of application, 1348
extent of liability, 1348
SURVEY —
Of ward's land into town lots ordered, when, 1418
SURVEYOR —
See SALE OF REAL ESTATE.
To attend viewers in State and county road appeals, 1795

(References are to sections.)

SURPLUS PROCEEDS —
Of sale of real estate by executor, etc., considered and disposed of as real estate, 905
Disposition of, of estate of non-resident decedent in business here 170

SURVIVING EXECUTOR —
Powers of, 107

SURVIVING PARTNER —
See PARTNERSHIP ASSETS.
Rights and duties of, 417

SURVIVING TRUSTEE —
May execute trust, 1265

T.

TABLES —
Contingent dower, 2142
Dower on Carlisle, 2139
Dower on American, 2140
Expectation of life, 2142
Mortality, 2138
Present value of certain annuity, 2144
Present value of sum certain, due at end of number of years, 2145

TAXES —
All in hands of administrator liable, 511
Assessments, 663
Assessments special, apportionment, 1292
Direct inheritance tax — see Inheritance Tax, 343
Duty of executor to pay, 506
Estate of decedent, taxes a preferred claim against, 647
Guardian must list, etc., 1393
Execution for, no exemption or stay, 511
Payment of, 663
order of, 663
Executor or administrator must pay, when, 95, 663
Must be where administrator resides, 205
Executor to list personalty, 511
liable for real tax, when, 511, 663
liable to devisee for neglect to list or pay, 511
lien for taxes advanced, etc., 1392, 511, 663
In assignments, 1648
lien for taxes advanced, etc., 1392, 511, 663
When charged to income, 232
When become a lien, 511
When executor, 663
When heirs should pay, 662
When listed, 511
When listed in co-administration, 205
When testamentary trustee liable, 511

TAX TITLE —
Release of ward's by guardian, 1395
effect of tender to release, 1395

TELEPHONE —
See APPROPRIATION, FRANCHISES.

TELEGRAPH, ETC., COMPANIES —
See APPROPRIATION, FRANCHISES.
Appropriation of property by, 1876
Public grounds, streets, etc., 1876
proceedings in Probate Court to appropriate, 1876

TENANT —
See LIFE TENANT.
Life, guilty of waste forfeits estate, 8593 G. C.
In dower, guilty of waste forfeits dower, 956

(References are to sections.)

TERM —
Of office of probate judge, 2
TERMINATION OF TRUST —
Heirs cannot, 1304
Court will not, when, 1304
TERMS OF PROBATE COURT —
Error in real estate proceeding, 898
For civil business, 5
criminal business, 5
Nunc pro tunc entries, 53
Proceeding in error, 52
Probate Court has what, 5
TERMS OF SALE —
Of personal property of decedent, 479, 495
of insolvent debtor, 1610
Of real estate of decedent, 880, 879
of ward, 1425
of insolvent debtor, 1610
TESTAMENT—See WILL. DEFINITION.
Forging, altering or counterfeiting, how punished, 13083 G. C.
Stealing, destroying, or secreting, how punished, 12451 G. C.
allegation of property or value unnecessary, 13591, 13592 G. C.
TESTAMENTARY CAPACITY —
Blind, deaf and dumb persons, 1023
Idiots, imbeciles and lunatics, 1022
Not under any restraint, 1025
meaning of, 1025
Old age, 1022
Persons under guardianship, 1024
Sound mind and memory, 1021, 1082
test of, 1021
Senile dementia, 1022
Testator, 1021
TESTAMENTARY DISPOSITION —
What is, 1013
TESTAMENTARY GUARDIAN —
Bond of, 1310
when not required, 1310
Duties and liabilities, 1309
Entitled to preference, 1309
Grandfather cannot, 1307
How designated, 1307
Investment of funds, 1385
Need not be express designation, 1308
Such guardian to have preference, 1309
Who is, 1307
Who may appoint, 1307
When mother may be, 1307
When Court must appoint, 1309
Who can not be, 1331
TESTAMENTARY POWER —
See TESTAMENTARY CAPACITY.
Right not inalienable, 1017
TESTAMENTARY TRUSTEES —
Rules governing guardians applied, 1250
TESTIMONY — See EVIDENCE.
Of witnesses to will, 1095
to be reduced to writing and filed in Court, 1095
Depositions on trial in Probate Court, 38
TIME —
Administrators, etc., of, to publish notice of appointment, 544
file inventory, 83, 124, 303
collect assets, 440-448*a*
file accounts, 83, 124, 703, 707

(References are to sections.)

TIME — *Continued.*
make sales of personal property, 479, 495
real estate, 883
Assignee or trustee to file assignment and give bond, 1546
publish notice of appointment, 1557
file inventory, 1594
file report of claims, 1628
file schedule of debts, 1594
file accounts, 1653
make sales, 1602
report payment of dividends, 1653
Creditors to present claims against insolvent estate, 1628
of decedent, 998, 967
to bring actions. See Limitation of Action. Statute of Limitations.
Filing appeal bond, 43
Guardian, to file inventory, 1367
file accounts, 1367
Trustee of non-resident, idiot, etc., to file accounts, 1310
Widow or widower, to make election under will, 1215

TIME OF COMMENCING ACTIONS —
See LIMITATION OF ACTIONS.— STATUTE OF LIMITATIONS.

TITLE — See REAL ESTATE: RECEIPTS: WILL.
Devise to sell, 804, 805
By descent and devise, 909
Of *bona fide* purchaser to land not defeated by production of will, when, 1133
By deed of gift, 910
to land fraudulently conveyed, protected when, 822
By purchase, 911
Of heirs, etc., in lands set-off to widow may be sold, 850
Questions as to on assignee's sale, how adjusted, 1618
Statute controls, 907
Abstract of, to be furnished by applicant for appointment as guardian, when, 1323
Conversion of, etc., 911, 921
Release of ward's tax, by guardian, 1395
Warrant of, 593, 902
by assignee, 1616

TOMBSTONE—See FUNERAL EXPENSE.
Administrator's discretion, 651
Amount allowed, 651
Court may allow for, 651
Court can not order purchase, 651
executor, etc., not bound to procure, 651
Order of payment, 651
Not for other than deceased, 651

TORTS—See GUARDIANS.
Action on does not survive, 385, 520
Security on bond not liable for torts of administrator, 259, 261
Estate not liable for torts of administrator, 888, 578, 519

TOWN LOTS—See SALE OF REAL ESTATE.
Land of ward may be ordered laid out in, 1418, 1425

(References are to sections.)

TRANSCRIPT —
Appeal on, generally, when to be filed, 49
to be filed in Probate Court, 51
who may file, 50
Appropriation cases, in, 1780
Concealing or embezzling assets, proceedings against persons suspected of, 413
Distribution, in proceedings to enforce order of, 779
Ditch case, county, who to furnish, 1833
to be sent to auditor, 1855
township, to be sent to township clerk, 1874
Drift, removal of, 2000
Road cases, 1789
to be sent to township clerk, 1827
When Probate Judge interested in cause, 9
TRANSFER —
Fraudulent, to hinder, etc., creditors, 1580
TRANSFER OF REAL ESTATE, 1111*a*
TREASURER —
Personal property escheated to State paid to, 921
TREASURY —
Examiner or accountant appointed by Probate Judge, when, 2024
TREES, WOOD, ETC.
Fruit, 366
Rails, 366
Right to in highway, 1668
When assets, 366
When not assets, 366
TRIAL —
Appropriation of property by municipal corporations, 1760
by private corporations, 1708
Complaint against municipal officer, 2121
against county auditor, 2124
Ditch appeal, county, 1849
township, 1865
Drift appeal, 2000
Exceptions to account, 739
Election of Probate Judge, contest of, 5151 G. C.
of justice of the peace, 5165
In action on distribution, 775
In sale of real estate, 812, 849
Levee improvement case, 2002
On appeal, 42
Road appeals, 1822
What may be heard, 42
TRUST —
Assignments preferring creditors, trust arising under, how administered, 1579
Equity will not permit to fail for want of a trustee, 1275
Fraudulently conveyed property, 1580
Generally, 1293, 1300
Non-resident minors, lunatics, etc., how administered, 1274, 1286
Religious institution, when valid, when made in will in favor of, 1028
Testamentary, administered how, 1256, 1271
When Probate Judge may appoint person to execute, 1266
When mortgaged premises held by executor, etc., in, 387
TRUSTEES — TESTAMENTARY AND OTHERS —
Administrator and executors and guardians are, 1250
Alterations and repairs, 1291
when should get order of Court, 1291

(References are to sections.)

TRUSTEES — TESTAMENTARY AND OTHERS — *Continued.*
Accounts of, in Probate Court, 39
must render when, 1293
after removal, 1301
same as administrators, 1293
citation, 1294
duty of Court in relation to, 1295
may involve, construction of trust, 1296
appeal from order of Court, 1297
effect of settlement, 1298
allowance of compensation, 1299
Application for, 1254, 33
should be in writing, 1254
any person may make, 1254
form of, 1255
Appeal may be taken from order settling, 39
biennially, must render, 1293
citation issued for, how, 1294
examination as to, in Probate Court, 733
Probate Court to pass on, 1295
appeal from determination, 1297
settlement of, how opened, 1298
settlement, mistakes in, how, corrected, 1298
Assets, when liable to refund to executor or administrator, 751
Appointment, 1256
Bond, 1256
when not required, 1256
when required notwithstanding provisions of will, 1256
when new bond required, 1256
removal on failure to give, 1258
separate or joint may be taken, 1264
Contest of will, powers and duties of trustees during, 95
Cannot deal with estate for his own profit, 1287
Cannot purchase from trust, 1287
Confined to use of income, 1288
Causes for removal, 1302
Court will appoint, 1266
Court may appoint under foreign will, 1271
before appointment, will must be recorded, 1272
Care of estate, 1287
Death, removal or incapacity effect, 1265, 1266
Definition, 1250
Distinction between executor and, 1251
Dividends, belong to whom, 1289
Distribution of funds, 1303
makes at his peril, 1303
legal advice will not protect, 1303
should have order of Court, 1303
Entry for appointment, 1261
Expenses, how charged, 1292
Form of letters, 1262
Foreign Court appointing, to give bond, etc., 1269
Foreign will creating, to execute trust, 1268, 1270
trustee to give bond, 1268
when bond not required, 1268
when Probate Court may appoint, 1271
to give bond, 1271
Gain and loss, how accounted for, 1290
How designated in will, 1260

(References are to sections.)

TRUSTEES — TESTAMENTARY AND OTHERS — *Continued.*
In doubt devolves upon executor, 1251
Income, who entitled to, 1288
Insurance to be kept on property, 1292
Inventory, 1263
should be filed, 1263
Jurisdiction of Probate Court, 1253
not exclusive, 1253
cannot construe, 1253
under foreign will, 1253
Letters should be issued, 1260
Liable for what errors, 1287
Must act in good faith, 1287
May use principal when, 1288
Must give bond, 1256
when may be omitted, 1257
form of, 1259
Non-resident should not be appointed, 1260
Power of testamentary regulated by will, 1251
Requires utmost good faith, 1251
Release of, 506
Removal for failure to give bond, 1258
Resignation, 1300
Court may accept, 1300
even if in default, 1301
Removed, when may be, 1300
how, 1301
on written application, 1301
made by one-half of heirs, 1301
causes for, 1302
Separate bonds, 1264
Surviving may act, 1265
Securities, trustees may invest in what, 514
Taxes paid by, 1292
Taxes, when bond for, 1292
Trust created under foreign wills, 1267
Termination of trust, 1304
by expiration of time limit, 1304
where no cause for continuance, 1304
Common Pleas Court only can compel, 1304
Under foreign will must give bond, 1268
Where same person is executor and trustee, 1251
Who may be, 1252
corporation may, 1252
estate may vest in infant, 1252
should be fit person, 1252
relationship, 1252

TRUSTEE FOR NON-RESIDENT —
Appointed when and how, 1274, 1276
Bond of, its conditions, etc., 1277
Court may appoint, 1273
Duties of, 1277
Foreign guardian may collect money from, 1282
petition for, 1283
entry and notice, 1284
hearing, 1285
may loan money, 1286
How long to hold office, 1279
Jurisdiction, 1276
May lease real estate, 1278

(References are to sections.)

TRUSTEE FOR NON-RESIDENT — *Continued.*
May sell real estate, 1278
Non-residents or unknown parties, appointment, 11022, 11023, 1102. G. C.
Powers of, money, may loan in certain cases, 1286
money of beneficiary, when and to whom to pay, 1280
real estate, may lease or sell, 1278
When appointment to be made, 1275

TRUST PROPERTY —
Administrator not to account for, 377
Does not belong to administrator, 377
Indemnity notes, 377
What is, 377

TRUST, TERMINATION OF, 1304, 4909
Of guardian, 1333
Settlement with succeeding guardian, 1496
Settlement with ward, 1497
Table to ascertain present value, 2145
Table to ascertain annuity, 2144
Table to ascertain consummated dower, 2139
Table to ascertain contingent dower, 2142

U.

UNCLAIMED BANK DEPOSITS—See BANK.
Annual report to be made to Probate Judge of, 509

UNCLAIMED COSTS—
Clerk of Common Pleas and Probate Judge to make list of, when 3041 G. C.
Probate Judge to post list in office, 3041 G. C.
how disposed of, 3041 G. C.

UNCLAIMED MONEY —
Belonging to heirs, legatees, etc., how invested, 786
how obtained, 791

UNDERTAKING — See BOND.

UNFAITHFUL ADMINISTRATION — 255, 268, 274
See COMPENSATION.

UNITED STATES —
Debts due to, 662
Debts against estate of decedent entitled to preference under laws of, 647
Guardian may invest in bonds of, 1367
Order of payment, 662

UNKNOWN HEIRS, DEVISEES, ETC. —
How service made upon, 841

UPSET PRICE —
When Court may fix, 877

(References are to sections.)

V.

VAGRANT CHILDREN—
May be sent to asylum or home, 1906

VENIRE—
Form, 409
Appropriation, proceedings in by municipal corporation, 1758
by private corporation, 1701
Ditch appeal, county, 1842
Drift appeals, 2000
Road appeals, 1816

VENUE—
See JURISDICTION.
Of action against executor, guardians, etc., 607

VERDICT—
See FORMS.
Appropriation proceedings in by municipal corporations, 1763
by private corporations, 1715*a*
Ditch appeal, county, 1852
Drift, removal of, 2119
Road appeals, 1822
Vested legacy, 679
Vesting of estates, 1190

VIEW BY JURY—
Of premises in appropriations by municipalities, 1762
by private corporations, 1707, 1708
ditch appeal county, 1849
When not evidence, 1711

VILLAGES—
Appropriation of property by, 1748 *et seq.*
Void legacy, 684

VOUCHERS-
See ACCOUNT.
To be taken by executor, etc., for all debts, and legacies paid and filed with account, 721
what items allowed without, 723
orders of Court as to desperate claims sufficient, 456
to heirs unclaimed, 786
Guardian's account of expenditures verified by, 1367
signed by lunatic, etc., and allowed as credit to guardian, void, 1516
Probate Judge or clerk can not make record of, unless, etc., 7
on presentation of claim, 1479*b*
Presentation of claim, 557

W.

WAGES—
Of laborers, a preferred claim against estate of decedent, 647, 664
Of insolvent debtor, 1647

(References are to sections.)

WARRANT —
See FORMS.
of judgment debtor in proceedings of execution, 1922

WASTE —
Executor or administrator guilty of, required to indemnify sureties, 253
foreign executor, etc., to secure distributees and indemnify sureties, 193
when liable for, to creditors of estate, 628
Tenant for life, guilty of, forfeits estate, 8593 G. C.
liable in damages to remainderman, etc., 8593 G. C.
tenant in dower forfeits dower, etc., 956
liable to remainderman, 956

WEARING APPAREL —
What is, 321
Widow entitled to, when, 320, 322

WIDOW —
See WIDOW'S ALLOWANCE.
Allowance for year's support, 324
money to be set off if necessary, 325
appraisers to certify amount, 325
to be stated in separate schedule, 324
how Probate Court may increase or diminish, 333
preferred claim against estate, 647
bond to pay may be given to prevent sale of land, 826
Appeal may be taken from order of Court increasing or decreasing allowance of, 39
Appraisement, notice of to be served on, 288
entitled to be present at making, 292
articles to be included in, but not appraised when deceased leaves a widow, 320, 322
articles included in but not appraised, belong to minor child, when, 322
property at, widow may take, 470, 472
Concealing assets, etc., rights against persons, 395
Contribution to pay claims against estate, 587
Damages for death by wrongful act, 536
Descent of property to. See Descent and Distribution, 915
Distribution by executor, etc., may enforce, 761
Dower of. See Dower, 944
appraisers to set off in action for sale of land, 857
specially assigned a charge on land, 870
adjusted on petition for sale of equitable interest in land, 825
action for, 12005 G. C.
assignment of, by heirs, 957
by commissioners, 12009 G. C.
assignment of in action by execution, etc., to sell lands to pay debts, 861, 870
election to be endowed out of proceeds of sale, 869
evicted from jointure to be endowed, 953
forfeited by waste, 956
guardian of insane, etc., widow, may sell dower of, how, 1523
Distributive share, 938
amount of, 938
right accrues when, 938
how barred, 938
gift *causa mortis*, 939
where advancement made to children, 939

(References are to sections.)

WIDOW — *Continued.*
Entitled to administer husband's estate, 114
when cited or notified for that purpose, 114
to funeral expenses of husband, 649
to homestead, when, 868
assignment of, 867
Exemption from execution, 1598
Homestead assigned in action for sale of land, 857, 868
assignment of, 867
How interested in estate of husband, 319
Liability of as distributee after settlement of estate, 585, 593
Life estate with power of disposal, 1193
May sue on administration bond for share of estate, 265
Notice of probate of will, 1067
of taking of appraisement, 288
of granting letters of administration, 114
Party in action on administration bond, 261
for sale of land, 833
Portion of in case of wrongful death, 541
Personal property entitled to on distribution, 938
amount of, 938
included in inventory but not appraised, 320, 322
when living with and providing for minor child, 322
when not, 322
set off by appraisers for year's support, 324, 333
may take at appraisement, 470.
Power under will to dispose of property, 1193
Quarantine, 341
Sale of lands to pay debts, allowance, etc., 963
party to action for, 833
dower, 857, 825

WIDOW'S ALLOWANCE—See INHERITANCE TAX.
Action may be brought against executor, 761, 779
Action on bond of executor, etc., when, 265
Action to pay debts, widow may be made party, 833
Allowance for year's support, 324–333
See WIDOW.
Allowance to, a preferred claim, 647
Amount raised on exception to inventory, 314
Articles allowed to, not deemed assets, 320
Administrator cannot sell, 323
Apportionment between widow and children, 330
Amount of, 331
insolvent estate, 331
in various States, 331
should be liberal, 331
what should control, 331
Appeal from order of Court as to allowance of, may be taken, 39
Barred by will or contract, 327
Contract strictly scrutinized, 327
Court may order payment, 332
Damages for death by wrongful act, 536
Descent of property to, 915
See DESCENT AND DISTRIBUTION.
Divorced is not entitled, 323, 326
Deserting not entitled, 323, 326
Dower to be assigned in action to pay debts, how, 857
Executor of widow may collect, 328
Homestead assigned in action for sale of land, 857
Husband may prevent how, 328
Husband, when widow entitled to administer estate of, 114

(References are to sections.)

WIDOW'S ALLOWANCE — *Continued.*
Is debt of estate, 328
Increased or diminished, 334
petition for, 334
what should contain, 334
review of, 334
when to be filed, 334
who may file, 335
form of petition, 336
entry, 337
notice, 338
error and appeal, 340
second application, 340
Made regardless of will, 323
Must have maintained marriage relation, 326
Must be made without demand, 329
Nature of claim, 328
Non-resident not entitled to, 326
Notice of appraisement, widow entitled to, 288
Not legally married not entitled to, 326
Origin of laws relating to, 319
wearing apparel, 321
what is, 321
Order of payment of allowance to, 647
Personal property of decedent entitled to, 320, 322
Question as right to, 335
Payment of, 334
Property consumed may be considered, 326
Right to, 323
To whom payable, 332
When payable, 332
When appraisers fail to make, 329
Widow may bar her own right but not her childrens', 327
Widow may take property at appraisement, 470
WIDOW AND CHILDREN —
See WIDOW'S ALLOWANCE.
Homestead assigned in action for sale of land, 857
Personal property of decedent, entitled to, 320, 322
WIDOWER —
Curtesy of, abolished, 943
vested rights as to, 943
Dower of, 944
See DOWER, WIDOW.
Election to take under will or dower, 1065
See WIDOW.
Personal property, amount entitled to on distribution, 938
WIFE — See HUSBAND AND WIFE, DIVORCE, WIDOW, ETC.
Contingent dower of, of insolvent debtor, 1600
See DOWER.
of idiot, etc., 1522
Damages for death by wrongful act, 536
Descent of property to, 927 *et seq.*
See DESCENT AND DISTRIBUTION.
Dower of barred by dwelling in adultery, 954
expectancy of, how disposed of in action by guardian of lunatic, etc., to sell real estate, 1522
Of idiot, etc., may be his guardian, 1512
Party to proceedings to sell real estate of insolvent debtor, 1602, 1618
WILLS —
See CONSTRUCTION OF WILLS, REVOCATION OF WILLS, SPOLIATED WILLS.
Animus testandi, 1014

(References are to sections.)

WILLS — *Continued.*
Acknowledgment of, 1034
Administration granted effect of finding will after, 162
Admission to probate, 1105
probated to be recorded and filed, 1109
can not pass real or personal estate without, 1108
admitted to record in each county where land situated, 1111
Advancement taken into account when, 1065
After acquired property passes, 1191
Aliens, effect of probate of will, 1130
Alterations, 1050
conveyance, etc., altering, etc., when not a revocation, 1059
when provisions inconsistent with terms of will, 1060
how punished, 13083 G. C.
Appeal from refusal to probate, 1116, 1117
Appeal from order of probate, 1153
not of foreign will, 1123
how perfected and proceedings in Common Pleas, 1117
in proceedings to supply destroyed record of will, 1157
Appointment, power of, 821–1193
Assets marshalled in conformity with, 832
Attestation of, 1040
witnesses must be competent, 1043
Bequest defined, 1013
See DEFINITIONS.
void in certain cases, 1028
Bond directed not to be given by, 1256, 1310, 83
may be required notwithstanding, 1256, 1310, 83
Certified copy of, evidence, 1110
when record of will destroyed, 1154, 1156
of foreign will admitted to record here, 1119, 1125
Charge on property not a revocation, 1058
devisee takes subject to, 1058
Charitable bequest void unless, etc., 1028
Child absent, reported dead or born after will made to have portion of estate, 1064, 1210
contribution for and by, 1064, 1210
advancements to be taken into account, 1065
Citation to widow or widower to make election under, 1215
See ELECTION UNDER WILL.
Codicil, term will includes, 1033
See CODICIL.
how made, 1034
Commission to take testimony of witness to, 1101
Construction, see Construction of Wills,
Concealment of, 1072, 1079
liability, 1079
punishment, 12451 G. C.
Contest of, 1124, 1235
duty of Probate Judge on notice of, 1113
what papers to be sent to Common Pleas and what returned to Probate Court, 1113
of spoliated, lost or destroyed will, 1152
of supplied record of will, 1157
not contest of foreign, 1133
powers of executors, etc., during, 95
uncontested binding after two years, 1112
Contribution, when devised or bequeathed property taken to pay debts, 1207–1213
child born after execution of will, portion of liable to, 1210

(References are to sections.)

WILLS — *Continued.*
Contest of, 1112
cannot after two years, 1112
exceptions, 1112
duty of Judge on notice, 1113
provisions against, 1203
Contract to make, 1032, 1170
may be enforced, 1032
how, 1032
Custody of, 1066
Confusion between will and other instruments, 1015
contracts, 1015
deeds, 1015
Copies of record of probate of to be admitted in other counties, 1119
effect of same, 1119
Copy of will and record of probate of, evidence, 1110
Copy of destroyed record of will, 1154
See CERTIFIED COPY, *Supra.*
of foreign will admitted to record, 1125
Distinguishing characteristics, 1014
Devisees, etc., liable to, when portion of one taken, 1207
unless exempted by will, 1208
enforced, how, 1212, 1213
nothing in sections 5973 and 5974 pertaining to, to impair liability of whole estate for debts, 1209
solvent legatees to contribute for insolvent, when, 1211
witness to a will, portion of, liable when, 1210
Deaf, dumb and blind may make, 1023
Debts against executor discharged in will, how construed, 391
naming person executor not to discharge debt, 389
Definition, 1033, 1013
See DEFINITIONS.
definition of terms used, 1013
Deposited with Probate Judge, 1067
fee for, 1067
certificate given for, 1067
how enclosed, 1068
indorsement on wrapper, 1068
delivered to whom during life time of testator, 1069
after his death, 1069
when to be opened and how, 1070, 1071
notice thereof, 1070
Drafting wills, suggestions, 1046
form of, 1047
Destroyed may be admitted to record, 1135
notice of application for record, 1144
testimony, what and how taken, 1146
record of, 1148
proceedings, when destroyed after probate but before record of, 1148
effect of will so established, etc., 1152
proceedings, when record of will destroyed, 1154
original will may be admitted to probate, 1155
or authenticated copy of will may be admitted to record, 1156
notice of record, etc., to be published, 1157
contest of supplied record, 1157
appeal in case of contest, 1157
saving of rights of persons under disabilities, 1157

(References are to sections.)

WILLS—*Continued.*
Destroyed, etc.—Continued.
when destroyed by fire, riot, or civil commotion, 12345 G. C.
Probate Judge to make rules as to testimony and appoint commissioner to take, 12346, 12347 G. C.
costs, how paid, 12348 G. C.
punishment for destruction, 12451 G. C.
revocation by destruction, 1049
second, destroyed, first not revived, 1053
Devisee, effect of witness being, 1044
when share of saved to him, 1044
contribution of heirs and devisees in such case, 1044
devisee not to lapse by death of, 1194
contribution, when devised property taken to pay debts, 1207
effect of withholding will from probate for three years, 1084
Discovery of, revokes letters of administration, 162
Drunkenness, effect on testamentary capacity, 1021, 1082
testamentary capacity, 1024
Eccentricities of character insufficient to invalidate, 1021
Election of widow or widower to take under, 1215
See ELECTION, ETC.
citation to issue for, 1215
construction of, may ask before election, 1215
entitled to make election when, after such proceedings, 1215
dower, effect if widow or widower elects to take, 1221
dower, when widow or widower entitled to in addition to provision under will, 1215
effect of on claim for year's support, 1221
insane or imbecile, how made, 1235
journal to be entered on, 1221
made must be, how, 1221
mansion house, widow or widower may remain in after election, 1221
non-resident or unable to appear, how election made in such case, 1231
Probate Judge, duties of as to, 1221
may appoint person to take, when, 1231
Probate Judge to make, when and how, 1235
time within which must be made, 1215
Entailed estates pass to issue of first donee, 1030
Equity will not reform, 1180
Evidence, certified copy of, 1110
parol, not admitted to alter, etc., 1186
when and for what purpose admitted, 1186
Executed in other States of the Union, when admitted to record in this, 1119
Executor, entitled to administration, 71
See LETTERS TESTAMENTARY.
administrator during minority of executor, 93
discharge of debt in, against executor, how construed, 391
naming person executor not to discharge debt, 389
when estate directed to be sold, 107
surviving may sell, 107
no order required, 802
powers of during contest of, 95
Effect of order to probate, 1108
Execution of, 1034
must be in writing, etc., 1035
lithographed or typewritten, 1035
lead pencil, 1035
in book, 1035

(References are to sections.)

WILLS — *Continued.*
on several pieces of paper, 1036
signed at end, 1037
by party making same, 1038
what constitutes signature, 1038
signed by other person, 1039
attestation of, 1040
subscription to, 1041
in presence of testator, 1042
what constitutes, 1042
witnesses, 1043
effect of being devisee or legatee, 1044
who saw testator subscribe or heard him acknowledge, 1045
Filed in office of Probate Judge, 1109
Foreign, 1118–1133
See FOREIGN WILLS.
Forging, altering, counterfeiting, etc., how punished, 13083 G. C
Form of. See Forms.
Guardian may be appointed by, 1307
How made, 1034
Infant cannot make, 1020
Insane person cannot make, 1022
Intention of testator governs, 1182
Joint wills, 1170–1173
See JOINT WILLS.
Law governing, 1016
at time of death, 1016
location of property, 1016
domicile of testator, 1016
controls construction, 1016
Legatee, effect of witness being, 1044
effect if death, 1194
Letters testamentary, etc., to issue, when, 71
to foreign executor, 1132, 169
Life estates in, 821, 1193
of contest of, 1112
Lost, admitted to probate, how. See Destroyed, etc., *Supra*, 1135, 1152
See SPOLIATED WILLS.
Marriage of woman does not revoke, 1061
married woman may make, 1061
Monomania, effect of, to make, 1021–1025
Neglect to probate in three years, forfeits devise, when, 1084
New record of, how made, when destroyed, 1154, 1157
appeal from order of Probate Court establishing, 1157
contest of will proceedings to establish new record not to extend time for, 1156
copy of will alone may be admitted to probate, 1156
copy of will and probate may be admitted to record, 1154
effect of new record, 1156
interested parties may oppose, 1157
made how, 1154, 1156
original will may be again probated, 1155
Probate Judge to give notice that copy of will has been admitted to record, 1157
saving of rights of persons under disability, 1157
Notice of probate, 1067
of application to admit foreign will to record, 1125
to admit lost or destroyed, etc., will to record, 1144
of new record when record of will destroyed, 1157

(References are to sections.)

WILLS — *Continued.*
of appeal or refusal to probate, 1116
Nuncupative will, 1158–1169
See NUNCUPATIVE WILLS.
Opened, when deposited with Probate Judge, how, 1070
Operation, etc., 1133, 107
Probate of, 1081–1117
See PROBATE OF WILLS.
Probate Judge witness to a will, proceedings, 9
Perpetuities, 1030
rule against, 1031
what comes within, 1031
Power of administrator during contest, 96
Power where set aside, 164
Property specifically devised, 473
Production enforced, 1072
application for citation, 1073
order of citation, 1074
form of citation, 1074
order for warrant, 1075
entry, 1075
into what counties process may issue, 1076
liability of officer serving same, 1077
hearing, 1078
punishment, 1079
commitment, 1080
Proved in Probate Court, 27
in Common Pleas, when, 27
by examination of witnesses, 1095
when witnesses unknown, incompetent, etc., 1098
when court may issue commission to take their testimony, 1101
Purchasers without knowledge of foreign, protected, 1133
Republication of by codicil, 1177
Receiver cannot be appointed during contest, 96
Revocation of, 1048-1065
See REVOCATION OF WILLS.
Right to make, 1017
regulated by legislature, 1017
Revocability, 1014
Record of, 1109
in each county where real estate is, 1111
destroyed how supplied. See Destroyed, 1154, 1157
foreign, how admitted to, 1119
Refusal to admit to probate, appeal from, 1116, 1117
Restoration of record of, 1154, 1157
Revivor, destruction of second will not to operate as of first, 1053
Statutory meaning of certain words, 1033
Sale of personal property, may require none be made, 470
court may order notwithstanding, 470
of real property directed by, 107
powers of executors under, 107
no order required, 802
Secreting, how punished, 12451 G. C.
Senile dementia disqualifies, 1022
Service by publication in actions to establish or set aside, when C. C. P., 11296 G. C.
Set aside where made, how far invalid here, 1133
Signed, how and where, 1034
Spoliated, 1134-1157
See SPOLIATED WILLS.

(References are to sections.)

WILLS—*Continued.*
Stealing, how punished, 12451 G. C.
allegation of property or value not necessary, 13591, 13592 G. C.
Surviving executor's powers under, 107
Testimony of devisee, when competent, 1044
Testimony of witnesses to will, 1095, 1109, 1146
to be reduced to writing, filed and recorded, 1095, 1109, 1146
Trust, when Probate Judge may appoint person to execute, 1266
Trustees appointed by to give bond, 1256
when not required to give bond, 1256
See TRUSTEES.
Uncontested probate binding after two years, 1112
Undue influence, 1025
Verbal, how made, proved, and when to be probated, 1159, 1166
See NUNCUPATIVE WILLS.
What instruments held to be a will, 1014
what not, 1014
Witnesses to, how many required, 1034
must be competent, 1034
effect of, being devisees or legatees, 1044
examined in open court, 1095
testimony reduced to writing and filed, 1095, 1146
and record, 1109
when unknown, incompetent or testimony cannot be had, how will proved, 1098
when court may issue commission to take testimony, 1098
or will lost, spoliated or destroyed, 1146
examination of, 1146
when residing out of jurisdiction, infirm or unable to attend court, 1146
Who may take under, 1027
charitable bequests, 1028
corporations and charitable uses, 1029
what are, 1029
Who may make, 1018
any person, 1019
full age, 1020
sound mind and memory, 1021
test of, 1021
definition of, 1021
idiots, imbeciles and lunatics, 1022
who are, 1022
blind, deaf and dumb persons, 1023
persons under guardianship, 1024–1511
minor cannot, 1020
not under any restraint, 1025
what is, 1025
must be free will, 1025
having property, 1026
courts not in accord, 1026

WITNESS—
Attendance of, 2126
Certificate of medical in inquest of lunacy, 2118
Competency, 1043
Devise or bequest when void, 1044
Fees of in Probate Court, 11204 G. C.
In contest of election of justice, 5165 G. C.
Saw testator subscribe, 1045

WITNESS—*Continued.*
To consent of guardian or parent to marriage of ward, 2117
Wills, commission may issue to take testimony of, when. See Will, *supra*, 1101, 1106, 1043
devise to, when void, 1044
examination of, to prove, 1095
lost or spoliated will, witnesses as to, 1146
number of, necessary to execution of, 1034

WOMAN — See Marriage, Widow.

WOODS — 366
See Trees.

WORDS — See Definition.
"Inventory" includes appraisement, 281

WRONGFUL ACT —
WRONGFUL DEATH —
Action, when brought, 534
Beneficiaries die, action to be dismissed, 533
If action commenced, 536
Jury should consider pecuniary injury, 536
Nonresident does not defeat, 534
Probate Court determines matter of distribution, 536
Settlement not binding unless Court approves, 536
Action for death by, 534
Action for, did not exist at common law, 533
Administrator must bring action, 533
Action brought in Common Pleas Court, 533
Apportionment, 541
entry, 542
Probate Court to approve, 541
Court shall exercise care in settlements, 537
For whose benefit, 536
Only exists by statute, 533
Settlement of, 537
application for, 538
form of, 538
entry allowing, 539
in Probate Court, 537
report of, 540
When liability exists, 534

Y.

YEAR'S ALLOWANCE —
See Widow's Allowance.
Inheritance


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